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

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

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ABSTRACT

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

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

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ÖZET

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

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

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

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INTRODUCTION

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

The reason has many functions that make it essential, such as forcing the decision-makers to be more attentive, thus preventing arbitrariness, ensuring that judicial decisions are reviewed and adopted by the parties and the public, contributing to the restoration of trust in the judiciary, and developing the science of law.[4]

In order to fulfill these functions, the legislation has a significant position as much as the practitioners. As a consequence of this, the concept of reason, which is included in the third paragraph of Article 141 of the Constitution[5] as 'The decisions of all courts shall be written with reasons', is embraced in detail by the Criminal Procedure Code[6] in accordance with the constitutional regulation.

Indeed, it is seen that the concept of reason is included in the CPC a total of forty times, including the headings, in twenty-one different articles. Moreover, considering the amendments made following the entry into force of the CPC, this number is likely to increase even more. However, despite the sensitivity on this issue and all the amendments made in the legislation, the fact of lack of reason continues to constitute one of the most current and controversial issues in criminal procedure.[7]

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1 M. Nedim Bekri, 'Gerekçeli Karar Hakkı' (2014) 3 ABD 203, 208.

2 Mustafa Alp, 'Anayasa Hukuku Açısından Mahkeme Kararlarında Sözde (Görünürde) Gerekçe', 'Prof. Dr. Mahmut Tevfik Birsel'e Armağan' (2001) DEÜY, 425, 427; Hilmi Şeker, 'Strazburg Yargı Kararlarında Doğru,Haklı,Yasal ve Makul Gerekçe Biçimleri' (2007) 65(2) İBD 179, 181; Muharrem Kılıç, 'Gerekçeli Karar Hakkı: Yargısal Kararların Rasyonalitesi' (2021) 47 TAAD 1, 7; Zühal Aysun Sunay, 'Gerekçeli Karar Hakkı ve Temel İlkeleri' (2016) 143 DD, 7,7.

3 Kılıç (n 2) 5; Ömer Faruk Atagün, 'Temel Bir İnsan Hakkı Olan Adil Yargılanmanın Unsuru Olarak Gerekçeli Karar Hakkı' (Master's thesis, University of Hacettepe 2020) 70.

4 The Court of Cassation of Turkey, General Assembly of Criminal Chambers 1098/212 [14 March 2019] 7; Atagün (n 3) 67-70, 135-141; Bekri (n 1) 210; Alp (n 2) 428.

5 The Constitution of Republic of Turkey, Law Number: 2709, Ratification: 18 October 1982, Issue: 09 November 1982 - 17863 (Repeating) (TR), https://www.mevzuat.gov.tr/MevzuatMetin/1.5.2709.pdf accessed 08 November 2021.

6 Criminal Procedure Code, Law Number: 5271, Ratification: 04 December 2004, Issue: 17 December 2004 – 25673 (TR), https://www.mevzuat.gov.tr/MevzuatMetin/1.5.5271.pdf accessed 08 November 2021.

7 Çetin Aşçıoğlu, 'Yargıda Gerekçe Sorunu' (2003) 48 TBBD 109, 110-114.

When the articles that include the concept of reason in the CPC are examined, the problems arising from phrases leading to uncertainties, incoherencies, and misunderstandings, insufficient explanations, misuse of punctuation marks, article references, statements limiting the obligation to give reasons to the decision-maker or the type of the decision, poor wording, the use of adverbs such as 'absolutely' and 'clearly' when pointing out the requirement of stating reasons draw the attention. Elimination of these drawbacks arising from the legislation, which may trigger or increase the long-standing implementation mistakes regarding the reason, would undoubtedly contribute to the solution of the problem of reason in Turkish criminal procedure.

In this study written for the purpose concerned, the texts of the articles that include the concept of reason in the CPC is subjected to a detailed evaluation under the headings formed by considering the general system of the CPC, the problematic aspects of the article in question are determined as a result of the discussions made on the basis of the notion of reason, and appropriate solutions and alternatives to these problems are tried to be proposed in order to ensure the right of reasoned decision as well as the right to an effective remedy and to a fair trial.

I. HOLDING THE HEARING ELSEWHERE

The principle of a natural judge, regulated in Article 37 of the Constitution,[8] requires that the court which has jurisdiction to try the case shall be determined by the law before the crime is committed or the conflict arises.[9] However, in practice, some situations exist where a court, which is later established or appointed by law, hears the case. In this respect, the third paragraph of Article 19 of the CPC titled 'Transferring of the lawsuit and holding the hearing elsewhere' specifies that 'The court may decide to hold the hearing elsewhere within the provincial borders by reasons of factual grounds or security. […]'[10]

Having the feature of being the first article in the CPC where the concept of 'reason' is included, this regulation which is not in the original version of the CPC was added to the Article as the third paragraph with The Law No. 6763.[11]

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8 Article 37 of the Constitution titled 'Principle of a natural judge' is as follows: 'No one may be tried by any judicial authority other than the legally designated court. Extraordinary tribunals with jurisdiction that would in effect remove a person from the jurisdiction of his legally designated court shall not be established', for the English translation of the Article: https://global.tbmm.gov.tr/docs/constitution_en.pdf accessed 08 November 2021.

9 Nur Centel and Hamide Zafer, *Ceza Muhakemesi Hukuku*, (13th edn, Beta, 2016) 607.

10 Feridun Yenisey, *Turkish Penal Procedure Code*, (3rd edn, Kutup Yıldızı, 2017) 8; The English translations of the articles included in this study have been obtained from the cited book, on some occasions, however, necessary changes have been implemented on the translations in line with the purpose of the study.

11 The Law about Amending Criminal Procedure Code and Some Laws, Law Number: 6763,

It should be noted that the Article clearly states the reasons for the decision about holding the hearing elsewhere instead of mentioning that the decision must be reasoned as in other related articles in the CPC. However, it is unclear what the 'factual grounds' are that caused the hearing to be held elsewhere. In the reasoning of Article 22 of the Law No. 6763 which added the third paragraph to Article 19 of the CPC, the phrase 'factual grounds' is explained as 'grounds related to the lack of space such as the excess number of offenders and victims', while the concept of 'security' is expressed as 'security reasons that do not threaten public safety'.[12] Nonetheless, it is difficult to suppose that these explanations remove the uncertainty in question. Despite this, the Constitutional Court dismissed the annulment action, filed with the allegation that the phrase '… may decide … by reasons of factual grounds or security' in the paragraph violates the principles of legal certainty and natural judge as well as the right to a fair trial.[13] According to the Court, since the aforementioned 'factual grounds' and 'security reasons' may arise in different ways, it is not obligatory for them to be determined in advance by the legislator and enumerated one by one in the law.[14] In addition, as the aforementioned paragraph is related to the trial procedure, the regulation of this issue remains within the discretion of the legislator, pursuant to Article 142 of the Constitution.[15]

While the use of the phrase 'by reasons of' (*gerekçesiyle*) for both 'factual grounds' (*fiili sebepler*) and 'security' (*güvenlik*) does not cause any grammatical mistake in English, the use of 'by reasons of' with 'factual grounds' in Turkish is incorrect. Therefore, amending the paragraph concerned by adding the phrase 'due to' before the phrase 'factual grounds' would eliminate the aforementioned negligence. On the other hand, it can be argued that the clause 'by reasons of' is used in the meaning of 'due to' in the Article. In fact, the use of 'factual grounds' before the word 'security' in the text of the Article also supports this determination.

II. REASONS REQUIRED AT DECISIONS

Stating reasons for judicial decisions ensures both the 'independence and impartiality' and 'transparency and accountability' of the judicial authorities before the public, by preventing arbitrary decisions, and providing a basis for the parties to apply to higher-level judicial authorities in terms of the right

Ratification 24 November 2016, Issue: 02 December 2016 – 29906 (TR), https://www.resmigazete.gov.tr/eskiler/2016/12/20161202-1.htm accessed 08 November 2021.

12 The Government Bill on The Law on the Amendment of the Criminal Procedure Code and Some Laws, 4059 [22 October 2016] 20-26 (TR), https://www2.tbmm.gov.tr/d26/1/1-0775.pdf accessed 09 November 2021.

13 The Constitutional Court, Case 326/81 [11 July 2018] paras 32-47.

14 Ibid. para 39.

15 Ibid. para 42.

to a fair trial.[16] As a continuation of this idea, Article 34 of the CPC titled 'Reasons required at decisions' states in its first paragraph that 'All kinds of decisions rendered by a judge and courts, including dissenting opinions, shall be delivered in a written form and contain the reasons. While writing the reasons, Article 230 shall be considered. […]'[17]

It is observed that this general article that regulates the requirement of motives for decisions is accordant with Article 141 of the Constitution. However, by specifying that the decisions of judges and courts shall be reasoned, the Article creates a situation as if decisions made by the public prosecutor, for instance, do not need to contain motives. As will be examined in the following sections of the study, it is accepted that the motions of the public prosecutor for pre-trial detention (Article 101) and appeal (Articles 273 and 295) must be reasoned. Moreover, pointing out that appellants shall declare their grounds for appeal on law, Article 295 of the CPC indicates that this obligation is not limited to the public prosecutors either. In this sense, it would be appropriate to make a regulation on the aforementioned Article, including that the motions of the public prosecutors and appealing parties shall also contain motives in cases that are clearly regulated by law. Such a regulation would not only protect the right to a reasoned decision but also have positive effects in terms of the integrity of the CPC.

The second drawback of the Article stems from the reference to Article 230 of the CPC with regard to the writing of the reasoned decisions. Not regulating the motions of the public prosecutor and appealing parties, Article 230 also includes many flawed provisions as discussed in detail in the relevant section of the study. In this regard, it would be beneficial to remove the reference to Article 230, which might cause confusion in practice regarding how to write a reasoned decision.

III. PROVISIONS REGARDING THE EXPERTS

A. The Appointment Of The Experts

In criminal procedure, apart from the issues which are possible to be solved with the general and legal knowledge required by the profession of the judge, where a special or technical knowledge for the solution of some cases is required, it may be decided to obtain the vote and opinion of an expert.[18] Expert

16 Atagün (n 3) 63-68.

17 Yenisey (n 10) 13.

18 Centel and Zafer (n 9) 279; Feridun Yenisey and Ayşe Nuhoğlu, *Ceza Muhakemesi Hukuku* (5th edn, Seçkin 2017) 220-221; Handan Yokuş Sevük, 'Ceza Muhakemesi Hukukunda Bilirkişilik' (2006) 64(1) İÜHFM 49, 49;Yaprak Öntan, *Ceza Muhakemesi Hukukunda Bilirkişilik*, (Yetkin, 2014) 54; Burcu Dönmez, 'Yeni CMK'da Bilirkişi Kavramı' (2007) 9

evidence mediates to reach the factual truth, which is the purpose of criminal procedure. For the resolution of the case subject to investigation or prosecution, in case the votes and opinions of other professional groups are needed or the law requires them in some cases,[19] the public prosecutor, judge, or court would appoint an expert. Pursuant to the second paragraph of Article 63 of the CPC, 'Appointing an expert and, by giving reasons, determining its number more than one belongs to the judge or court. If motions on appointing more than one expert are denied, the decision shall meet the same requirements'.[20]

The first point that draws attention in the paragraph is that it causes incoherency due to subject-verb disagreement. In the first sentence whose subject is 'appointing an expert and by giving reasons determining its number more than one', the phrase 'the decision of' or 'the authority to' must be added to the subject by making grammatical corrections in order for the predicate 'belongs' to be used without causing incoherency. Considering that the word 'authority' is included in the third paragraph of Article 63 regulating that the public prosecutor is also entitled to exercise the aforementioned authorities[21], changing the subject of the sentence to 'The authority to appoint an expert and by giving reasons determining its number more than one' would eliminate this drawback.

Furthermore, no obvious explanation exists both in the paragraph and the reasoning of Article 63 as to why the obligation to give reasons for appointing more than one expert is specifically established. On the other hand, in the face of the existence of Article 34 of the CPC, which may be considered as the general regulation with regard to the concept of reason, there is no need to mention such an obligation. Having stated that determining the number of experts more than one by giving reasons, the paragraph may lead to some misunderstanding, as if giving reasons is not required for decisions, such as appointing a single expert unless otherwise clearly provided in the article text.

(Special Issue) DEÜHFD 1145, 1146; M. Onursal Cin, 'Ceza Yargılamasında Bilirkişilik ve Uygulama Sorunları' (2021) 4(1) NEÜHFD 170, 171; The Court of Cassation of Turkey, General Assembly of Criminal Chambers 541/194 [04 May 2021] 11.

19 Centel and Zafer (n 9) 282-283; Yenisey and Nuhoğlu (n 18) 221-222; Dönmez (n 18) 1145-1146; Cin (n 18) 171; Sevük (n 18) 62-63; Öntan (n 18) 208; For instance, according to the first paragraph of Article 73 of the CPC, 'In crimes related to falsification, committed on currency and values such as stock papers and treasury checks, all seized items of the currency and values shall be asked to be examined by those authorities in the center or their affiliated units in the country having responsibility for circulating the original materials ' Yenisey (n 10) 30.

20 Yenisey (n 10) 25.

21 The third paragraph of Article 63 of the CPC provides that 'The public prosecutor shall also be entitled to exercise the authorities regulated in this Article, during the investigation phase', Yenisey (n 10) 25.

The same applies to the second sentence of the paragraph, which requires reasons for denial of motions on appointing more than one expert. Again, this form of regulation is flawed as it paves the way for understanding that the decision may not contain reasons when these motions are approved. However, it is without doubt that the rights of parties, at least their right to a reasoned decision, could be violated even in case of approval of such motions. Therefore, these types of phrases must be eliminated in order for the aforementioned paragraph to be in harmony with Article 34 of the CPC.

B. Oath Given In A Written Form

The legislator has assigned some duties and responsibilities to the expert in order to ensure that the expertise could be carried out in an effective way. One of these duties and responsibilities is taking the oath of the expert.[22] The experts, who are placed on the expert-lists, give an oath, repeating the following words before the judicial commission at the courts of ordinary jurisdiction: 'I swear on my honor and conscience, that I shall fulfill my duty pursuing the justice and in accordance with sciences and technology, in an impartial manner'.[23] The experts who are not included in the lists, on the other hand, take the oath in the above-mentioned manner in the presence of the authority that appointed them when they are assigned. Nevertheless, it is not always possible to give the oath orally. In this sense, the seventh paragraph of Article 64 of the CPC titled 'Individuals who are eligible to take the expert stand' establishes that 'In cases where there are obstacles, the oath may be given in a written form and the text of it shall be attached to the file. However, the reasons for this must be laid down at the decision.'[24]

Considering the legal regulation, it is understood that giving the oath in a written form is exceptional. There is no explanation both in the text of the paragraph and in the reasoning of the Article regarding this exception, which is stated as 'in cases where there are obstacles'. On the other hand, temporary or permanent speech impediments and certain diseases that prevent or make it difficult to speak could be given as examples of this exception.

Since the decision to give the oath in a written form in certain cases is also within the scope of 'all kinds of decisions' referred to in Article 34 of the CPC, it is not necessary to include a separate requirement of giving reasons in the paragraph. Yet, the inclusion of this requirement for such an exceptional case does not necessitate an amendment to the seventh paragraph of Article 64.

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22 Süha Tanrıver, 'Bilirkişinin Sorumluluğu' (2005) 56 TBBD, 133, 147; Centel and Zafer (n 9) 285; Öntan (n 18) 107; Cin (n 18) 174; Sevük (n 18) 79; Dönmez (n 18) 1161; Yenisey and Nuhoğlu (n 18) 228-229.

23 The fifth paragraph of Article 64 of the CPC.

24 Yenisey (n 10) 26.

C. The Decision On The Appointment And The Course Of Examination By The Experts

Experts must complete their examination within a certain time and notify their votes and opinions to the authority that appointed them. Sometimes, due to the nature of the work, it may be possible for experts to make the examination and express their opinion in a short time. Most of the time, however, time will be needed and the authority appointing the experts will determine this period in accordance with the law.[25] According to the first paragraph of Article 66 of the CPC,

> The decision granting an expert examination shall clarify the questions to be answered requiring specialized and technical knowledge, the subject of the examination, and the duration within which this task is to be accomplished. This duration shall not exceed three months, according to the qualifications of the duty. In cases where special grounds make it necessary, the appointing authority may prolong this duration upon the demand of experts, with a decision that includes reasons, for no longer than three months.[26]

In the first paragraph of the Article, it is highlighted that the decision to prolong the duration of the expert examination due to the necessity of 'special grounds' shall be reasoned. However, there is no clear explanation of what is meant by 'special grounds' in both the text of the paragraph and the reasoning of the Article.[27] Taking into account the nature of the expert's duty in criminal procedure, 'special grounds' in question may be qualifications or complexity of the duty, the excess of documents or items to be examined, the need for information, documents, or items during the examination.

Incidentally, it should be noted that the obligation of the judge and courts to give reasons for their decisions continues even when the duration is not prolonged upon the demands of experts. Undoubtedly, acting contrary to this requirement would amount to a violation of Article 6 of the ECHR, regarding the right to a reasoned decision, Article 141 of the Constitution, and Article 34 of the CPC.

As a conclusion of the failure of experts to deliver their written votes and opinions within the determined time, the second paragraph of Article 66 provides that

> Experts who do not deliver their written opinion within the determined duration may be immediately replaced. In such instances, the aforementioned shall submit a written report, explaining what has

[25] Öntan (n 18) 146.
[26] Yenisey (n 10) 26.
[27] Öntan (n 18) 146.

been conducted up to that point and shall immediately return items and documents delivered to them in connection with their duty. In addition, without prejudice to the provisions regarding legal and criminal liability, it may be decided not to make any payment to the expert under the name of wage and expense, and the regional council of expertise shall be requested to apply the necessary sanctions by explaining the reasons.[28]

The last sentence of the paragraph, including the concept of reason, has taken its current form as a result of the amendment made in the CPC with Article 44 of the Law No. 6754 dated 03.11.2016.[29] It is beyond doubt that at least the facts and reasons shall be stated when sanctions concerned are requested, and this eliminates the need to specifically mention that the request to imply sanctions must contain reasons. This issue is not mentioned in the reasoning of the amended paragraph either. It is only stated in the reasoning that the amendment was made in order for Article 66 of CPC to comply with Articles 8 and 13 of the Law No. 6754.[30]

D. Experts Who Have Different Views Or Dissenting Opinions On The Common Outcomes

Within the scope of their discussion obligation, more than one expert could be appointed for the same examination in order to enable them to reach more accurate outcomes in the field of inspection by exchanging views. Nonetheless, it is always possible for experts to reach different conclusions or have divergent views on common outcomes regarding the dispute to be solved while fulfilling their aforementioned obligation.[31] In this sense, the second paragraph of Article 67 of the CPC declares that 'If there is more than one expert appointed and they have different views or opinions on common outcomes, they shall write this instance along with their reasons in the written expert opinion.'[32]

First of all, it could be argued that the paragraph contains several grammatical errors. The phrase 'more than one expert appointed' amounts to 'experts who are appointed more than once' rather than 'more than one expert who is appointed for the same examination' as intended to be emphasized in the paragraph. On the other hand, the noun 'experts' must be used in singular form after the pronoun 'more than one', since indefinite pronouns must be followed

28 Yenisey (n 10) 26-27.

29 Expertise Law, Law Number: 6754, Ratification 03 November 2016, Issue: 24 November 2016 – 29898 (TR), https://www.mevzuat.gov.tr/MevzuatMetin/1.5.6754.pdf accessed 09 November 2021.

30 The Government Bill on Expertise Law, 683 [04 March 2016] 46 (TR), https://www2.tbmm.gov.tr/d26/1/1-0687.pdf accessed 09 November 2021.

31 Öntan (n 18) 117.

32 Yenisey (n 10) 28.

by a singular name in such cases. For the reasons explained, amending the beginning of the paragraph to 'More than one expert who is appointed for the same examination' would eliminate the aforementioned errors.

In the legal regulation, it is stated that if the appointed experts reflect different views on the report or have dissenting opinions on the common results, they must give reasons for these issues. By doing so, it is aimed to provide reasons for the different or dissenting opinions put forward by the experts in their written reports so that they could be evaluated by the Court. However, expert reports, which should be based on technical data, are expected to contain reasons of their own. In this sense, if a warning is to be included in the text of the Article regarding the requirement of reason, although not necessary, this must be done for not only different or dissenting opinions but also all the opinions put forward by the experts. On the other hand, this regulation complies with Article 34 of the CPC, which states that even dissenting opinions must be justified.

E. Asking A New Written Expert Opinion And Putting The Motions Of Opposition

In criminal procedure, it is rather important to allow the views of the parties to be taken regarding the written opinion of experts in order to resolve the dispute in a proper fashion and to reach the factual truth. In this regard, the fifth paragraph of Article 67 of the CPC is as follows:

> After the expert has finished the inspection, the public prosecutor, the intervening party, his representative, the suspect or the accused, his defense counsel, or the legal representative shall be given a specified time limit to ask any new expert opinion or to put motions of opposition against this given written expert opinion. If the motion filed by these individuals is denied, a reasoned decision shall be produced in this respect within three days.[33]

As seen, the fifth paragraph points out that following the completion of expert examinations, if the motions on asking a new written expert opinion or opposing against the given report are denied, a reasoned decision shall be rendered.

The time limit to be determined for a request for a new expert examination or for the parties to report their objections is not clearly specified in the law. The fact that this period, which may vary due to the difficulty and complexity of the issue to be resolved, is not specified in the law, draws attention as a positive practice. However, in terms of securing the right to be tried within a reasonable time, it would be appropriate to set an upper limit for the time limit concerned.

[33] Ibid.

Again, the obligation to give reasons mentioned in the paragraph should not be limited to the decisions of rejection. This idea would both prevent the misconception that stating the reasons for the acceptance of the claims is not compulsory, and ensure the right to a reasoned decision of parties.

IV. THE DECISION FOR PRE-TRIAL DETENTION

A warrant of pre-trial detention against the suspect or accused may be rendered if there are concrete reasons showing the existence of a strong suspicion of a crime and a ground for pre-trial detention, provided that it is proportionate to the importance of the case, expected punishment, or security measure.[34] In this regard, the first paragraph of Article 101 of the CPC titled 'The decision for pre-trial detention' specifies that

> During the investigation phase, upon the motion of the public prosecutor, the Justice of the Peace in Criminal Matters shall issue a pre-trial detention warrant for the suspect, and during the prosecution phase the trial court shall issue a pre-trial detention warrant for the accused upon the motion of the public prosecutor, or by its own motion. In the aforementioned motions, the reasons shall absolutely be shown, and legal and factual grounds, which states that judicial control would be insufficient, shall be included.[35]

It is quite remarkable that the adverb 'absolutely' is included in the paragraph. This word, which is presumed to be used to emphasize the importance of the reasoned decisions regarding the pre-trial detention, causes a misunderstanding that giving reasons is not absolute in the other articles of the CPC pertaining to reasons, and it weakens the obligation to state reasons, which is guaranteed by the Constitution and Article 34 of the CPC.

In the paragraph that requires the motion on pre-trial detention to be 'absolutely' reasoned, there is no regulation on how to act if the motion of the public prosecutor does not include reasons. In such a case, the judge or court may request the public prosecutor to make a statement on this matter, or the motion on pre-trial detention may be returned without inspection.[36]

Prior to the amendment made by Article 97 of the Law No. 6352 dated 07.07.2012,[37] the second paragraph of the Article, which affirms that

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34 Tuğrul Katoğlu, 'Tutuklama Tedbirine İlişkin Sorunlar' (2011) 4 ABD 17, 21; Nur Centel, 'İnsan Hakları Avrupa Mahkemesi Kararları Işığında Tutuklama Hukukuna Eleştirel Yaklaşım' (2011) 17(1-2) MÜHFD 49, 50 ff; Centel and Zafer (n 9) 363-364; Yenisey and Nuhoğlu (n 18) 358.

35 Yenisey (n 10) 46.

36 Centel and Zafer (n 9) 372; Hasan Sınar, *Ceza Muhakemesi Hukukunda Tutuklama*, (1st edn, On İki Levha, 2016) 239-240.

37 The Law about Amending Some Laws for the purpose of Enhancing the Judicial Services,

> The decisions on pre-trial detention with a warrant, continuation of the pre-trial detention, or a decision denying the motion of release from pre-trial detention, must be furnished with the legal and factual grounds and reasons. The contents of the decision shall be explained to the suspect or accused orally, additionally a written copy of the decision shall be handed out and this issue shall be mentioned in the decision[38]

already contained the obligation to give reasons. After the amendment, however, the paragraph emphasizes that the evidence indicating a) a strong suspicion of a crime, b) the existence of the reasons for pre-trial detention, and c) the proportionality of the pre-trial detention measure shall be clearly demonstrated by justifying specific facts in aforementioned decisions. In the reasoning, the underlying cause for this amendment is explained as the criticism of the decisions made by the European Court of Human Rights regarding the application for pre-trial detention without sufficient reason.[39]

By the amendment made by Article 14 of the Law No. 7331 dated 08.07.2021,[40] a subparagraph (d) was added to the second paragraph, including the phrase 'insufficiency of judicial control'. Thus, it is accepted that in the decisions on pre-trial detention with a warrant, continuation of the pre-trial detention, or a decision denying the motion of release from pre-trial detention, the evidence indicating that the application of judicial control would be insufficient shall also be demonstrated, in addition to the issues specified in the other subparagraphs.

After all of these amendments, the final version of the paragraph is as follows:

> In the decisions on pre-trial detention with a warrant, continuation of the pre-trial detention, or a decision denying the motion of release from pre-trial detention, the evidence indicating
>
> a) A strong suspicion of a crime,
>
> b) The existence of the reasons for pre-trial detention,
>
> c) The proportionality of the pre-trial detention measure,

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and Postponing of the Public Claim and Punishment regarding the Crimes through Press, Law Number: 6352, Ratification: 02 July 2012, Issue: 05 July 2012 - 28344 (TR), https://www.mevzuat.gov.tr/MevzuatMetin/1.5.6352.pdf accessed 09 November 2021.

38 Ibid 11687.

39 The Government Bill on the Law about Amending Some Laws for the purpose of Enhancing the Judicial Services, and Postponing of the Public Claim and Punishment regarding the Crimes through Press, 544 [30 January 2012] 51/54 (TR), https://www2.tbmm.gov.tr/d26/1/1-0687.pdf accessed 09 November 2021.

40 The Law about Amending Criminal Procedure Code and Some Laws, Law Number: 7331, Ratification: 08 July 2021, Issue: 14 July 2021 – 31541 (TR), https://www.resmigazete.gov.tr/eskiler/2021/07/20210714-8.htm accessed 09 November 2021.

d) Insufficiency of judicial control shall clearly be indicated by being reasoned through specific facts.[41]

In the reasoning of the amendment, it is emphasized that when deciding on pre-trial detention, which is considered as an exceptional measure, whether the application of judicial control is sufficient should be taken into consideration on a preferential basis. Thus, the first two paragraphs of the Article have been harmonized with the stipulation that it is necessary to include matters indicating that the application of judicial control would be insufficient, in both the motions and the decisions regarding pre-trial detention. On the other hand, it should be noted that this amendment, which aims to prevent unlawful pre-trial detention decisions, has the potential to have favorable results in terms of the protection of the right to liberty and security and to a reasoned decision. However, the use of the verb 'to indicate' twice in the same sentence, by including the phrase 'the evidence indicating [...] shall clearly be indicated […]' in the second paragraph does not constitute an example of effective wording.

Speaking of which, by emphasizing in the first paragraph that the motions of the public prosecutor for pre-trial detention shall contain reasons, the aforementioned determination, including that there should be an amendment to Article 34 of the CPC is supported.

V. THE DURATION OF PRE-TRIAL DETENTION

The word 'reason' is included in the first two and the fourth paragraph of Article 102 of the CPC. According to these paragraphs, which are related to the maximum period of pre-trial detention based on the courts that would issue a pre-trial detention warrant, whether the pre-trial detention warrant is issued during the investigation phase, which Law or which Section of the TPC the crime concerned is regulated in, and whether the crime is committed collectively:

(1) Where the crime is not within the jurisdiction of the court of assize, the maximum period of pre-trial detention shall be one year. However, in necessary cases, this period may be extended for six more months, by explaining the reasons.

(2) Where the crime is under the jurisdiction of the court of assize, the maximum period of pre-trial detention is two years. In necessary cases, this period may be extended by explaining the reason; the extension shall not exceed three years for ordinary crimes, and five years for the crimes defined in the Fourth, Fifth, Sixth, and Seventh Parts of the Fourth Chapter of the Second Volume of the Turkish Penal Code No. 5237 and the crimes falling within the scope of the Anti-Terror Law No. 3713 dated 12/4/1991.[42]

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41 Criminal Procedure Code (n 6) 9126-1.

42 Yenisey (n 10) 46-47.

> (4) During the investigation phase, the period of pre-trial detention shall not exceed six months where the crime is not within the jurisdiction of the court of assize, and one year where the crime is under the jurisdiction of the court of assize. However, for the crimes defined in the Fourth, Fifth, Sixth, and Seventh Parts of the Fourth Chapter of the Second Volume of the Turkish Penal Code, the crimes falling within the scope of the Anti-Terror Law and crimes committed collectively, the maximum period of pre-trial detention shall be one year and six months, and this period may be extended for another six months by explaining the reasons.[43]

As observed, the legal regulation generally points to the obligation to provide reasons in decisions regarding the extension of the maximum period of pre-trial detention. However, since the punctuation marks are not used appropriately in the last sentence of the first paragraph, amended by the Law No. 5560 dated 06.12.2006,[44] some ambiguity arises. Indeed, the first paragraph leads to an understanding as if the reasons should only be given in necessary cases, as a comma is not used after the phrase 'in necessary cases'. In the second paragraph that immediately follows, this time, a comma is used after the phrase concerned, and thus the paragraph is written in a way that could be understood as intended.

Another point that draws attention in the legal regulation is that the word 'reason', used as a plural in the last sentence of the first paragraph, while it appears as a singular form in the second paragraph. It is not easy to comprehend the reason for such a difference in these sentences with the same meaning and structure.

In the fourth paragraph added to the Article with the Law No. 7188 dated 17.10.2019,[45] it is stated that the reason must be given in the decisions regarding the extension of the pre-trial detention period in terms of certain crimes during the investigation phase. As seen, the paragraph does not include the phrase 'in necessary cases' unlike the first two paragraphs. In addition, the ambiguity, stemming from the misuse of plural suffixes and commas does not exist. Therefore, it could be claimed that this paragraph presents a better example of effective wording, which is in accordance with the purpose expected from it.

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43 Criminal Procedure Code (n 6) 9127.

44 The Law about Amending Various Laws, Law Number: 5560, Ratification: 06 December 2006, Issue: 19 December 2006 – 26381 (TR), https://www5.tbmm.gov.tr/kanunlar/k5560.html accessed 09 November 2021.

45 The Law about Amending Criminal Procedure Code and Some Laws, Law Number: 7188, Ratification: 17 October 2019, Issue: 24 October 2019 – 30928 (TR), https://www.resmigazete.gov.tr/eskiler/2019/10/20191024-25.htm accessed 09 November 2021.

VI. THE OBJECTION TO THE DECISION ON NO GROUND FOR PROSECUTION

After mentioning in the first two paragraphs that the victim may oppose the decision on no ground for prosecution by the public prosecutor, and what matters must be included in the petition of opposition, the third paragraph of Article 173 of the CPC titled 'Opposition against the decision of the public prosecutor' affirms that

> If the criminal judgeship of peace deems it necessary to broaden the investigation in order to render its decision, it may demand this from the office of chief the public prosecutor by clearly specifying this issue; if sufficient grounds for opening a public claim are not discovered, it shall deny the motion and give reasons for doing so, inflict the costs on the opposing party and send the file to the public prosecutor. The public prosecutor shall notify the decision to the opposing party and the suspect.[46]

In the third paragraph, it is stated that the criminal judgeship of peace, evaluating the objection against the decision on no ground for prosecution, shall deny the motion by giving reasons, in case sufficient grounds for opening a public claim is not discovered. The fact that the motion to the decision on no ground for prosecution shall be denied by stating reasons, was included in the paragraph before the amendments made by both Law No. 5353 dated 25.05.2005[47] and the Law No. 6545 dated 16.06.2014.[48] Although the authorities that would evaluate the objection to the decision on no ground for prosecution changed after each amendment, the fact that the decisions in question must contain reasons has remained stable, and this could be interpreted as an indicator of the importance that the legislator attaches to the concept of the reason for these decisions. However, taking the general regulation in Article 34 of the CPC into account, it is not essential to include the phrase 'by giving reasons' in the paragraph, as the denial of the motion against the decision on no ground for prosecution is in the nature of 'a decision rendered by judge'. In the reasoning of the Article what needs to be understood by 'reason' is explained as specifying why the issues on which the motion is based are not considered valid in the decision.[49] On the other hand, the phrase concerned lays the groundwork

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46 Yenisey (n 10) 92.

47 The Law about Amending Criminal Procedure Code, Law Number: 5353, Ratification: 25 May 2005, Issue: 01 June 2005 - 25832 (TR), https://www5.tbmm.gov.tr/kanunlar/k5353.html accessed 09 November 2021.

48 The Law about Amending Turkish Penal Code and Some Laws, Law Number: 6545, Ratification: 18 June 2014, Issue: 28 June 2014 - 29044 (TR), https://www.resmigazete.gov.tr/eskiler/2014/06/20140628-9.htm accessed 09 November 2021.

49 The Government Bill on the Criminal Procedure Code, 1020 [07 March 2003] 73 (TR),

for the paragraph to be read that the criminal judgeship of peace does not need to give reasons when making a request for the broadening of the investigation but instead state this issue 'clearly'. Considering the fourth paragraph of the Article which states that 'If the criminal judgeship of peace determines that the motion is justified, then the public prosecutor shall prepare an indictment and submit it to the court',[50] it is observed that the aforementioned misinterpretation is also valid for the decisions regarding the acceptance of motions.

As previously mentioned, the word 'reason' placed in the texts of the articles with some motives despite the general regulation in Article 34 of the CPC sometimes results in the opposite of what is intended, by leading to the perception that the reason is not required when the legal regulation concerned does not include this word.

On the other hand, it is important to point out that even the opposition petitions must contain some kind of reason by including the phrase 'it is obligatory to indicate facts, evidence, marks, vestiges, and signs that may justify the opening a public claim' in the reasoning of the Article.[51]

VII. THE OPEN COURT PRINCIPLE

The principle of open court, which is stated to be one of the general characteristics of the hearing stage, a principle that provides the guarantee of a good justice and general prevention in terms of crime in the reasoning of Article 182 of the CPC, means that the hearing is open and accessible to the public.[52] However, the second paragraph of Article 182 enables the court to rule that the main hearing be conducted partially or as wholly closed to the public in cases where it is strictly necessary with respect to public morale or public security.[53] In this context, the third paragraph of Article 182 of the CPC notes that 'The decision about exclusion of the public, which shall be furnished with reasons, as well as the judgment, shall be announced in the open main hearing'.[54]

It is emphasized in the Article that the decision regarding the exclusion of the general public from the trial shall be reasoned. According to the reasoning of the Article, the decision in question absolutely must be reasoned, and this reason could only be based on 'the absolute necessity of public morality and

https://www2.tbmm.gov.tr/d22/1/1-0535.pdf accessed 09 November 2021.

50 Yenisey (n 10) 92.

51 The Government Bill on the Criminal Procedure Code (n 49) 73.

52 Ibid 77; Centel and Zafer (n 9) 698-699; Yenisey and Nuhoğlu (n 18) 726 ff; The Court of Cassation of Turkey, General Assembly of Criminal Chambers 15/106 [16 March 2021] 16-18.

53 Centel and Zafer (n 9) 701; Yenisey and Nuhoğlu (n 18) 730.

54 Yenisey (n 10) 97.

safety'.[55] Despite the general regulation in Article 34 of the CPC, the fact that the decision to exclude the general public from the trial, which is in the nature of a judge or court decision, must be reasoned, could be explained by how cautious the lawmakers are about the right to a public trial. The fact that the violation of the principle of open trial in the judgments passed as a result of the oral hearing is regulated among the cases are considered absolute violations of the law[56] also supports this judgment. By the same token, the Court of Cassation considers the violation of the principle of open trial a reason for annulment.[57]

VIII. THE CONTENT OF THE RECORD OF THE MAIN HEARING

Whether or not the legal forms stipulated by the law are complied with may only be understood by observing the record of the main hearing. From this point forth, Article 221 of the CPC titled 'Content of the record of the main hearing' is as below:

> The record of the main hearing shall contain the following;
>
> […]
>
> g) Motions, reasons in case of their denial,
>
> h) Rendered decisions,
>
> i) The judgment.[58]

The subparagraph (g) of the first paragraph of the Article, which regulates the outlines on which the course and results of the hearing would be based, emphasizes that the reasons for denial of the motions made shall be stated in the record of the main hearing. The first of the criticisms about the Article is that it is written in a way that could be understood that stating reasons is not required in case the motions are accepted. Secondly, there is no indication that reasons must be given for the 'rendered decisions' and 'the judgment' specified in subparagraphs (h) and (i) of the paragraph, respectively. Although from a more general perspective it could be argued that this situation arises from Article 34 of the CPC, it is perplexing why the paragraph specifically states that the reason is sought in the decisions of denial of motions, which are in the nature of a judge or court decision. Moreover, considering that the denial of motions mentioned in subparagraph (g) is also a decision, it remains unclear in what way the phrase 'rendered decisions' in subparagraph (h) differs from the decisions of denial of motions and which decisions it covers. Since

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55 The Government Bill on the Criminal Procedure Code (n 49) 78.

56 The subparagraph (f) of the first paragraph of Article 289 of the CPC.

57 The Court of Cassation of Turkey, General Assembly of Criminal Chambers 82/231 [13 October 2009] 2-3.

58 Yenisey (n 10) 109.

the phrase 'The judgment' is included separately in subparagraph (i), the fact that subparagraph (h) evidently does not cover judgments supports this idea. As seen, Article 221 of the CPC is written in a way that could be interpreted in many different ways. In order to eliminate this problem, the Article needs to be rearranged by taking into account the above determinations.

IX. DISSENTING OPINION AND ITS REASON IN THE RECORDS

Dissenting opinions force the majority opinion to be reasoned in an altogether more profound and communicative fashion. They produce the paradoxical effect of legitimating the majority as it becomes evident that alternative views were considered even if ultimately rejected.[59] Considering the importance of dissenting opinions, the second paragraph of Article 224 of the CPC titled 'Quorum of the votes at decisions and judgment' provides that 'Dissenting opinion shall be included in the records; its reason shall be indicated in the records as well.'[60]

As seen the second paragraph gives priority to the requirement of including dissenting opinions and their reasons in the records rather than the repetition of Article 34 of the CPC which states that even dissenting opinions shall contain reasons. However, it would set a better example of effective use of language if the paragraph is written as 'Dissenting opinion and its reason shall be included in the records'.

In the meantime, it is worth noting that the reasoning of the Article remarks that dissenting opinion of the judge who is in the minority shall absolutely be included in the records while its reason shall only be indicated.[61] This statement, which is in line with Article 34 of the CPC, may be understood as that dissenting opinion is not necessarily justified.

X. ISSUES TO BE SHOWN IN THE REASONS FOR THE JUDGMENT

As a continuation of the regulation in the third paragraph of Article 141 of the Constitution, Article 230 of the CPC demonstrates separately what and in what order the reasons for the judgment must include, in terms of conviction,

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59 Katerina Simackova, 'Dissenting Opinions in Constitutional Courts: A Means of Protecting Judicial Independence and Legitimising Decisions', 1 https://echr.coe.int/Documents/Intervention_20210415_Simackova_Rule_of_Law_ENG.pdf accessed 10 November 2021; Katalin Kelemen, 'Dissenting Opinions in Constitutional Courts' (2013) 14(8) GLJ 1353-1354; Venice Commission, 'Report on Separate Opinions of Constitutional Courts' [17 December 2018] 932/2018 CDL-AD(2018)030 4.

60 Yenisey (n 10) 111.

61 The Government Bill on the Criminal Procedure Code (n 49) 95.

acquittal, and other judgments and decisions. Regardless of the type of judgment, there is no doubt that the reason must be legal, sufficient, and valid, in accordance with law and factual case, and must indicate the logical chain that leads to the conclusion without interruptions and gaps.[62] In this regard, Article 230, which contains the most detailed regulations regarding the concept of reason in the CPC, specifies that

> (1) The reasons for the judgment on the conviction of the accused shall contain the following issues:
>
> […]
>
> c) The reached opinion, the criminal conduct of the accused, that is deemed as proven, and the definition of it; determining the punishment according to the order and principles which are defined in Articles 61 and 62 of the Turkish Penal Code, taking into consideration the motions that are put forward; again, according to the provisions of Article 53 and following Articles of the Turkish Penal Code determining the measure of the security instead of, or along with, the punishment.
>
> […]
>
> (2) The reasons for an acquittal shall contain an explanation thereof on which of the points that are indicated in the second paragraph of Article 223 the ruling of the court is resting.
>
> (3) The reasons for a judgment related to no need to inflict punishment shall contain an explanation thereof on which of the points that are indicated in the third and fourth paragraphs of Article 223 the ruling of the court is resting.
>
> (4) In cases where a decision or a judgment is rendered that are beyond the judgments mentioned in the above subparagraphs, then the grounds for this shall be included in the reasoning.[63]

As explained, in the Article, the issues that shall be included in the reasons for the judgments and decisions are tried to be stated separately in each paragraph. First of all, it should be noted that such a detailed regulation may appear to be an appropriate choice at first glance, as it guides the judges who render the judgments. However, due to the issues as will be mentioned below, it causes some confusion about the reasons of the judgments. Perhaps the decisions of reversal rendered by the Court of Cassation because of the violation of this Article offer the clearest indication yet that producing well-written reasoned

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62 The Court of Cassation of Turkey, General Assembly of Criminal Chambers 1190/302 [22 June 2021] 11-13.

63 Yenisey (n 10) 113-114.

judgments is extremely challenging.[64] In addition, the fact that improving the effectiveness of decision-writing continues to be one of the most controversial current debates in criminal procedure law[65] supports this determination.

The first criticism is directed at the Article might be that only the word 'judgment' is included in the title. Indeed, after mentioning some judgments, including conviction, acquittal, and 'no need to inflict punishment' in the first three paragraphs, the Article, in the fourth paragraph, states that if a decision or a judgment is rendered that is different from the aforementioned judgments, the grounds for this shall be included in the reasoning. As seen, the title does not relate in full to the content of the Article due to not including the word 'decisions'. Therefore, amending the title as 'Issues to be shown in the reasons for judgments and decisions' would be more inclusive with the content of the Article.

Even though the Article regulates the issues to be contained by the reasoning of the judgment on the conviction in detail may seem favorable, it is noteworthy that the phrase 'determining the punishment according to the order and principles specified in Articles 61 and 62 of the Turkish Penal Code'[66] in subparagraph (c) is a cause of perplexity. The determination of the punishment is regulated in Article 61 of the TPC, and the following Article is related to whether the discretionary mitigation would be applied to the accused after the punishment is determined. By including the provision

> The punishment according to the above paragraphs will be finally determined by taking the following into consideration and in this order: attempt; jointly-committed crimes; successive crimes; unjust provocation; minor status; mental disorder, personal circumstances requiring a reduction of the penalty and discretionary mitigation[67],

the fifth paragraph of Article 61 of the TPC clearly emphasizes that discretionary mitigation is not about determining the punishment mentioned in Article 230 of the CPCbut rather the final punishment. For this reason, it is both confusing and unnecessary to touch upon Article 62 of the TPC in subparagraph (c).

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64 Jeffrey A. Van Detta, 'The Decline and Fall of the American Judicial Opinion, Part I: Back to the Future From the Roberts Court to Learned Hand – Context and Congruence' (2009) 12(1) BLR, 53, 55; Frank B. Cross, 'The Ideology of Supreme Court Opinions and Citations' (2011-2012) 97(3) ILR 693, 742; S. I. Strong, 'Writing Reasoned Decisions and Opinions: A Guide for Novice, Experienced, and Foreign Judges' (2015) 2015(1) JDR, 93, 95-96.

65 John F. Duffy, 'Reasoned Decisionmaking vs. Rational Ignorance at the Patent Office' (2019) ILR 104 2351, 2353 2351-2386; Adam Rigoni, 'Common-Law Judicial Reasoning and Analogy' (2014) 20 LT 133, 133-134; Strong (n 64) 94.

66 Turkish Penal Code, Law Number: 5237, Ratification: 26 September 2004, Issue: 12 October 2004 – 25611 (TR), accessed https://www.mevzuat.gov.tr/MevzuatMetin/1.5.5237.pdf 10 November 2021.

67 The fifth paragraph of Article 61 of the TPC.

Another subject of criticism regarding the Article is that subparagraph (d) of the first paragraph does not refer to 'the delaying of the pronouncement of the judgment' that must be considered by the court on a preferential basis in comparison to other individualization reasons, such as alternative sanctions for short-term imprisonment and suspending the sentence of imprisonment, pursuant to the seventh paragraph of Article 231 of the CPC[68] and settled case-law of General Assembly of Criminal Chambers.[69] It could be argued that it is not required to mention 'the delaying the pronouncement of the judgment' in subparagraph (d), since the fourth paragraph of the Article already includes it within the scope of 'other judgments and decisions' and it is regulated in the next Article. However, taking into consideration a large number of decisions of reversal rendered by the Court of Cassation due to not discussing the delaying of the pronouncement of the judgment on a preferential basis, it is not possible to agree with this opinion.

What is more, the Article seems to contradict Article 141 of the Constitution and Article 34 of the CPC, as it is written in a way as if the judgments apart from the conviction are not necessarily justified. Indeed, the second and third paragraphs of the Article, regulating reasons for 'acquittal' and 'no need to inflict punishment', could lead to a misunderstanding that a single explanation thereof on which of the points that are indicated in the related paragraphs of Article 223 the ruling of the court is resting is sufficient when stating the reason.

Last but not least, in the last paragraph of the Article, it is stated that if a decision or a judgment is given other than the judgments specified in the above subparagraphs, the reasons for this shall be indicated in the reasoning. Although it is possible to determine the judgments other than those mentioned in the paragraph by referencing the reasoning of Article and Article 223 of the CPC, what the decisions referred to in the paragraph are remain unclear.

It is difficult to understand why the legislator, who prefers to adopt detailed regulations on other decisions including interim decisions, as in the provisions regarding the expert examination and pre-trial detention, is content with merely stating that the decisions in question, including even those that have the qualification to conclude the case, shall be written with purely justification despite the existence of Article 34 of the CPC.

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68 The seventh paragraph of Article 231 of the CPC is as follows: 'In the judgment, of which the pronouncement is delayed, the inflicted imprisonment term shall not be postponed, and in cases where the punishment is a short term imprisonment, it shall not be converted into the alternative sanctions', Yenisey (n 10) 115.

69 The Court of Cassation of Turkey, General Assembly of Criminal Chambers 114/99 [11 March 2021] 8.

XI. THE PRONOUNCEMENT OF THE JUDGMENT

When the public prosecution is concluded, it is rather important for the parties to be notified of the outcome of the judgment, and the legal remedies that are open to the parties, the time limits for the motion, where to apply, and formalities of the application in terms of ensuring the right to an effective remedy and to a fair trial. Pursuant to the first paragraph of Article 231 of the CPC titled 'Pronouncement of the judgment and delaying the pronouncement of the judgment', 'At the end of the main trial, the outcome of the judgment that is taken into the records of the trial according to the rules as indicated in Article 232, shall be read out and the main outlines of the reasons shall be explained'.[70]

As seen, the paragraph is relating to reading the judgment and explaining the outlines of the reasons at the end of the main trial. In the reasoning of the Article, it is stated that the judgment shall be pronounced by reading the final judgment, and the reasons if written. Otherwise, the pronouncement shall be made by reading the final judgment taken into the records and explaining the main outlines of its reason orally.[71] In this regulation with respect to conveying the final judgment to the parties, any deficiency regarding the concept of reason does not draw attention.

XII. THE REASONS FOR THE JUDGMENT AND THE ISSUES TO BE INCLUDED IN THE FINAL JUDGMENT

Article 232 of the CPC regulates the time limit for the reasons of the judgment and, if any, of the dissenting opinions to be taken into records, and decisions and judgments would be signed by the judges who participated in the decision-making, specific to the subject of the study. At this point, the third and the fifth paragraphs of Article 232 of the CPC provides that

> (3) In cases where the reasons of the judgment and, if any, the reasons of the dissenting opinion is not taken into the records completely, it shall be added into the files within fifteen days after the pronouncement of the judgment.
>
> (5) Following the pronouncement of the outcome of the judgment, if the judge dies or becomes unable to sign the decision for any reason before the reasoned decision is signed, the successor judge shall personally write and sign the reasoned decision in accordance with the judgment pronounced. If such a case happens in the courts of collective judges, the judgment shall be signed by other judges, and the reason for this shall

[70] Yenisey (n 10) 114.

[71] The Government Bill on the Criminal Procedure Code (n 49) 97.

be noted and signed under the judgment by the president, or the most experienced judge who participates in the decision-making.[72]

Even though the reasons for the judgment and the dissenting opinion are mentioned in the third paragraph of the Article, it is more related to the period where the reasons for the judgment are not taken into the records completely, rather than the concept of reason.

With the amendment made by Article 31 of the Law No. 6763, the phrase 'and, if any, the reasons for the dissenting opinion' was added to the paragraph to come after the phrase 'reasons of the judgment' to be in line with Article 34 of the CPC. In the reasoning of Article 31, it is stated that the amendment was made in order to accelerate the judicial proceedings by ensuring that the reasons for the dissenting opinion are included in the file within fifteen days.[73]

Following the amendment, it is seen that the word 'reason' is unnecessarily used twice in the paragraph. Replacing the phrase 'the reasons for the judgment and, if any, the reasons for the dissenting opinion', which is the subject of the one-sentence paragraph, with 'the reasons for the judgment and, if any, the dissenting opinion' would eliminate this problem.

In the fifth paragraph, it is stipulated that if the judge dies or becomes unable to sign the decision for any reason after the outcome of the judgment is pronounced, the successor judge would write and sign the reasoned decision in accordance with the judgment pronounced. In the reasoning of Article 31 of the Law No. 6763, which amended the paragraph, it is mentioned the aim of eliminating the deficiency which may arise from the fact that the procedure to be followed in the courts heard by a single judge is not included in Article 232 of the CPC.[74] However, this provision, which is rather controversial even before the amendment, continues to be debated, as it enables to write the reasons for a decision already rendered. It could be claimed that the provision does not pose any problem in terms of natural judge principle, since the paragraph states that the reason for the decision to be written by the successor judge shall be in accordance with the judgment pronounced, and this issue is always possible to be reviewed by the appellate courts. Nevertheless, this view may lead to serious drawbacks regarding the independence of judges. As known, under Article 138 of the Turkish Constitution, judges shall give judgment pursuant to the Constitution, laws, and their personal conviction conforming to the law. The aforementioned provision, on the other hand, obliges the successor judge to write the reasoned decision in accordance with the judgment pronounced,

72 Yenisey (n 10) 117.

73 The Government Bill on the Law on the Amendment of the Criminal Procedure Code and Some Laws (n 12) 23/26.

74 Ibid.

even if the judgment is not in compliance with the Constitution, laws, and his/her personal conviction.

In addition, there are some circumstances where the reason, which cannot be considered independent of the judgment, is at least as significant as the judgment itself. For instance, assume that the judgment which had been pronounced by the judge, who died or became unable to sign the decision for any reason, is an acquittal due to insufficient evidence in accordance with subparagraph (e) of the second paragraph of Article 223 of the CPC.[75] The successor judge, who is of the opinion that the accused must be acquitted pursuant to subparagraph (b) of the second paragraph of Article 223,[76] regulating the type of acquittal where it is proven that the charged crime is not committed by the accused, would not be able to reflect this point on the reasoning. In such a case, there would be dire consequences against the accused due to the significant differences between the grounds of acquittal mentioned above, arising from the fifth paragraph of Article 232 of the CPC.

Another problem in the paragraph is relating to the regulation on the courts of collective judges. In the second sentence of the paragraph, it is stated that if such a case occurs in the courts of collective judges, the judgment shall be signed by the president, or the most senior judge, but it is not mentioned by whom and how the judgment would be written. Yet, even in the courts of collective judges, in order to avoid the aforementioned drawbacks, for the reasoning to be stated by the president, or the most experienced judge, the judge who is unable to sign the judgment for any reason should at least not vote against.

XIII. THE MOTION OF APPEAL ON FACT AND LAW AND ITS TIME LIMIT

Stating that non-submission of the grounds of the application in the petition or the declaration shall not prevent the inspection for accused and the individuals who acquired or have the right to acquire the status of the intervening party in the fourth paragraph of Article 273 of the CPC,[77] the following paragraph stipulates that

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75 According to the subparagraph (e) of the second paragraph of Article 223 of the CPC, 'If it is not proven that the charged crime is committed by the accused', Yenisey (n 10) 110.

76 The subparagraph (b) of the second paragraph of Article 223 of the CPC is as follows: 'If it is proven that the charged crime is committed by the accused', Ibid.

77 Pursuant to the fourth paragraph of Article 273 of the CPC 'If the accused and the individuals who have acquired the status of the intervening party according the provisions of this Code, as well as individuals who have filed a petition of intervention and their request is not ruled upon, is denied; or the individuals who have suffered damages that would justify the status of the intervening party, have not submitted the grounds of their application in the petition or in their declaration, this shall not prevent the inspection', Ibid 138-139.

> The public prosecutor shall submit the grounds of filing a motion of appeal on fact and law together with the written motion, writing them clearly, together with the reasons. This motion shall be notified to the concerned individuals. The concerned individuals may submit their responses in this respect within seven days after the date of the notification.[78]

As understood from the paragraph, the public prosecutor must clearly indicate the reasons for filing a motion of appeal on fact and law in a written form. However, it is uncertain why the legislator, who already admits that the grounds of filing a motion of appeal on fact and law shall be submitted along with the reasons, requires the public prosecutor to write them 'clearly' as well. Considering that the motion of the public prosecutor for appeal on fact and law shall be notified to the relevant parties so that they have the opportunity to submit their responses, the legislator may intend to secure the principle of equality of arms[79] and the right of the accused to have facilities for the preparation of a defense,[80] pursuant to subparagraph (b) of the third paragraph of Article 6 of the European Convention on Human Rights, by requiring the public prosecutor to clearly indicate the reasons for filing a motion of appeal on fact and law.

On the other hand, a lack of clarity exists in the CPC as to how the court should act in cases where the public prosecutor does not submit the reasons for filing a motion of appeal on fact and law. The reasoning of the Article provides that the public prosecutor must indicate the reasons for filing a motion of appeal on fact and law in a written form but it does not clarify the issue as well.[81] Despite different opinions in the doctrine, in such a case, returning the case file to the public prosecutor by the court in order to state the reasons for the appeal may be considered as a solution to this problem, since there is no regulation similar to Article 298 of the CPC[82] with regard to the appeal on fact and law.

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78 Ibid 139.

79 Stefania Negri, 'The Principle of Equality of Arms and the Evolving Law of International Criminal Procedure' (2005) 5 ICLR 513, 513; Karin Calvo-Goller, *The Trial Proceedings of the International Criminal Court*, (Martinius Nijhof, 2006) 46; Sibel İnceoğlu, *Adil Yargılanma Hakkı – Anayasa Mahkemesine Bireysel Başvuru El Kitapları Serisi 4* (European Commission, 2018) 115 ff; Osman Doğru and Atilla Nalbant, İnsan Hakları Avrupa Sözleşmesi – Açıklama ve Önemli Kararlar 1. Cilt (Council of Europe, 2012) 636.

80 Doğru and Nalbant (n 79) 646-647; İnceoğlu (n 79) 324.

81 The Government Bill on the Criminal Procedure Code (n 49) 117.

82 Pursuant to Article 298 of the CPC, 'If the Court of Cassation determines that the petition on appeal on law is not submitted in time, that the judgment cannot be appealed on law, that the individual appealing does not have standing, or that the appellate written application does not include the grounds for appeal on law, the motion for appeal on law shall be rejected', Yenisey (n 10) 148.

XIV. NOTIFICATION OF THE REASONS

In terms of ensuring the right to an effective remedy, the judgment, including the reasons must be explained to both the public prosecutor who has the obligation to submit the reasons of filing a motion of appeal on fact and law and the parties who do not have such an obligation. Within this framework, the second paragraph of Article 275 of the CPC provides that

> If the judgment, including the reasons, is not explained to the public prosecutor or to the parties who file the motion of appeal on fact and law, then the reasons shall be notified within seven days after obtaining the knowledge by the court, that the judgment has been attacked with a motion of appeal on fact and law.[83]

The word 'reason' is used twice in the paragraph. The first of which is relating to the notification of the reason to the parties in order to ensure their right to an effective remedy. The second one, as clearly stated in the reasoning of the Article, aims to indicate that the seven-day period would start from the date when the reason for the judgment is written and attached to the file.

In the second paragraph of Article 293 of the CPC, titled 'The effect of the petition of appeal on law', the same regulation is included, this time regarding the appeal on law. According to this paragraph, 'If the judgment and its motives have not been explained to the appealing public prosecutor or the related parties, the motives shall be notified within seven days, after the regional court of appeal on fact and law has the knowledge of the appeal on law'.[84]

It is noteworthy that both Articles include the phrases 'obtaining the knowledge/has the knowledge of' regarding application to appeal on (fact and) law. Since it is stated in the first paragraph of Article 273 of the CPC that the motion of appeal on fact and law shall be lodged to the court that rendered the judgment, it would be more appropriate to use the word 'determining' instead of the phrase 'obtaining the knowledge by the court,' in the paragraph. The same explanations are also valid in terms of appeal on law due to the statement in the first paragraph of Article 291 of the CPC that 'A motion of appeal on law must be filed … to the court that rendered the judgment'.[85] In this sense, replacing the phrase 'has the knowledge of', included in the second paragraph of Article 293, with the verb 'determines' would be a better way of wording.

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83 Ibid 139.

84 Ibid 146.

85 According to the first paragraph of Article 291 of the CPC, 'A motion of appeal on law must be filed within seven days after the pronouncement of judgment by either submitting a written application to the court which rendered the judgment or by making a declaration to the registration clerk and having him/her prepare the necessary documents; the declaration shall be included in the records and be approved by the judge. The provision of Article 263 related to the accused under arrest with a warrant has precedence', Ibid 145.

Another important point to be emphasized is that both Articles do not include the consequences of not notifying the reasons within seven days. However, considering the first paragraph of Article 277 of the CPC,[86] it is evident that the notification of the written application of appeal on fact and law or a copy of the record about the declaration to the opposite party would be delayed. As for the appeal on law procedure, the start of the seven-day period for the additional written application to be submitted to the regional court of appeal on fact and law would be delayed, as the grounds of appeal on law are not declared in the petition, pursuant to the first paragraph of Article 295 of the CPC, which is examined in the following sections of the study.

XV. EXCEPTIONS

Due to the unique nature of the appeal on law, some exceptions have been made to the general rules of criminal procedure in matters such as the preparation of the hearing, the conduct of the hearing, and the making of a decision, while the regional court of appeals conducts a hearing examination. One of the exceptions in question is the reading of the reasoned judgment given by the court of the first instance. According to Article 282 of the CPC,

> When the main trial is opened, apart from the exceptions listed below, the provisions related to the preparation of the main hearing, main hearing, and decision of this Code shall be applicable:
>
> […]
>
> b) The final judgment of the court of the first instance, which is furnished with reasons, shall be read as well.
>
> […][87]

According to the Article, in case the main trial is opened within the scope of appeal on fact and law process, the reasoned judgment of the first instance court shall be explained as an exception to the provisions of the CPC regarding the preparation of the main hearing, the main hearing, and the decision. It is thought that this exception stems from the distinctive structure of the appeal on fact and law process. Among the provisions of the CPC regarding the decision, the above-mentioned inconveniences, particularly those arising from Articles 230 and 232, would undoubtedly affect the process of the appeal on fact and law in a negative way.

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86 The first paragraph of Article 277 of the CPC is as follows: 'If the written application of appeal on fact and law is not rejected in accordance with Article 276 by the court which rendered the judgment, the written application of appeal on fact and law or a copy of the record about the declaration shall be notified to the opposite party. The opposite party may give his response in writing within seven days after the date of notification', Ibid 140.

87 Ibid 142.

XVI. THE ABSOLUTE VIOLATION OF LAW

Violation of law, defined as the non-application or erroneous application of a legal rule in the second paragraph of Article 288 of the CPC, may be of material or procedural law. Violations of the procedural law constitute a reason for annulment to the extent that they affect the judgment.[88] The Court of Cassation also held that violations of the procedural law, which do not affect the basis of the judgment and do not change the judgment to be established after the reversal, cannot be considered as grounds for reversal.[89] However, the legislator has regulated that some violations of the procedural law shall absolutely constitute grounds for reversal, regardless of whether they would affect the judgment or not. Within this scope, Article 289 of the CPC emphasizes that

> Although it may not be mentioned in the written application or declaration of appeal on law, the following points are considered absolute violations of the law:
>
> […]
>
> g) If the judgment does not include reasons according to the Article 230;
>
> […][90]

As understood from the Article, although it is not shown in the petition or statement of appeal on law, the fact that the judgment does not contain reason in accordance with Article 230 of the CPC is accepted as one of the points of absolute violation of law. Therefore, the Court of Cassation, which determines that the judgment does not include legal and sufficient reason pursuant to the provisions of the Constitution and the CPC, would decide to reverse. In this respect, the General Assembly of Criminal Chambers, in its consistent decisions, maintains that the matter of whether the decisions contain sufficient reason must be evaluated primarily during the proceedings of legal remedies for being an essential element of the proceedings and a right for the parties, preventing arbitrariness, inconsistencies and legal uncertainties, ensuring that the concerned individuals use their right to an effective remedy by explaining why they are regarded as fair or unfair, and reviewing the judgment.[91] While the Article is rather favorable in emphasizing the importance of the reason, it

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88 Yenisey and Nuhoğlu (n 18) 939; Friedrich-Christian Schroeder and Torsten Verrel, *Ceza Muhakemesi Hukuku* (Salih Oktar tr, Yetkin 2019) 236; Serap Keskin, *Ceza Muhakemesi Hukukunda Temyiz Nedeni Olarak Hukuka Aykırılık* (Alfa 1997) 110; Bahri Öztürk (ed) , *Ana Hatlarıyla Ceza Muhakemesi Hukuku* (5th edn, Seçkin 2018) 530.

89 The Court of Cassation of Turkey, General Assembly of Criminal Chambers 1422/695 [25 December 2018] 7-10.

90 Yenisey (n 10) 145.

91 The Court of Cassation of Turkey, General Assembly of Criminal Chambers 986/554 [22 November 2018] 8.

becomes problematic by referring to Article 230 of the CPC, which contains many of the problems identified above.

XVII. THE MOTIVES FOR APPEAL ON LAW

As a result of the fact that the appellant must indicate in the petition on what ground he/she requests the judgment to be reversed, Article 295 of the CPC includes explanations regarding the time limit and how to submit the additional petition containing the reasons for the appeal on law. Pursuant to the first and third paragraphs of Article 295 of the CPC titled 'Motives for an appeal on law',

> (1) If in the petition for appeal on law or in the declaration the grounds of appeal on law is not declared, the appealing party shall submit, within seven days, starting from the expiration of the period, that is set in order to submit a written application of appeal on law, or within seven days starting from the notification of the decision of the judgment, that contains the motives, an additional written application to the regional court of appeal on fact and law shall be submitted. The public prosecutor shall clearly state in his written application of appeal, whether the appeal is put forward in favor or against the accused.
>
> (3) If the accused does not have a defense counsel, he may declare his grounds for appeal on law to the registration clerk, which shall be taken into the record; and this record must be approved by the judge. With respect to the legal representative of the accused and his spouse, the provisions of Article 262 and about the accused under arrest, of Article 263 has precedence.[92]

The first paragraph of the Article points out that even the motion of appeal on law must contain reasons, and then explains when and how these reasons shall be submitted. Although the phrase 'is set' in the paragraph does not pose a major problem, replacing this phrase with 'is specified in Article 291' would remove the ambiguity, causing the paragraph to be understood that a separate time may be given to the public prosecutor or the concerned individuals for the appeal on law.

In the third paragraph, it is stated how the accused, who does not have a defense counsel, may declare its reasons for the appeal on law. It should be noted that the Article, which requires the appeal on law to be reasoned and contains detailed regulations on the submission of the grounds of appeal on law, is highly effective in using the right to a reasoned decision. However, once again, it is clear that Article 34 of the CPC needs to be reorganized in a way that emphasizes the requirement of the reason for even the motions of the public prosecutors.

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92 Yenisey (n 10) 146.

CONCLUSION

The right to a reasoned decision, which amounts to that the decisions of all courts, including the dissenting opinions, must be written with reasons, is regulated in detail in our national legislation and key international human rights documents, and this issue is frequently examined by academic circles. The concept of reason is evaluated in detail by the settled case-law of the Court of Cassation and due to lack of reason, a great number of reversal decisions are rendered as a guide to the courts of the first instance. In this sense, the General Assembly of Criminal Chambers provides that a sufficient and reasonable reason, in accordance with law and logic, covering the trial process, evidence, and events, indicating how the judge reaches his/her personal conviction and comprehends the concrete case, and what intellectual and legal discussions the decision is made of, is as the legal basis and prerequisite on which a good decision is built.

Undoubtedly, the legislation constitutes to be one of the factors for the continuation of the problems related to reason, as well as the mistakes arising from the practitioners in the field of criminal procedure. In order for the reason to be an essential element of the proceedings, to prevent arbitrariness, inconsistencies, and legal uncertainties, to enable the relevant parties to use their right to an effective remedy by explaining why they are deemed right or wrong, to contribute to the formation of trust in the judiciary and the development of legal science, amendments to be made in the problematic articles of the CPC would contribute significantly to the solution of these problems.

Within this scope, phrases leading to uncertainties, incoherencies, and misunderstandings should be eliminated. Making a regulation on Article 34, including that the motions of the public prosecutor and appealing parties shall also contain motives in cases that are clearly regulated by law, would be appropriate in terms of the right to a reasoned decision and the integrity of the CPC. Moreover, insufficient explanations, misuse of punctuation marks, article references which might cause confusion regarding how to write a reasoned decision, statements limiting the obligation to give reasons to the decision-maker or the type of the decision, the use of adverbs such as 'absolutely' and 'clearly' when pointing out the requirement of stating reasons should be removed. Furthermore, the approach to the additional obligation to state reasons for the decisions which are in the scope of 'all kinds of decisions rendered by the judge and court' in Article 34 must be abandoned.

On the other hand, the number of articles, such as the amended first paragraph of Article 101, that have the potential for favorable results in terms of the protection of the right to liberty and security and the right to a reasoned decision need to be increased.

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