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Özel Hayatın Gizliliği Karşısında Basın Özgürlüğü: Türkiye'deki Mevcut Hukuki Düzenlemeler

Prof. Dr. Seldağ GÜNEŞ PESCHKE*

ABSTRACT

Press is an institution with the main task to inform the public about different issues. In a democratic society press is often regarded as the forth power which has influence on public opinions and political decisions. On one hand, press takes its power from the community and empowers the community in the democratic process, on the other it respects the foundamental rights of the individuals in the society. In this sense, informing the public is sometimes opposed to privacy. In each culture, there is a different context of privacy, but sometimes common themes are shared. The news, that are given to the public, related to the people's private lives should be expressed within the borders of privacy regulations. In the Turkish Constitution privacy, freedom of communication, freedom of expression and freedom of press are published in different articles, although they should be considered together. It requires to draw the border between privacy and freedom of press. In this paper an overview of the current legislative framework about the protection of privacy in Turkey will be given in the context of freedom of press.

Keywords: Privacy, Personality Rights, Media, Freedom of Press, Personality Rights.

ÖZET

Farklı konularda kamuyu bilgilendiren, özellikle demokrasilerin gelişimine ve güçlenmesine büyük katkı sağlayan basın, toplum içinde önemli bir role sahiptir. Bir yandan, basın gücünü toplumdan alır ve demokratik süreç içinde toplumu güçlendirir, diğer yandan da toplum içinde yaşayan bireylerin temel hak ve özgürlüklerine saygı gösterir. Bu bağlamda, kamuyu bilgilendirmek, bazen özel hayatın gizliliğini ihlal edebilir. Her kültürde, özel hayatın gizliliği farklı bir şekilde algılanabilir, ama bazen ortak konularda benzerlikler de bulunmaktadır. Kişilerin özel hayatlarına ilişkin haberler, özel hayatın gizliliğinin korunmasına ilişkin hukuki düzenlemeler de dikkate alınarak verilmelidir. Anayasamızda, özel hayatın gizliliği, basın özgürlüğü, ifade özgürlüğü ve haberleşme özgürlüğü farklı maddeler içinde yer almakla birlikte, aslında bunlar birarada değerlendirilmesi gereken temel haklardır. Bu bağlamda,

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basın özgürlüğü ile, özel hayatın gizliliği arasındaki sınırı çizmek önem arzeder. Bu makalede, özel hayatın gizliliğine ilişkin mevcut hukuki düzenlemeler, basın özgürlüğü çerçevesinde ele alınacaktır.

Anahtar Kelimeler: Özel Hayatın Gizliliği, Kişilik Hakları, Medya, Basın Özgürlüğü.

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Introduction

The change of the technology effects the behaviours of the people in the society which causes a cultural change. So, it is clear that privacy changes according to the content of the legal regulations, culture and the environment. The protection of privacy is seen as one of the main principles of democracy. At the beginning of the 20th century, the behaviours of the people were more centralised in the environment where they were living. In 1890, the Supreme Court Judge Louis Brandeis wrote an article "The right to privacy" and stated that the concept of privacy should be protected under the Constitution[1]. Since then, by the change of the media, the understanding of knowledge transfer changed and from this change the rules about privacy were effected, as well. After fifty years of Warren and Brandeis' article, Prosser systematized and classified the privacy torts[2] between 1940 and 1972[3] and became the key figure for the implementation of this subject[4].

The area of privacy has expanded in the last years according to the change of the technology. Nowadays, the internet threatens privacy in many ways, because it is possible to record everything through IP addresses of the users what they do on line[5]. Everyone has the right to control over his/her data which are considered often as e-mail adress, telephone numbers, name, IP numbers, genetical informations, etc. Independent on the forms how the information is accessible, it should always be appropriately protected.

1 Warren, S./Braindeis, L.:"The Right to Privacy", 4 Harvard Law Review, 1890, p. 193-220.

2 Richardst, Neil; Solove, Daniel: "Prosser's Privacy Law: A Mixed Legacy", California Law Review, No: 98, s. 1895; Prosser has classified the torts into four different forms which were as follows:1. The breach of plaintiff's desolation or private affairs 2. The exposition of the plaintiff's annoying private facts 3. The insulting reputation in the public 4. Appraprіation of the plaintiff's name, in the advantage of the defendant.

3 Prosser, William: "Privacy", 48 CALIF. L.REv., 1960, 383.

4 Brüggemeier, Aurelia; Colombi, Ciacchi; O'Callaghan, Patrick: Personality rights in European Tort Law, Cambridge 2010, p. 59.

5 Peschke, Lutz: „The Web Never Forgets!: Aspects oft he Rights tob e Forgotten", Gazi University Faculty of Law Review Vol. XIX, Y.2015, No. 1, p. 153.

I. The Protection of Privacy in International Treaties

In the international level, Universal Declaration of Human Rights (UDHR)[6] is an important turning point for territorial and communications privacy. Article 12 states that "No one shall be subjected to arbitrary interference of his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks." In many international treaties, privacy is recognised as a fundamental right which should be taken into consideration in every sense. As it is stated, in the European Convention on Human Rights (04 November 1950), article 8, everyone has the right to respect for his private and family life, his home and his correspondence[7]. With this article private life of the individuals are protected against interference by other people. In the last years, privacy is being discussed in many different platforms and it is seen as one of the main responsabilities of the State. In the constitutions of many countries, privacy is regulated under fundamental rights.

In the United Kingdom, the Calcutt Committee defined privacy as "the right of the individual to be protected against intrusion into his personal life or affairs, or those of his family, by direct physical means or publication of information."[8] In Germany, the general right to personal life has been constitutionally guaranteed by Articles 1 and 2 of the Basic Law (Grundgesetz - GG) within the protection of human dignity and the right to free development of the personality. As it is stated in GG, the respect and protection of human dignity is the duty of all state authority which is indispensable[9]. Austrian Privacy Charter provides that, a free and democratic society requires respect for the autonomy of individuals. Consequently, privacy is seen as a basic human right and the reasonable expectation of every person.

According to Edward Bloustein, privacy is an interest of human personality

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6 Universal Declaration of Human Rights (UDHR) dated 10 December 1948 (http://www.un.org/en/universal-declaration-human-rights/index.html)

7 In the European Convention on Human Rights article 2/2 states that there shall be no interference by a public authority with the exercise of this right. There can be exceptions in accordance with the law and when it is necessary in a democratic society in the interests of national security, public safety, the economic well-being of the country. The prevention of disorder or crime, the protection of health or morals, and the protection of the rights and freedoms of others are also included in these exceptions. (http://www.echr.coe.int/Documents/Convention_ENG.pdf)

8 Report of the Committee on Privacy and Related Matters (Chairman: David Calcutt), Cmnd.1102, London 1990, 7

9 Güneş Peschke, S./Peschke, L.: „Protection of the Mediatized Privacy in the Social Media: Aspects of the Legal Situation in Turkey and Germany", Gazi University Faculty of Law Review Vol. XVII, Y.2013, No. 1-2, p. 868.

which protects the independence, dignity and integrity of the individual[10]. Privacy can be described as one's own space which he does not want to share with the public and limit the access of the others to his/her personal information, data or secrets. Everybody has the right to decide which information with whom to share. Privacy cannot be localised as home or family, which is associated with certain procedures and it can be in everywhere, even in the middle of a public place[11]. When someone is in the public, it does not mean that she/he has no privacy.

In this context there is an significant court decision from the Princess of Monaco, Caroline. Princess Caroline sued some German magazines, as they published her photos with her husband in different places. The German Federal Constitutional Court decided in the same direction as an earlier decision of German Federal Court of Justice that Princess Caroline is a well-known person in the society and a public figure, for that reason, she has to tolerate being photographed in the public[12]. With this decision, the public interest of the society and the freedom of press are put in a higher place than the right to privacy. Princess Caroline brought the case to ECHR, with the same reasons as her photos are published in German magazines without her permission and there is the breach of privacy. ECHR considered that the general public did not have a legitimate interest in knowing Caroline von Hannover's private life.[13] Even if she is a public figure, she has her own private life which should be protected under privacy regulations. As a result the ECHR decided that the personality rights of Princess Caroline should be protected in this case, as they have a higher value than freedom of press[14].

II. The Protection of Privacy in Turkey

In Turkey, privacy is regulated under different Codes like Turkish Constitution, Turkish Civil Code, Press Code, the Turkish Penal Code, Data Protection Code and other specific codes which deal with privacy. According to the hierarchy of the Turkish legal system, the Constitution comes at the top

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10 Bloustein, E.: Privacy as an Aspect of Human Dignity, 39 New York University Law Review, 1964, p. 971

11 Güneş Peschke, S./Peschke, L, p. 865.

12 BundesVerfassungsGericht, 1 BvR 1861/93, 1864/96, 2073/97, 14 January 1998, (1998) 97 BVerfGE 125; BundesVerfassungsGericht, 1 BvR 653/96, 15 December 1999 (1999) 101 BVerfGE 361 (Caroline II)

13 Von Hannover v. Germany (Application no. 59320/00) (2004) ECHR 294, (2005) 40 EHRR 1 (ECtHR Caroline I)

14 Fink, Udo: „Protection of Privacy in the EU, individual Rights and Legal Instruments". In: Witzleb, Normann/ Lindsay, David/ Paterson, Moira/ Rodrick, Sharon (Eds.): Emerging Challenges in Privacy Law, Cambridge 2013, p. 83.

of the other regulations. In this hierarchial discipline none of the codes or by laws can be against the Constitution. Privacy and freedom of press are first regulated in the constitution in seperate articles. Besides, both of them are described under several articles in different codes and by laws[15].

In the Turkish Constitution the privacy of individual life[16] and the nature of fundamental rights and freedoms are expressed in different articles (Article 12 and 20)[17]. According to Article 12, everyone possesses inherent fundamental rights and freedoms which are inviolable and inalienable. The fundamental rights and freedoms also comprise the duties and responsibilities of the individual to society, their family, and other individuals[18].

Everyone has fundamental rights which cannot be forgiven and has the right to respect for his private and family life, his home and his correspondence. The respect and protection of human dignity is the duty of all state authority. For that reason, at first, the Turkish Constitution respects private life and protects people against interference by other individuals. Fundamental rights and freedoms may be restricted only by law as it is stated in the Article 14 of the Constitution "None of the rights and freedoms embodied in the Constitution shall be exercised in the form of activities aiming to violate the indivisible integrity of the State with its territory and nation, and to endanger the existence of the democratic and secular order of the Republic based on human rights". Besides, in the second paragraph it is edited that, "no provision of this Constitution shall be interpreted in a manner that enables the State or individuals to destroy the fundamental rights and freedoms recognized by the Constitution or to stage an activity with the aim of restricting them more extensively."

Privacy and its protection is regulated in a separate single article in the Turkish Constitution with three paragraphs, because of the importance given to the subject. According to Article 20, first paragraph, everyone has the right to demand respect for his/her private and family life. Privacy of private or family life shall not be violated.

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15 Güneş Peschke, Seldağ: Roma Hukukundan Günümüze Kişilik Haklarının Korunması, Ankara 2014, p. 71.

16 ARASLI, Oya: Özel Yaşamın Gizliliği Hakkı ve T.C. Anayasası'nda Düzenlenişi, Yayımlanmamış Doçentlik Tezi (not published), Ankara 1979.

17 The right to legal protection of private life, honour, name and the right to determine one's private life were introduced in Turkish Constitution which also contains guarantees of freedom to communicate and protection of secrecy of communication, guarantees of freedom to express opinions and to obtain and disseminate information, as well as guarantees of consumer protection against the actions threatening their privacy.

18 (https://global.tbmm.gov.tr/docs/constitution_en.pdf, 11.05.2016)

Although privacy is protected under the regulations of the State and is described as one of the basic rights, there are restrictions in exceptional circumstances by governmental authorities, police, courts and by some other legal entities. In the second paragraph of the 20th article, there is the expression under which conditions privacy can be limited. But the most important thing for these restrictions is the court's decision. Because unless these restrictions are legitimized with a court's decision on national security, public order, prevention of crime, protection of public health and public morals, or protection of the rights and freedoms of others, they would be illegal. Again on the above-mentioned grounds, neither the person, nor the private papers, nor belongings of an individual shall be searched nor shall they be seized. The decision of the competent authority shall be submitted for the approval of the judge having jurisdiction within twenty-four hours. The judge shall announce his decision within forty-eight hours from the time of seizure; otherwise, seizure shall automatically be lifted[19].

The limits of privacy is drawn in the Turkish Constitution, but as a subject matter, privacy is regulated in civil law under personality rights. The main provisions on personality rights are introduced under TCC (Turkish Civil Code) and TCO (Turkish Code of Obligations). So the characteristics of personality rights are seen directly in the rules of the privacy as well. Personality rights are absolute rights which are given to a person at birth[20]. As they are accepted under the fundamental rights, all the values that are related with the personality can be included in the personality rights like name, life, honour, freedom, health, body, secrets, photos, voice, privacy and many more[21]. Although the personality is protected under three separate articles in civil code, all personality rights are not written down, as the legislator did not want to limit these rights by counting them one by one. In the article 23, only a few of the personality rights are mentioned. It is stated that no one may waive his/her rights and capacity to act freely, besides his/her freedom even if it is in the least degree.

When there is an infringement of the personality rights, the person whose rights are violated have the chance to sue, because no one may impose restrictions on a person contrary to the legal regulations. The act against

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19 Turkish Constitution Article 20/2.

20 Akipek, Jale/Akıntürk, Turgut/Karaman Ateş, Derya: Türk Medeni Hukuku Başlangıç Hükümleri Kişiler Hukuku, 10. Ed., Vol.1, İstanbul 2013, p. 240; Öztan, Bilge: Medeni Hukukun Temel Kavramları, 23. Ed., Ankara 2006, p. 220; Arpacı, A.: Kişiler Hukuku (Gerçek Kişiler), İstanbul 2000, p. 5; Hatemi, H.: Kişiler Hukuku Dersleri, İstanbul 2001, p. 29.

21 Kılıçoğlu, A.: Şeref, Haysiyet ve Özel Yaşam Basın Yoluyla Saldırılardan Hukuksal Sorumluluk, 3. B. 2008, s. 7; Güneş Peschke, S./ Peschke, L., p. 871.

personality rights can be because of an assault on personality or an insult to the dignity, honour or reputation of a person, causing harm to his feelings, or a breach to the personal or family life[22]. There is a basic principle in TCC Art.24 which protects the personality against the individuals who made the assault. According to TCC Article 24, the person whose personality rights are violated can instantly claim protection from the legal enforces and the courts against the individuals who made the assault. No one has the right to act against another person to his fundamental rights given to him by laws. The one who acts against these rules would be punished strictly under civil law and penal law.

The victim cannot be defined as injured, whenever he had given his lawful consent. On the other hand, the consent cannot be given in all rights to privacy. The frame of the consent is drawn in TCC Article 23, as it is mentioned above. The consent neither makes the person to do whatever he wants against another person's rights, nor gives the permission to act against his basic rights like legal capacity, life, liberty, the capacity to act and more. These rights are defined as inalienable rights and protected strongly in the Constitution and in the other codes. But it is clarified in the second paragraph of Article 24 that, the breach against personality rights is considered contrary to the law unless there is the consent of the damaged person for this act or the assent of the person whose personality rights are damaged, is based on the reasons related to private or public interest[23] and usage of authorisation conferred upon by the law[24]. But sometimes the public interest does not make the infringement lawfull[25].

III. Media and Its Duties in the Society

Media has an important role in the society, as it is seen as the fouth force under the principle of the separation of powers in the democracies. Care role in the free media is a must in a democratic country. Media provides a place to

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22 Court of Cassation of Turkey (Yarg.), Assembly of Civil Chambers (HGK.) 2007/4-221 E., 2007/213 K.; the criticisms and the language used in the news which is published in a newspaper against a politician is considered as the breach of personality rights and the defendant was sentenced to pay pecuniary damages in favor of the plaintiff. Court of Cassation of Turkey (Yarg.), Assembly of Civil Chambers (HGK.) 2000/4-1672 E., 2000/1720 K., The court of cassasion decided that there is no breach of personality.

23 Kılıçoğlu, A.: Borçlar Hukuku, s. 289 vd.; Nomer, s. 118; Court of Cassation of Turkey (Yarg.) 4. Law Chamber (HD) 21,10.2010, E. 2009/13923, K. 2010/10697, "There is no public interest of the publication of the in the plaintiff's personal telephone calls, … there is the breach of privacy and the infrigement of the freedom of communication. ".

24 Güneş Peschke/Peschke, p. 871

25 Court of Cassation of Turkey (Yarg.) 4. Law Chamber (HD) 15.10.1981, 9783/11230, "… even if the news is right and there is the public interest, when the publication style of the news is not appropriate and degrading, humiliating the personality, there is no lawfullness."

test the new ideas and opinions in the society and helps people to understand each other. In this regard, there is the intersection point between the freedom of press and the personality rights, especially in the breach of privacy. In the last years most of the violations against privacy takes place in the media or internet blogs[26]. When we consider the duty of media is to enlighten the public and privacy which is an absolute and a fundamental right, how should they be balanced? Under this aspect, it would be better to explain press and its duty according to the Turkish regulations.

Today the media's potential support for the democracy is discussed in many platforms. It is clear that media has two important obligations for the public. The first one is to tell the truth where facts are involved. Second is to clarify what is a factual story and what is the newspaper's or the journalist's opinion on the current issues. In this sense there should not be any difference between internet journalists and print press journalists. Both of them have exactly the same obligation to be fair and honest as other parts of the media**.**

IV. The Legal Aspects of Freedom of Press in Turkey

Freedom of press is regulated under the Turkish Constitution, besides in the Press Code. In article 28 of the constitution a general rule for freedom of press is written down, beginning with "The press is free, and shall not be censored." It is the duty of the State to take the necessary measures to ensure freedom of the press. In fact, this freedom is not without any limits. Press has several roles in the society, and the main role is to enlighten the public about the new developments, to form opinions and make comments regarding various issues. Media has a strong role in the society, as it informs, entertaints, creates policies, criticise and takes the interest of the public.

The freedom of press is protected under constitution, but this freedom is not without any limit. The press can be restricted under different circumstances. The limits of freedom of press is bounded also in the constitution under the second paragraph of the Article 28. Anyone who writes or prints any news or articles which threaten the internal or external security of the state or the indivisible integrity of the state with its territory and nation, which tend to incite offence, riot or insurrection, or which refer to classify state secrets and anyone who prints or transmits such news or articles to others for the above

[26] Hoeren, Thomas: "Persönlichkeitsrechte im Web 2.0." In: Kleist, Thomas; Roßnagel, Alexander; Scheuer, Alexander (ed.): Europäisches und nationales Medienrecht im Dialog. Schriftreihe des Instituts für Europäisches Medienrecht (EMR), Band 40. Baden-Baden: Nomos 2010, p. 487; Peschke, Lutz (2015): "The Web Nerver Forgets": Aspects of the Right to Be Forgotten. Gazi University Faculty of Law Review, 19 (1), 2015, p. 152.

purposes, shall be held responsible under the law relevant to these offences[27].

In Turkey, publications which contravenes the indivisible integrity of the state with its territory and nation, the fundamental principles of the republic, national security and public morals may temporarily suspended by court sentence. Any publication which clearly bears the characteristics of being a continuation of a suspended periodical is prohibited; and shall be seized following a decision by a competent judge.

In the Turkish Constitution, freedom of press, freedom of communication and the freedom of speech are described under different articles, although they have common principles. It is stated in the Turkish Constitution (Article 22) that everyone has the right to freedom of communication and the secrecy of communication is fundamental. There is a special code for the press no. 5187, which is in force since 9/6/2004. The first article of this code expresses the aim of the code as to regulate the freedom of press and its usage.

Freedom of expression is not only one of the essential foundations of democracy, but also it is one of the basic conditions for its progress and for each individual's accomplishment. The essential role of the press is to provide the accurate function of democracy and has the duty to inform the society. For that reason, press is also protected in the constitution and in several codes. Press code is formed to provide the freedom of press and aims to ensure the freedom of press and the usage of this freedom. The most important function of press in the society is to search for the realities and enlighten the public. Because, truth can be found only by discussing the facts.

V. Privacy v. Freedom of Press

Although press plays an essential role in democratic societies, freedom of press and right to privacy should be balanced. These are the two values which are protected under different articles in the constitution. The freedom of expression is guaranteed under the Article 26 of the Turkish Constitution. Every person has the right to communicate freely, express and disseminate his opinions in speech, writing and pictures, and to inform himself without hindrance from generally accessible sources. When there is the public interest for the publication of a news or a photograph, there should be a balance between the general interest of the community and the interests of the individuals (Art.26).

There are some principles for press which it should obey, while giving the information to the public. First of all, the news should be given under the real facts. According to the Turkish Press Code Article 12, unless the news are

[27] (https://global.tbmm.gov.tr/docs/constitution_en.pdf, 11.05.2016)

presented in reality, there is the responsibility of the author and the general editor of the newspaper or magazine. Public interest is also a need, besides the interest for the news from the society. The press should inform the public, by keeping the balance between the format and the content. When the publication style of the news is not appropriate, besides, degrading and humiliating the personality, there is no lawfulness, even if the news is right, talking about the truths and there is the public interest for the publication.

The press has the responsibility to research, evaluate, inform, teach, enlighten and guide the public. In this sense it has a different role in the society. For that reason, individual criterias are needed for the formation of illegal acts in media. It should be considered that freedom of press is not unlimited. In the publications, press cannot act against the fundamental rights and freedoms written down in the Constitution, TCC Article 24 and 25 and the other codes related with privacy[28].

In this sense, a breach of privacy can occur while the press is informing the public. At this point, when there is an infringement of the personality rights, the person whose rights are violated have the chance to ask for protection from the judge under TCC Article 24, or sue according to Article 25 and demand from the judge to take an action for prevention of assault, elimination of such threat and determination of unlawful consequences of the assault even though it is discontinued.

When the freedom of press is on one hand side and the privacy is on the other, law cannot protect the two values at the same time. It values one of them superior than the other one. The press enlightens the public and searches for the public interest[29]. But at the same time, a proper language and

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[28] Court of Cassation of Turkey (Yarg.) 4. Law Chamber (HD) 2009/13923 E., 2010/10697 K.; The plaintiff opens a lawsuit and points out that his telephone calls which are not related with the case are published. He demands the moral damages, as his privacy, freedom of communication and personality rights are infringed. The court gives the decision that no one can touch the privacy of someone and has no right to share his informations in this sphere with the public, without the concent of the damaged person. As there is no public interest in the publication of the telephone calls of the plaintiff, it is clear that there is a breach of privacy.

[29] Court of Cassation of Turkey (Yarg.) 4. Law Chamber (HD) 2009/8119 E., 2010/7573 K.; "… privacy of a person is inviolable, private life cannot be disclosed without the consent, regardless of the person's title and location. These are the the hidden fields of the person. Recording the image and the conversation of someone without his consent causes infringement against the privacy, even if the nature of the attack is unlawful. The reflection of any audio and video recordings, breaches the personality rights. As it is understood from the case that the audio recording is obtained secretly and illegally. Without the plaintiff's will they should be kept secret and confidential. As there is no public interest for the disclosure of these audio recordings, it causes violation against the privacy of the plaintiff."

statement should be used according to the information given. There must be a balance between the style of the news served to the public and the content of the news. If the content is suspicious or the news is given in a way which provocates the public, in accordance with the Article 49/1 of the Code of Obligations, it can be considered illegal. In the Turkish Code of Obligations, the liability resulting from tortious acts is stated as a "fault liability" which is regulated in the articles between 49 and 64. The one who gives damage to the other one against law by fault, should compensate[30]. Under Article 49, the claimant has the right to demand compensation[31] for physical damages, as well as the moral damages[32].

Conclusion

Press plays an essential role in democratic society which has the duty to inform the public. For that reason, press is protected in the constitution and in several codes. Privacy is an important fundamental right which is protected under different codes, like Turkish Constitution, Turkish Civil Code, Press Code, Turkish Penal Code and other specific codes.

When freedom of press and privacy are two rights against each other in the same dispute, both of them cannot be protected at the same time. Thus, the freedom of press and right to privacy should be balanced. For that reason, the judge should balance these two rights in a proper way, by using his discretion and keep one of them higher than the other while giving the decision. In these cases public interest should be searched.

As a result, each case is individual and in each case judge should decide freely, within the rules of fairness and good faith. When freedom of press and privacy are on different sides of the litigation, two values cannot be protected at the same time. For that reason, judge has the freedom to decide according to the legal regulations on freedom of press, freedom of expression and privacy, within the framework of her/his discretion.

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30 Court of Cassation of Turkey (Yarg.), Assembly of Civil Chambers (HGK.), 27.12.2006, E. 2006/4-800, K. 2006/821; " The judge should decide the compensation in justice and …. the compensation should be determined in accordance with its purpose."

31 Court of Cassation of Turkey (Yarg.) 11. Law Chamber (HD), 11.01.2010, E. 2008/8804, K. 2010/100; "… the compansation which judge decides should be fair, in justice and appropriate to compensate."

32 Zevkliler/Acabey/Gökyayla, Medeni Hukuk: Giriş, Başlangıç Hükümleri, Kişiler Hukuku, Aile Hukuku, 6. Ed., Ankara 2000, p. 499; Gençcan, Ömer Uğur: Medeni Hukuk Davaları, Ankara 2013, s. 283; Akipek/Akıntürk/Karaman Ateş, p. 396; Court of Cassation of Turkey (Yarg.) 21. Law Chamber (HD), 04.03.2008, E. 2007/22495, K. 2008/3479.

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EFFECTS OF DEVELOPMENTS IN INFORMATION TECHNOLOGY ON CRIMINAL LAW

Bilişim Teknolojisindeki Gelişmelerin Ceza Hukukuna Etkisi

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ABSTRACT

Advancements in the field of information technology (IT) have brought some problems and various regulations have been made for the elimination of these issues from a legal perspective. The criminal acts that also constitute crimes in criminal law are covered in this context. They are included in some other specific codes as well as being regulated in criminal code. The effect of the developments of the IT on law and criminal law has resulted in the use of the following terms; "Information Technology Law (IT Law)" and "Criminal Information Law". Although these terms are used by some authors in terms of doctrine, this study has revealed that the use of these terms is erroneous.

Developments in the field of information technology have influenced criminal law about the protection of personal data, cyber crimes, copyrights, electronic commerce, electronic signature and new payment systems**.** In this study, regulations on these developments on a country basis, international research and their impact on Turkish law have been included.

Keywords: Criminal Information Law, Personal Data, Cyber Crimes, Copyrights, Electronic Commerce, Electronic Signature.

ÖZET

Bilişim teknolojileri alanında yaşanan gelişmeler bazı sorunları da beraberinde getirmiş ve bu sorunların giderilmesi noktasında hukuki alanda düzenlemeler yapılmış, bu kapsamda ceza hukuku alanında da suç teşkil eden fiillere yer verilmiştir. Bu fiiller ceza kanununda düzenlendiği gibi diğer özel kanunlarda da yer almıştır. Bilişim alanında yaşanan bu gelişmelerin hukuku ve ceza hukukunu etkilemesi bilişim hukuku ve bilişim ceza hukuku kavramlarının kullanılması sonucunu doğurmuştur. Doktrinde bazı yazarlar tarafından bu kavramlar kullanılsa da çalışmada bu kavramların kullanılmasının doğru olmadığı ortaya konulmaya çalışılmıştır.

Bilişim teknolojisi alanında yaşanan gelişmeler ceza hukukunu kişisel verilerin korunması, bilişim suçları, telif hakları, elektronik ticaret ve elektronik imza, yeni

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ödeme sistemleri hakkında etkilemiştir. Çalışmada bu konudaki ülkeler bazında düzenlemelere, uluslararası çalışmalara ve Türk hukukundaki belirlemeler yer verilmiştir.

Anahtar Kelimeler: Bilişim Ceza Hukuku, Kişisel Veriler, Bilişim Suçları, Telif Hakları, Elektronik Ticaret, Elektronik İmza

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INTRODUCTION

Human beings have been occupied with the process of information, the storage of information and the access to it for many years. Over time, to facilitate the process, a number of studies have been conducted. Through the mid 20th century, on the issue of processing and evaluation there occurred a big improvement and the manufacturing of the computers started. The production of computers and other subsequent developments in this area affected also the criminal law as it affected many fields. Developments in the field of IT revealed that information is not only an essential value for human beings, but it is also the source of a new form of threat. The necessity for the protection of personal data has become apparent and new forms of criminal activity have emerged. Also it has thus become clear that computer programs themselves need to be protected. Furthermore, in the meantime, improvements in IT have resulted in economic activity based on electronic commerce, signatures now began to taken in electronic platforms, new payment methods have been revealed. Hence, a provision should be inserted into the legislation to ensure criminal protection.

In our study, all these developments in IT will be examined and the situation in Turkey will be stated. Explanations in the strict sense will be made restrictedly on criminal law. Regulations on administrative fines and developments in criminal proceedings are outside the scope of this study.

Developments in information technology will not also be limited to the current situation. As there will be new amendments to meet the current developments, the regulations in criminal law will take place in also for the later improvements.

I. Obligation for Protection in Information Technology

With putting the mass production of personal computers into service of humanity in the 1980s, the development of data networks and the start of the Internet age, the world has begun to experience a big change. The Industrial Revolution has ended and the Technology Revolution and the Information Age have begun. As a result of these improvements, there have been many changes

in the economic and social lives of people. Electronic commerce has been become possible, tele-working[1], tele-health, and tele-meeting opportunities have been born. Also significant changes have occurred in librarianship, education, and banking services. New business areas -such as information brokerage[2]- have emerged. Computers are being used in diverse areas, such as music, the auto industry, the military[3], and business. The phenomenon has carried the world into the globalization.

IT, as well as changing economic and social life, has also affected criminal law by using it as a tool in the violation of some values**.** In the empirical researches, it has been stated that the information based on computing is not only an economic, cultural and political benefit but also a threat[4]. The realization of some actions, such as the violation of personal rights by abusing information systems, causing material damage to people and organizations or theft of business secrets and the programs have arised the necessity of taking measures on this issue. In the 1980s, it was understood that the crimes resulted from information technology are not only limited to economic crimes, but also crimes concerning the violation of the personal rights, the unauthorized accesses to systems, the illegal seizure of data, and the forms violating other legal values[5]. These emerging improvements have resulted in the researches on the development of new strategies in security and on the prevention of delinquency in information technology. The regulations related to IT crimes have been measures both precautionary just as to ensure the fulfillment of computer-based transactions and become an important factor in the prevention of IT violations.

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1 Women who want to have children in the United States and some women employees in the IT field in the United Kingdom have been allowed to work at home: Özerkan, Şengül Altınal, "Bilgisayar ve İletişim", Yeni Türkiye, Special Issue-I of the 21st Century, 1998, Year 4, Issue 19, p. 779.

2 Information brokering is providing synthesis information and services to buyers. The use of this information is called the transportation process. This includes, for example, the work of a commercial internet center: Keneş, Bülent - Mehmet Yılmaz, "Üçüncü Millennium'da İstihbaratın Değişen Yüzü", Yeni Türkiye, 21. Yeni Türkiye, Special Issue-II of the 21st Century, 1998, Year 4, Issue 20, p. 1552.

3 Information technology facilitates the launch of missiles, the usage of nuclear power and the transform of military planning and deployment. However, the connection between the military and advanced computer systems is criticized for the reason that the fate of the world is left at the mercy of countries with advanced technology. According to this view, the complex computer systems presently in the hands of a limited number of experts puts the world's peace on a knife-edge: Erdoğan, Mustafa, "Bilgi Toplumu ve Demokrasi", Yeni Türkiye, Special Issue-I of the 21st Century, 1998, Year 4, Issue 19, p. 468.

4 Sieber, Ulrich, "Informationsrecht und Recht der Informationstechnik", NJW, 1989, Issue 41, p. 2571.

5 Sieber, Ulrich, "Der strafrechtliche Schutz der Information", ZStW, 1991, Issue 3, p. 781.

However, handling such violations has left all legal orders with serious problems. This is due to the fact that the principles of criminal law had been based on the protection of physical and tangible subjects on and that they had not dealt with the other issues apart from these until the middle of the twentieth century. Until this time, even if there were some provisions in penal codes for the protection of information and other intangible media, they fell behind compared to tangible issues. However, this situation has begun to change with the extraordinary developments experienced in the field of information technology. The transformation of the industrial society to the information society and the increasing transition from physical to non-physical issues has revealed the absolute necessity of making new reforms in criminal law[6].

II. Criminal Information Law and Information Technology Law

Developments in the field of IT influencing the criminal law have resulted in stating that a separate strand of criminal information law has emerged and developed. Some authors examine crimes caused by these developments in information technology under the title of material computer criminal law[7]. Absence of tangible quality in the information in computers and that the acts related with these cannot be imposed a penalty have given rise to the notion that IT breaches should be examined within the scope of separate branch of law. In this sense, it has been stated that developments revealed the need to separate the legal assessment of the tangible and intangible properties and that it has been understood that the principles developed for the protection of the owners and the possessors of the tangible goods were not fully applicable for the owner of the information. In other words, the classical sense of the relationship of ownership cannot be applied to intangible assets. For instance, it is indicated that whereas material assets are under the sole control of a particular person, information is a public property, which must flow freely and therefore should not be protected by exclusive rights. Yet, it is also uttered that provisions on the protection of the content of the personal data whose personal rights are related to cannot be excluded from the rules set for tangible assets by making comparison and that computer information law should be developed on an independent basis[8]. At the current level, criminal information law is still in the developmental stage and general provisions on some issues, such as determining the ownership of the power of disposition,

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6 Sieber, Der strafrechtliche Schutz der Information, p. 783.

7 For details see: Möhrenschlager, Manfred, "Computerstraftaten und ihre Bekämpfung in der Bundesrepublik Deutschland", wistra, 1991, Issue 9, pp. 324.

8 Sieber, Der strafrechtliche Schutz der Information, p. 787, 788.

are still insufficient[9]. The scope of criminal information law includes cyber crimes described under criminal law, criminal regulations related to programs protected within the framework of copyrights, criminal provisions made under scope of the special codes (for instance; the protection of topographies of semiconductor) and the provisions of penal codes and special codes for the protection of personal data (crimes of data protection)[10] and other acts which constitute a crime.

It is true that acts performed through IT tools have emerged that they have technical aspects and the data cannot be considered as a commodity in the physical sense and that regulations regarding the violation of informatics have to be regulated with separate provisions with some exceptions. It can be seen that the new legislation has been regulated in the countries which have processed enactment, except for the extension of certain provisions. Moreover, seeing that these provisions sometimes seem inadequate before new technological advances, changes or new arrangements have been made. However, these developments do not result in the emergence of an independent criminal information law within the scope of criminal law. Criminal acts are not only included in the Turkish Penal Code, but they are also in special penal codes and in other criminal codes. Many codes require criminal sanctions to be effective, and they include criminal acts which form crimes[11]. General provisions of criminal law have been applied for all these criminal acts as a rule (Turkish Penal Code art. 5). Formulating acts in many special codes to define what forms crimes related to this field does not mean that there is an independent criminal branch arising**.** It is not appropriate to define related branches of law for every discipline which contain criminal provisions, such as "Press Criminal Law", "Taxation Criminal Law", and "Commercial Criminal Law"[12]. In this sense, enacting legislation relating to crimes concerning information violations in both the Turkish Penal Code and in the codes of other branches does not show that there is an independent branch of law named criminal information law. In the narrow sense, these are acts which constitute crimes within the scope of criminal law and do not constitute an independent branch of law.

Another determination which IT developments have created is the term, "information law". In fact, what is expressed is that the basis of criminal

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9 Hilgendorf, Eric, "Grundfälle zum Computerstrafrecht", JuS, 1996, Issue 6, p. 510.

10 Möhrenschlager, p. 324-328.

11 İçel, Kayıhan-Donay, Süheyl, Karşılaştırmalı ve Uygulamalı Ceza Hukuku, Genel Kısım, Book 1, Renewed 3rd Edition, Istanbul 1999, p. 22.

12 İçel-Donay, p. 22; Özgenç, İzzet, Türk Ceza Hukuku, Genel Hükümler, 10th Edition, Ankara, 2014, p. 37.

information law is said to be consisted of developing information technology law and the information technology. It is stated that developments occurring in national and international fields (such as establishing chairs in universities, issuing periodicals, having studies and the establishment of research institutes in national or international platforms, reform movements that took place in legalization, and the increase of jurisprudences on the subject)[13] have shown that information law has constituted, improved and increased its importance progressively[14]. Information law[15]which is also named as computer law, Internet law, new media law[16], is defined as "the law branch which contains rules related to information technology"[17]. According to this law branch, information, which has increase edits importance as a result of IT developments and hence has become an increasingly important factor, constitutes a third essential element besides material and energy. Alongside this elevation, the information also carries a risk factor on committing a crime[18]. However, it is mentioned that it is questionable whether technological developments have created such a branch of law or not. It is stated that general legal provisions can be applied mostly in this field and making certain specific arrangements due to the technical nature of the subject cannot be said to constitute a separate branch of law[19]. Apart from that, it is alleged that the realization of IT law is difficult because information law has an inter-disciplinary structure which includes many areas other than law[20].

Even if the term, information technology law, is used and new chairs are opened in universities, journals are published, and international meetings are organized, information law has not become an independent sub-discipline of IT law on its own and it is not accepted as a doctrine. Information technology

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13 For applications of the information law in Germany see: Junker, Abbo, "Die Praxis des Bundesgerichtshofs zum Computerrecht 1989-1992-Teil 1", JZ, 1993,Issue 7, pp. 344; Junker, Abbo, "Die Entwicklung des Computerrechts im Jahre 1998", NJW, 1999, Issue 18, pp. 1294.

14 Sieber, Informationsrecht und Recht der Informationstechnik, p. 2572.

15 Opponents who think that the term of information law is too broad suggest the expression "computer law" : Ersoy, Yüksel, "Genel Hukukî Koruma Çerçevesinde Bilişim Suçları", Yılmaz Günal'a Armağan, Ankara, 1994, Vol. 49, Issue 6-12, p. 152.

16 Hilgendorf, Eric, (Translator: İlker Tepe), "Tek Başına Bir Disiplin Olarak Enformasyon Hukuku? Hukuk Bilişiminin ve Enformasyon Hukukunun Bazı Temel Sorunları Üzerine Eleştirel Değerlendirmeler", CHD, Year 3, Issue 7, August 2008, p. 254.

17 About developments and characteristics of information law see: Sieber, Informationsrecht und Recht der Informationstechnik, pp. 2569.

18 See: İnanıcı, Haluk, "Bilişim ve Yazılım Hukuku, Uygulama İçinden Görünüşü", İBD, 1996, Year 70, Issue 7-8-9, p. 514 ; Aydın, Emin D., Bilişim Suçları ve Hukukuna Giriş, Ankara, 1992, pp. 67.

19 Ersoy, p. 151.

20 See: Aydın, p. 72.

law is specified as a branch of law which regulates relations concerning information technologies. Subjects falling within its scope are diverse and heterogeneous. Many subjects which originally belonged to other fields like private law (such as civil law), public law (such as administrative law, constitutional law) and criminal law are under the scope of information technology law. However, because these fields have serious differences (such as the term of mistake and principle of legality), it seems impossible to define uniform dogmatic rules which contain all of them. Therefore, it seems difficult for information technology law to be an intersection discipline that covers all areas of law. Problems arising in the field of information will be examined in every branch of law itself. Civil lawyers will examine issues related to Civil Law, administrative lawyers will examine problems in her/his own field and criminal lawyers will assess problems related to criminal law. An approval of a branch of information law and an expert in that branch which covers all these diverse situations is not only by creating an intolerable burden on the scientist but also it is harmful for teaching of the subject. Indeed, even advocates of a distinct branch of information technology law cannot agree on the subjects which will covered by this branch[21]. For instance, some proper lawyers examine copyrights in the scope of information technology law.

III. The Effects of The Information Technology Developments on Criminal Law

A. Personal Data

The impact of developments in IT to criminal law initially concerned the protection of personal data. Laws made in the 70s and 80s were a reaction to the threat to private life[22] caused by the increasing possibilities of electronic data processing[23].However, computers were used generally for data collection, assessment and storage, due to their storage capacity, and rapid processing. In other words, at first, they were used for creating ''data banks''[24]. In the

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21 Hilgendorf, Enformasyon Hukuku, pp. 254, 259.

22 There is not any general definition of private life that can be used in the context of law, and its scope can not be determined cause it varies by time, place and people. But generally issues concerning personal and family life of the individual is said to be in this context. : Danışman, Ahmet, Ceza Hukuku Açısından Özel Hayatın Korunması, Konya 1991, p. 2, 7. For private life also see: Özdemir, Salim, "Ordinatör (Bilgisayar) ve Hukuk Enformatiği (Bilişimi)", AD, 1974, Year 65, Issue 1-12, pp. 345; Dinç, Güney, "Bilgisayar Çağında Özel Yaşamın Korunması", ABD, 1987, Issue 2, pp. 195; Özbudun, Ergun, "Anayasa Hukuku Bakımından Özel Haberleşmenin Gizliliği", AÜHF 50. Yıl Armağanı, 1977, Year 1-2, pp. 265; Özdeş, Orhan , "Tabii Hukuk Açısından Kişinin Özel Hayatının Gizliliği", DD, Year 4, Issue 14-15, pp. 87.

23 Sieber, Der strafrechtliche Schutz der Information, p. 783.

24 For data bank see: Coşar, Ertan, "Bilgi Bankaları ve Hukuk Uygulaması", DD, Year 4, Issue 14-15, p. 27, 29.

1960s, the Ruggles Report on a central data bank for the collection of data in the different ministries in the United States drew attention to the dangers in terms of the invasion of privacy**.** The idea of the creation of a central data bank faced objections in the US congress on the grounds that the data is secret and information collected would not be secure. Then also in Germany and other European countries, the creation of data bank was objected to on the grounds that it threatened the privacy of private life[25]. After the 1970s, many countries adopted regulations because of the danger that the data bank formed. Sweden enacted the Data Protection Code in 1973 (and other codes were amended in 1979 and 1982); USA enacted the Code on Protection of Privacy in 1974 (and many other special codes); Germany enacted the Federal Data Protection Code in 1977 (amended in 1990); France enacted the Information Technology and Freedom Code (amended in 1988); Finland enacted the Code on Personal Data in 1987; Luxemburg enacted the Code on the Regulation of the Use of Personal Data in Computer Applications in 1979; Great Britain enacted the Data Protection Code in 1984; Ireland enacted the Data Protection Code in 1988; Israel enacted the Protection of Privacy Code in 1981; Japan enacted the Code on Protection of Personal Data in 1988; Austria enacted the Federal Data Code in 1988; Norway enacted the Code on Personal Data in 1978[26]. In addition, many countries, not mentioned here, enacted legislations concerning the protection of personal data and private life. According to a report dated 2013, 99 countries have their own data protection code[27]. Many issues, such as what types of data can be collected, bans on illegal data collection methods, and essential security measures to be taken, have been addressed and come under legal protection[28].

Today various people or organizations (national or international, governmental agencies or private organizations) are collecting data about people related to each others for various reasons. For example, doctors or hospitals collect and keep personal data about patients, banks about customers, businesses about the people they do business with, government agencies about the issues that they are concerned with, security forces about

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25 Sieber, Ulrich, Computerkriminalität und Strafrecht, 2nd Edition, Köln/Berlin/Bonn/München1980, p. 24, 25.

26 For these countries see: Sieber, "Der strafrechtliche Schutz der Information", p. 783, footnote 15.

27 Presidency, State Audit Board, Audit Report, 2013, https://www.tccb.gov.tr/assets/dosya/ddk56, pdf, p. 779 (A.D.22.11.2015).

28 About the concern on regulations on protection of private life against computers see: Tezcan, Durmuş, "Bilgisayar Karşısında Özel Hayatın Korunması", Anayasa Yargısı, Papers presented at the symposium edited due to 29th Anniversary of the Constitutional Court, Ankara, 1991, pp. 386.

criminals, airports about passengers, insurance companies about customers, telecommunication companies about users. Data banks contain a lot of information about individuals on diverse topics such as family life, business and business secrets, the newspapers and magazines they read, the associations they are members of, expenditure, private pleasures, possessions, diseases, and crimes they've committed. Considering the advent of digital technology, it is clear how easy it is to access this information. Furthermore, there are concerns about the purposes for which collectors will use this information, with whom they will share it, how long they will keep it, whether they have adequate security measures to protect it, how the people to whom the data belongs to can use his right to delete or rearrange it. Due to the sensitivity of this subject, countries are taking a firm stance on this issue. There have also been researches conducted on this issue in the international arena and the contracts have been agreed on. The protection of personal data has regulated in international agreements since the 1980s. Contracts have been made to provide a common standard of personal data protection in all countries and to determine the principles of cross-border information flows. The Council of Europe's Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, dated 28.01.1981, expresses the aim to secure the fundamental rights and freedoms of every individual, and in particular his right to privacy, with regard to automatic processing of personal data (art. 1). The convention ensures the protection of the personal data of individuals on a uniform level in several countries which are members of the Council and sets standards for the cross-border flow of data. According to article 12 of the Convention, a state can prohibit cross-border data transfer to other states, which don't provide an equivalent level of data protection in their legislation. An additional protocol for the Convention dated November 8th, 2001 is also another measure in this regard. Even though the agreement was signed by our country, it has not been approved by the Grand National Assembly of Turkey due to the absence of law on the protection of personal data, which is required in article 4. Decisions of the Council of Europe Committee of Ministers are also binding and have to be taken into account in addition to the Convention. There are some provisions on preventing the flow of data to countries that do not have adequate protection on the Data Protection Directive 95/96 of 24 October 1995. Accordingly, the cross-border flow of information can be prevented to those countries which do not have sufficient provisions to protect personal data, smart cards and internet communications. In l995, the European Union confirmed the guiding principles which demand countries such as Greece and Italy[29] that do not have data protection to accept the law

[29] Italy has adapted to the EU with the Act of Personal Data Protection dated January 30, 2003.

on the protection of data[30]. Apart from this, there is the Directive 2002/58 on the Protection of Privacy and Electronic Communications and the Retention of Communications Traffic Data Directive No. 2006/24 of the European Union. Moreover, on this subject, another international agreement to be mentioned is the OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, adopted on 23 September 1980.

In our country, all public and private organizations operate official transactions with computers and store personal data of people. You cannot even receive your cargo without giving your ID number to the courier company at your doorstep. However, there had not been any common law on the protection of personal data until 7th April, 2016. On this date, The Law of Protection of Personal Data no. 6698 was put into action, fulfilling this need on the issue. (Some articles of the code – 8,9,11,13,14,15,16,17, and 18. articles – will be put into force 6 months later). But since 1989, some studies have been conducted on the basis of drafts in our country. Within the amendment in the Constitution in 2010, it is clearly regulated that the demand for the protection of personal data is an individual's right (art. 20/3). This right includes the rights of people to be informed about their personal data, to have access to this data, to demand the correction or deletion and to get information about whether the data is used in accordance with its purposes. Because of the lack of a general law on the protection of personal data in that period it was criticized that the right guaranteed by the Constitution were not provided[31]. With the code no. 6698, the terms of the Constitution have been fulfilled by means of putting the provisions into practice on the issues such as which rules and procedures will be implemented for data collection, the processing terms of the personal data, deletion, destruction of the personal data and making it anonymous, under what circumstances and with whom it can be shared, the clarification obligation of the person in charge of the data, being informed, having access to personal data, the correction or deletion of it, the demand of destruction and learning whether it is used in accordance with its purposes, responsibilities related with the security of the data. Just as the protection of personal data by law was recorded as acceptable for the data

[30] Keyder, Virginia Brown, (Translator: Ayşe Berktay Hacımirzaoğlu), Fikri Mülkiyet Hakları ve Gümrük Birliği, Intellectual Property Rights and Customs Union, Istanbul 1996, p. 68,69. These principles have been approved at Germany's insistence. Germany's Federal Data Protection Act (Bundesdatenschutzgesetz - BDSG) concerns the provisions about the protection of international data. Germany have some bad experiences in this regard, and thus has been more willing than other countries to adopt these principles. For the principles and protection in EU see: Geis, Ivo, "Internet und Datenschutzrecht", NJW, 1997, Issue 5, pp. 289.

[31] Tezcan, p. 386.

automatically recorded, the data recorded via non-automatic ways, providing that it is the part of the data registration system, are also considered within the scope of the law (art. 2). In addition, arrangements were made about in which situations the provisions of the Law of the Protection of Personal Data (art.28) will not be applied. In general preamble of the law, it is stated that by taking international documents, the comparative practices of law, the needs of our country into account, the processing and the protection of the personal data in contemporary standards have been aimed. However, considering the nature of the law being the framework law, with the consideration of recommendations of the Council of Europe, it is stated that the decisions were not texted, and may be included in regulations to be made concerning the various sectors. Besides the regulations in The Law of the Protection of Personal Data, different codes of law (in the Electronic Communications Code, the Criminal Trial Code, the Code on Regulation of Online Broadcasting and Fighting against the Crimes Through These Publications, Criminal Records Act, the Right to Get Information Act and other codes) include provisions on the protection of personal data.

In terms of criminal law, the provisions relating to the protection of personal data are stated in the code No. 5237 in the Penal Code. In article 135 and the following articles, the act of storing personal data, delivering or getting the data illegally or not destroying the data are regulated. Also, The Law of Protection of Personal Data has resolved that the 135-140. Articles of the Turkish Penal Code will be put into force in terms of the crimes related to the personal data (art. 17). There are not any similar regulations in Code No. 765. In 1991, with the article 525 A / 1 added to law No.765 with the law No. 3679, taking data illegally were put under the scope of the laws (the quality of the data captured is not important according to the paragraph). This regulation covers the nature of a provision to be applied only in terms of the seizure of data and does not make any determination on saving data, protecting, deleting or giving data to others or misusing the data.

B. Cyber Crimes

The second wave of reforms related to information violations in criminal law was experienced in the early 1980s with the regulation of cyber crimes. The first news about information guilt appeared in the press and scientific literature in the 1960s and caused discussion on the existence of information guilt because many news is based on newspapers. A small number of cyber crimes were identified in investigations in the mid-1970s[32]. With the

[32] Sieber, Der strafrechtliche Schutz der Information, p. 780, 784.

development of computers and the emergence of violations interest was focused on whether there was a necessity for specific regulation. Those who argued that legislation was unnecessary argued that computers did not bring something new. Archives had been kept since time immemorial and any specific legislation would hinder the development of computers. Those who were in favor of the regulation argued that computers brought quantitative changes which gave rise to qualitative differences and that, for this reason, legal regulations were necessary[33]. In the 1980's, both general and scientific estimates of cyber crimes increased considerably and the threat posed by cyber crimes became increasingly apparent. The spread of commiting crimes and harming the information society clearly being understood by the large masses, which has led to countries to legislate. The following countries made regulations related to cyber crimes; Australia in 1983, 1985, Chile in 1986, Denmark in 1985, Germany in 1986, France in 1988, Greece in 1988, England in 1981, Italy in 1993, Japan in 1987, Canada in 1985, Austria in 1987, Norway in 1987, Sweden in 1986 and the United States in1984[34].

In the changes which took place in the 1980s, it was recognized that cyber crimes violated intangible values (data) as well as legal values which were already protected and that the new methods were being used to commit the crimes (e.g.: computer manipulations instead of fraud). Many countries have stipulated cyber crimes by making specific changes to legislation rather than using the flexible interpretations of existing provisions (which would constitute a violation of the principle of legality and prohibition of analogy). For example, they have regulated new crimes such as the unauthorized access to a computer system[35].

The first regulation on cyber crimes in our legislation was made in 1991. It was added to the Turkish Penal Code with the code No. 3756 on 06.06.1991. These crimes placed under the eleventh sub-section titled Crimes in the field of Information in the articles 525a, 525b, 525c were enacted identically except for a few differences from the Turkish Penal Code dated 1989. The previous Penal Code adjudicated that the seizure of data illegally in article525 a/1, the usage of data to harm someone, transport or replicate the data in article 525 a/2, harm the data and functioning of the system in article 525 b/1, to benefit through illegal information system in article 525 b/2, fraud in data in article 525 c. In the Turkish Penal Code No. 5237 which is still in force and abrogated the Penal Code No. 765, access to IT systems (art. 243), blocking, disrupting the system, destroying or changing the data (art. 244), misuse of debit or credit

33 Danışman, p. 39.
34 Sieber, Der strafrechtliche Schutz der Information, p. 781.
35 Sieber, Der strafrechtliche Schutz der Information, p. 784, 785, footnote 16.

card (art. 245) were regulated in Chapter 10 under the title "Crimes on field of Information". Crimes concerning the misuse of debit and credit cards which was included in the scope of article 525-b/2, while Turkish Penal Code No.765 was in force, were regulated as an independent crime in the Code numbered 5237. The crime of entering a cyber system which was not stated in the previous code although it was necessary, was also been regulated in this new code. However, the requirement of staying on the system for the constitution of the crime was not correct. Making amendments on the provision on 24.03.2016 with the Code number 6698, the legislator has accepted that entering into the system or staying online is enough to be regarded as a crime (art.243). The acts of seizure or storing data are not regulated only regarding the information system. These acts are also stipulated in articles 135 and 136. Thus, there is not a determination made in the Crimes in the Field of Information section regarding these crimes. The acts of use, duplication and transmission of data in article 525 a/2 are not stated in the Code numbered 5237. Because the acts of copying programs which were the purpose of the provision (art. 525 a/2)[36] were regulated in the Code on Literary and Artistic Works (CLAW) by the amendments made on 12.06.1995. Because protection of private life or personal data were stated in our legislation, the article of 525 a/2 was not necessary anymore. However, there is a lack of provision on forgery in our penal code. Although there is a regulation in the legislation about forgery on electronic certificates (Electronic Signature Code, art.17), that provision is found to be insufficient because it doesn't cover all the acts related to forgery on data. Even though there is a determination on the forgery of debit and credit cards in art. 245/3, the Turkish Penal Code does not punish the act of fraud on cards, but regulates against the benefit to self or others by using a fake or the fraudulent debit or credit card. There was also no regulation in the Turkish Penal Code regarding the use of and keeping of password crackers, programs or other devices in order to commit a crime before the code change with the Code n. 6698 on 24.03.2016, which made a deficiency in terms of our Penal Code. Although there are some provisions in some special codes about their own fields (Electronic Signature Code, art.16, CLAW art.72), there was no provision relating to misuse of devices involving cyber crimes. With the amendment made in 2016, for the realization of the crimes that can be committed by means of using cyber crimes or systems as tools of information, some of the acts such as, in the case of making a device, a computer program or forming the password or the other security code of the computer program,

[36] In the same vein: Ersoy, p. 175; Aydın, p. 90. However, the opinion of these authors that the programs are protected has been criticized on the grounds that it only gives the impression of protection but in reality the data is not protected: Yazıcıoğlu, Yılmaz, Bilgisayar Suçları, Kriminolojik, Sosyolojik ve Hukukî Boyutları İle, Istanbul 1997, p. 245, footnote 478.

manufacturing and exporting them has been regulated as crimes.

Developments in the field of IT do not only affect criminal law on cyber crimes, but also lead to new provisions on crimes which are already stipulated in the Penal Code in terms of usage of IT tools. Developments in IT have not only increased the number of crimes committed but also have facilitated the committing of the crimes. For example, obscenity or pornography, defamation, threat, fraud and gambling (providing the location and facilities to play) can be considered in this regard.

There have been studies in this area to define and determine the cyber crimes on account of their international nature. Activities that G-8 countries have organized since 1995 (action plans, reports, recommendations, congresses held by the United Nations (on rehabilitation of criminals and preventing crimes) and studies conducted by Organization of Economic Cooperation and Development (OECD) and the Council of Europe can be stated in this context. In OECD reports, computer crimes have been defined as "any computer abuse, any illegal, unethical or unauthorized behavior relating to the automatic processing and transmission of data [37].

Also, on 13 September 1989 the Council of Europe suggested in the recommendation decision[38], which also included instructions for national legislators, to impose cyber crimes sanctions by dividing them into two lists. The first list contains a minimum of acts that countries should take under sanction. These criminal violations are specified as computer fraud, data fraud, the damaging of computer data and programs, computer sabotage, unauthorized access, unauthorized monitoring and unauthorized duplication of computer programs. The second list contains those acts that countries may voluntarily choose to punish. These violations were listed as unauthorized modification of computer data and programs, computer espionage and the unauthorized use of computers and computer programs that were under protection[39].

The most important work of the Council of Europe is the Cyber Crime Convention which set obligations for the countries signed the contract. In this convention, countries are put under the responsibility to legislate

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[37] See: Dönmezer, Sulhi, Kişilere ve Mala Karşı Cürümler, Fifth Edition Revised and Renovated, Istanbul 1998, p. 521.

[38] The recommendations of the Council of Europe have been guiding the legalization to cyber crimes in many countries (eg. Italy) and it has been adopted by many organizations in the study without amending. For details, see: Möhrenschlager, Manfred, "Computerkriminalität und andere Delikte im Bereich der Informationstechnik", ZStW, 1993, Issue 4, p. 922, 923.

[39] Möhrenschlager, Computerkriminalität, p. 923, 924.

against illegal access, intervention, and interference of data, illegal system interference, computer-related fraud, computer-related forgery and the illegal misuse of devices. The legislators in our country will make some modifications in accordance with the obligations under the convention on forgery and other provisions currently not available in our code.

C. Copyright

In the 1980s, some amendments were made in the laws for the protection of the copyright of goods in the field of computer technology. After the 1970s, due to the fact that patent protection wasn't applied to computer programs worldwide[40], many countries had to make regulations[41] to protect programs within the framework of intellectual law[42]. During this period in which the countries made amendments to extend intellectual law, provisions concerning the criminal aspects of intellectual rights were brought into force in different legal systems: Germany accepted the Code of Amending on Copyrights in 1985; Finland, Code No. 442 in 1984; France , Code No. 85 in 1985; Italy, Code No. 406 in 1981; Sweden, Code No. 284 in 1982; China, Intellectual Property Code in, 1985[43].

Turkey fixed up the regulation on 07.06.1995, which deals with both issues by making changes in the Code on Intellectual and Artistic Works

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40 Because article 52 of the European Patent Convention 1973 had forbidden granting patents for computer programs. However, following the increase in demands made for providing patent protection in the 1980s (because there were some regulations contrary to this article in the codes of many countries), the Convention was amended in 1985 and some new guidelines were adopted concerning patents of inventions linked to software that can be considered as a technical nature. As of 1994, the European Patent Office has given more than 11 thousand patents for inventions of linked software. Hence, the Patent Code is still serving an important function in the protection of programs. For example, the United States of America is protecting many programs by patents. Therefore, it would not be wrong to say that there is uncertainty in the world about the protection of programs. See: Keyder, p.58, 59, 79.

41 Accepted regulations in countries: The Code of Amending on Copyrights, Germany, 1985; The Code No. 7646, Brazil, 1987; The Code No. 153, Denmark, 1988; The Code No. 85, France, 1985; The Code Amending the Code on Copyrights about the Literary and Artistic Works, Finland 1984; The Code No. 406, Italy, 1981; The Code No. 284, Swedish, 1982; The Amendment of 1986 in the Copyright Code for computer programs, Britain; The Code numbered XIX Out going to Amendment in Copyrights, India, 1984; The Copyright Code on Computer Programs, United States of America, 1980; The Intellectual Property Code, China, 1985.For amending countries see: Sieber, Der strafrechtliche Schutz der Information, p.785, 786, footnote 18.

42 The Philippines was the first country to receive computer programs protected under the scope of literary and artistic works in 1972: Dalyan, Şener, Bilgisayar Programlarının Fikri Hukukta Korunması, Ankara 2009, p. 64.

43 Sieber, Der strafrechtliche Schutz der Information, p. 786, footnote 19.

within Code No. 4110[44]. With the change of article 2 of that Code, computer programs were also characterized as scientific and literary works. Concepts of computer program interface and operational search were identified in article 1/B under Code No. 4630, dated 21/2/2001. Crimes were issued in the 71. and 72. articles of the Code. The article 71 is concerned about the actions violating the spiritual, financial or related rights about all intellectual and artistic works including the computer programs protected by the Code. In the article 72, regulations are set out concerning the punishment of people who produce programs or technical equipment to disable programs, put them on the market, sell them or hold them for any purpose excluding the personal use.

International studies have also been done for the protection of computer programs. As examples, the Trade-Related Aspects of Intellectual Property Rights (TRIPs), dated 1994, and WIPO (World Intellectual Property Organization) Copyright Agreement, dated 1996, and Council of Europe's Directive on the Legal Protection of Computer Programs, no. 91/250 can be specified. Also, copyrights and the crimes associated with the violation of the rights related to them have been included in 10. article of the Cyber Crime Agreement.

Since 1984, countries have also begun to make regulations for the protection of topographies[45] of semiconductors. The United States of America enacted a new law named "the Code of Protection of Semi-Conductor Chips" in 1984. This was followed by Japan, who, in 1985, enacted the Code of Semi-conductor Integrated Circuit Design. A number of countries then followed suit, Sweden in 1986, and Denmark, Germany, France, Britain and Italy in 1987[46].

The importance of 'chips', that are used in all areas of production and consumption ranging from the basic household appliances (such as washing machines) to the high-tech products, has led to the realization that their protection should not be neglected. While at first the laws for the protection of these products were at the aim of preventing of the unauthorized copying of the "chips", later on they adopted the aim of prevention of the unauthorized re-marking and packaging of them. Most countries taking the

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44 For these changes see: Kılıçoğlu, Ahmet, "Fikir ve Sanat Eserleri Kanununda Yapılan Değişiklikler", ABD, 1995, Year 52, Issue 4, pp.13. For previous state before 1995 see: Erel, Şafak, "Fikrî Hukukta Bilgisayar Programlarının Korunması", AÜSBFD, 1994, Vol. 49, Issue 1-6, pp.141.

45 Topography of semiconductors is defined as three-dimensional designs embedded in semiconductor material. So what is protected here is the three-dimensional layout formed by circuits in layers: Keyder, p. 54, 55.

46 Sieber, Der strafrechtliche Schutz der Information, p. 786.

"chips" into the scope of arranging the legislation, have chosen to protect them within the context of copyrights and/or within the framework of design law. The United States of America has adopted a relatively new distinctive approach. A sui generis protection of the topography of semiconductors has been a relatively new improvement[47]. Some of the member countries of the European Community have protected semiconductor topographies as sui generis right[48].

As for Turkey, the first special regulation for the protection of topographies of semiconductor was made by the Code on the Protection of Integrated Circuit Topography under the Code No. 5147 on 22.04.2004. Prior to this, topographies of semiconductor were protected, by the implementation of the articles 56 and more of the Turkish Commercial Code relating to unfair competition and (by analogy) article 2 of the Code on Literary and Artistic Works (CLAW)[49]. Integrated circuit topography was defined in article 2 of the Code dated 2004 and penalty provisions to be applied in case of violation of the right were included in article 39.

D. Electronic Commerce and Electronic Signature

Another issue that the developments in IT has affected the criminal law is on the electronic signature. Technological developments have created new opportunities in public, social and economic life, and have resulted in transactions, handwritten signatures replaced by electronic operations previously ratified on paper, being made electronically. The emergence of electronic commerce[50] has improved by the use of electronic signatures. This development has given rise to safety concerns and the need for regulation emerged. However, for the improvement of the electronic commerce and the adoption of electronic signatures by the users, the consumers or the people doing transactions should be provided with security, and the trust in open network systems should be ensured.

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47 Keyder, pp. 54. Also for the protection of semiconductors in some countries and in the international arena see: Koch, Ingwer, der Halbleiterschutz nach nationalem, internationalem und europäischem Recht, in: Lehmann (Hrsg.), Rechtsschutz und Verwertung von Computerprogrammen, Köln 1993, 2nd Edition, pp. 333.

48 Odman Boztosun, Ayşe, "Entegre Devre Topografyası Hakkına Eleştirel Bakış", AÜEHFD, 2004, Vol. VIII, Issue 3-4, p. 309, 311.

49 Yüce, Özden, Özel Bir Düzenleme Olan Entegre Devre Topografyalarının Korunması Hakkında Kanunun Değerlendirmesi, file:///C:/Users/Administrator/Desktop/Evaluation%20of%20a%20Special%20Act%20on%20the%20Protecion%20of%20Topographies%20of%20Microelectronic%20Semiconductor%20Products%20(Semiconductor%20Protection.pdf, p. 49 (A.D.01.12.2015).

50 For electronic commerce see: Taupitz, Jochen – Thomas Kritter, "Electronic Commerce - Probleme bei Rechtgeschäften im Internet", JuS, 1999, Issue 9, pp. 839.

Ensuring this trust in electronic signatures can only be possible when the protection of confidentiality and integrity of information transmitted mutually between the parties with the legal arrangements to guarantee the accuracy of identification of the parties. (General Justification of the Electronic Signature Code). As for electronic commerce, transparency and accessibility are essential in an electronic environment to ensure confidence. For that reason, for the people dealing with electronic commerce with the aim of ensuring trust and transparency, certain obligations must be fulfilled. It is necessary for the electronic service recipient to be able to recognize the goods or services that she/he will purchase, and there must not be any misleading information. Also, making the contract accessible subsequently and giving the opportunity to correct the mistakes are other measures to be taken in this regard. In addition, a solution must be found for spam (General Justification of Code on Regulating Electronic Commerce).

Since the late 1990s and early 2000s, countries have begun to make regulations concerning electronic signatures and electronic commerce. These are the codes one by one that were put into effect in the named countries: United Kingdom, Electronic Commerce Regulations in 2002 and Electronic Commerce Directive in 2013; France, Code No. 2000-230 in 2000 and Code No. 2004-575 in 2004; Romania, Electronic Commerce Act in 2002; Slovenia, Electronic Commerce and Electronic Signature Code in 2002; Philippines, Electronic Commerce Act in 2000; Spain, the Electronic Signature Code in 1999; Portugal, Code No. 290-D / 99 in 1999; USA, the Code of Electronic Signatures in Global and National Commerce and the Code on Electronic Transactions in 2000; Austria, the Electronic Signature Code in 2000; Germany, the Electronic Signature Code in 2001; Sweden, the Qualified Electronic Signature Code in 2001; Luxembourg, the Electronic Commerce Code in 2002; Ireland, the Electronic Commerce Code in 2000; Iceland, the Electronic Signature Code in 2001; Argentina, the Digital Signature Code in 2001; Poland, the Electronic Signature Code in 2002; Lithuania, the Electronic Signature Code in 2000.

In addition, studies have been carried out on this issue internationally and some determinations have been approved. Two model codes have been prepared for countries as a template for legislation by UNCITRAL. One of them is the Model Code on Electronic Commerce dated 1996, and the other one is the Standard Provisions on Electronic Signature dated 2001. Apart from these, there are also EU directives on this issue. The Electronic Signature Directive, No. 1999/93 dated 13 December 1999; EU Electronic Commerce Directive, No. 2000/31 dated 8 June 2000; Distant Sales Directive, No. 1997/7 dated 20 May 1997 and the Directive on the protection of privacy in Electronic

Communication, No. 2002/58 dated 07.12.2002 can be regarded as the illustrations[51].

Turkey adopted the Electronic Signature Code No. 5070 on 15.01.2004 and the Code on the Regulation of Electronic Commerce No.6563 on 23.10.2014. In 3. article of the Electronic Signature Code, electronic signature has been defined, and the principles for the legal and technical aspects concerning their use have been regulated. The crime related with the unauthorized use of the data of the signature formation has been regulated in article 16, and the crime of forgery in electronic certificate has been regulated in article 17. In addition, in article 19, regarding the crimes mentioned, the implementation of security measures are to be provided for the legal entities referred in article 60 of the Penal Code. In article 2 of the Code on the Regulation of Electronic Commerce No.6563 electronic commerce is defined and in article 10, it is regulated that the service provider and intermediary service provider are responsible for the storage and security of personal data obtained and that they are prohibited from transmitting personal data to third persons without the consent of the person concerned and cannot use this information for any other purposes they intended. Therefore, the relevant provisions of the Turkish Penal Code will be valid in the case of violation of the obligations stated. The breach of its obligations apart from that is considered a misdemeanor and administrative fines are envisaged.

E. New Payment Systems

Information technology has also affected our lives in the field of payment services. Thanks to improved technology and a variety of applications, available in the field of payments, non-cash payments, and electronic payments have begun to be used for many commercial and financial transactions performed in daily life. Electronic money[52], electronic checks[53], (EFT) Electronic Funds Transfer, credit cards and debit cards are some of the payment methods. Now, some specifications will be made concerning electronic cash and debit and credit cards that have special regulations in our country.

Since 2000s, countries have begun to make regulations concerning electronic money. There are two directives from the European Union in this regard. The

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51 For developments in the world and in the international arena see: Demirel, İnci, Hukuk Elektronik Yaşam Ve Ticaretin Hizmetinde veya Siber Uzayda Hukukun Yükselişi", DTM, Dış Ticaret Dergisi, 2002, Issue 26, http://home.ku.edu.tr/~daksen/mgis410/materials/SiberUzaydaHukuk.pdf, pp. 6 (A.D.01.12.2015).

52 See: Kümpel, Siegfried, " Elektronisches Geld (cybercoins) als Bankgarantie", NJW, 1999, Year 52, Issue 5, pp. 313.

53 Karabıyık, Ayşegül, "Alternatif Ödeme Aracı Olarak: Elektronik Çek Sistemi (E-Çek)-1", Mufad Journal, Issue 38, April 2008, pp. 81.

first is the Electronic Money Directive No. 2000/46 dated October 18, 2000. Member countries of the European Union have also enacted rules that fulfill the requirements of the union's directive dated 2000. 15 members of the Union put the rules of the Directive into effect by 27 April, 2002 (within the time specified in the Directive). Five member countries enacted the regulations between May 2002 and November 2002. Four member states (Belgium, Finland, France and Greece), which did not enact the Directive within the specified period, accepted provisions concerning the Directive in the first half of 2003[54]. The second directive is No. 2009/110 dated 30.10.2009. Turkey accepted the Code on Payment and Stocks and Shares Conformity Systems, Payment Services and Electronic Money Institutions No.6493 to ensure compliance with the EU directives and filled the legal gap in the field of payment services and electronic money institutions for the healthy development of these areas and to determine the relevant rights and obligations on 06.20.2013[55]. In article 28 of this code, the measure of closing the workplace in the case of unauthorized activity and the realization of this activity within the workplace were regulated, in article 29, blocking control and surveillance activities and not giving the information requested were regulated, in article 30, making untrue statements was regulated, in article 31, storing documents and violating the obligations of the information security were regulated, in article 32, the disclosure of secrets was regulated, in article 33, damage to reputation was regulated, in article 34, the criminal responsibility of people in charge and those concerned in electronic money instutions was regulated, in article 35, unrecorded transactions and false recognition were regulated, in article 36, embezzlement and personal reasons for reducing the penalty were regulated, in article 37, the investigation and prosecution procedures were stated and it was conditioned on application for some crimes in the code. This application is criminal procedure condition.

Credit cards were first used in America (applicable card application everywhere took place in 1950 and later), then spread to Europe in the 1970s, and then became a payment system widely used all over the world. In our country, the first credit card was issued in 1968[56]. The specific regulations

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[54] Yurtçiçek, Mehmet Sıddık, Hukuki Açıdan Elektronik Para, Istanbul 2012,file:///C:/Users/Administrator/Downloads/315760.pdf, p. 173 (A.D.25.11.2015). See also: Yurtçiçek, Mehmet Sıddık, Hukuki Açıdan Elektronik Para, 2nd Edition, Istanbul 2015, pp. 161.

[55] However, the Code ıs not applicable for the Bitcoin system which is the world's first electronic currency that can not be controlled by anyone and there is a legal gap here. See: Şen, Ersan, "Bitcoin: Elektronik Para", http://www.haber7.com/yazarlar/prof-dr-ersan-sen/1120849-bitcoin-elektronik-para (A.D. 01.12.2015).

[56] For historical developments see: Kaya, Ferudun, Türkiye'de Kredi Kartı Uygulaması, Istanbul 2009, http://www.tbb.org.tr/content/upload/dokuman/807/263.pdf, pp. 9 (A.D.29.12.2015).

relating to cards are done in the Code of Bank Cards and Credit Cards No. 5464 dated 23.02.2006. In article 37 of the Code, making untrue statements about bank and credit cards and forgery in a credit card contract and extra card contract were regulated, making unauthorized cards in article 38, the measure of suspension of business activities and advertising due to unauthorized activity were regulated, in article 39, the breach of information security obligations and also the realization of acts in a negligent way were regulated, in article 40, the first paragraph of article 17 and the responsibility to remove the signs indicating that transactions were made by debit card and credit card in article 18, and criminal responsibility for the official and members concerned in actually governing the works of merchants who violate the second paragraph of article 19 were regulated, in article 41, the avoidance of information disclosure and documents requested on inspection were regulated. In article 42, the conduct of the investigation and prosecution relating to crimes referred to in articles 38, 39 and 41 were conditioned on the terms of application. Also, about the banks and the employees dealing with the transactions of credit cards and debit cards the provisions of the Banking Code were applicable. In our Penal Code, the acts of misuse of debit and credit cards are regulated (art.245).

CONCLUSION

Developments in IT have led countries to put provisions in penal codes as well as in special regulations. This has also resulted in the application of changes in regulations over time. The continuity of IT developments has led not to have an end to the regulations made in criminal law, but has resulted in the continuity of new regulations. For example, electronic forms of payment have started to be used in the field of payments with emerging technologies in recent years and these have been regulated legally. As long as technological developments in IT continue, these amendments and new criminal regulations will be inevitable. Just as the developments in IT have affected criminal law in terms of necessitating new regulations , so have facilitated the committing of current actions in both in scope and in number. This has resulted in the specification in the code.

There are some problems in the Turkish legal system concerning the regulation of IT crimes which have emerged due to the developments in IT. All of these problems are not covered here because our topic is not limited to these crimes. However, concerning the study, it must be stated that the current regulations on IT crimes did not meet the requirements of the Convention on Cyber Crime ,to which Turkey was also a party, till the 2016 amendment. For example, there was not a regulation in our legal code about forgery on data,

the illegal intervention and the misuse of devices. Likewise, both entering the system and staying in the system were required for the crime pertaining to entering IT systems. However, entering the system for the occurrence of crime is sufficient under the Convention. With the amendments made in Turkish Penal Code in 2016, this deficiency has been overcome. However, the provision regarding forgery in the data is still not included in our Criminal Code. We hope that this deficiency will be overcome by the legislator.

Due to the nature of violations in the field of information technology and its transboundary quality, work has also been carried out in the international area as it is understood in the Cyber Crime Agreement. Turkey has likewise been trying to fulfill the requirements of the contracts made in this area and making legal arrangements to ensure the compliance with the European Union legal acquis. Although it has been late to react, they have gained a legal basis. Lastly, the Law of Protection of the Personal Data Law has been enacted. The protection of the rights guaranteed by the Constitution has been provided with this arrangement.

It is doctrinally debatable whether technological developments have revealed criminal information law as a sub-discipline of criminal law or whether there is a separate discipline under the name of information law. We point out that it is not possible to say that there occurs a separate branch of criminal law based on the developments in IT and the laws discipline with which each code is related. Because of the technical side of the issue, it is not right to accept the existence of a different branch of law. OIn addition to that, information technology has not been a sub-discipline by itself today where we stand now and it has to be stated that it doesn't seem possible to make it happen due to many disciplines inside. Rather than expressing the effects of developments in IT on law as a separate branch of law, I believe that the so-called regulations should be examined in each branch of law.

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THE PREVENTIVE RECORDING OF COMMUNICATIONS DATA

İletişim Verilerinin Önleme Amaçlı Denetimi

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ABSTRACT

The concept of "Big Data" is used in order to designate the application of statistical tools to the production at a large scale, the recording and the analysis of data directly correlated to the dissemination of digital technologies in the field of science and media. The collection of communication data at a preventive stage is an aspect of the concept of "Big data". The purpose of this study is to reveal the legal framework of preventive monitoring, its implementation and the destiny of information obtained through monitoring under Turkish law.

Keywords: Big Data, Communication, Preventive Recording, Right to Communication.

ÖZET

Big Data "Büyük Veri" kavramı bilim ve medya alanında dijital teknolojilerin yaygınlaşmasıyla birlikte ortaya çıkan büyük ölçekli verilerin üretimi, kaydedilmesi istatistiksel araçlar uygulanmak suretiyle verilerin analizini tanımlamak üzere kullanılan bir kavramdır. Önleme amaçlı iletişim verilerinin toplanması "Büyük veri" kavramının bir boyutudur. Bu çalışmanın amacı Türk hukukunda önleme amaçlı iletişimin denetlenmesi, önleyici amaçlı denetimin uygulanması ve denetim yoluyla elde edilen bilgilerin durumunun yasal çerçevesini ortaya koymaktır.

Anahtar Kelimeler: Big Data, İletişim, Önleme Amaçlı Denetim, Haberleşme Hürriyeti.

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Introduction

The concept of "Big Data" is used in order to designate the application of statistical tools to the production at a large scale, the recording and the analysis of data directly correlated to the dissemination of digital technologies in the field of science and media.[1] The production and analysis of data at large scale

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1 OUELLET *et al*. "Big Data", Gouvernance et Surveillance, p. 3.

and their conservation has proved to be a mean of control and monitoring.[2] These new mechanisms of control and monitoring offer new opportunities and challenges for police and security agencies. The development of electronic communications has led to a large increase in the amount and type of data available about people and their activities that can be used by these agencies.[3]

Police and security agencies routinely collect large amounts of data in the course of their work preventing and detecting crime and gathering intelligence. The assessment of present or future threats to the democratic legal order and the warning of security forces is the duty of police forces.[4] At the same time, the collection of data and their elaboration in order to make them exploitable (valorisation process) is closely related to intelligence tasks. It should not be forgotten that data are firstly collected as raw material (unprocessed data). It is necessary to perform some analysis work in order to assess in a subsequent stage if they can be useful.

The collection of communication data at a preventive stage is a second aspect of the concept of "Big data". The data collection and analyse follow a set format, such as the location and type of crime reported, DNA profiles, or personal details of an individual who has been arrested or charged, called as structure data. Unstructured data is a text that does not follow a set format, including police and witness statements. Analysing big data could provide with additional tools to predict and detect crime.

Under Turkish law, there is no special legal provision dealing with the data collection by police forces. Article 5 of the Law n° 2559 on Duties and Powers of Police[5] allows the recording of finger prints, photographs and personal data in an electronic database for preventive purposes. The same provision provides that the recorded data should be used by a competent person and in conformity with the aims contemplated by the law.[6]

The other legal provisions enabling the police forces to preventively record data are those related to the preventive monitoring of telecommunication. In the present article, we will deal with the issue of collection and recording of communication data under Turkish law.

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2 In his book "Too Big to Know", David Weinberger describes this "new knowledge" as requiring "*not just giant computers but a network to connect them, to feed them, and to make their work accessible. It exists at the network level, not in the heads of individual human beings*". WEINBERGER, Too Big to Know, p. 130.

3 Big Data, Crime and Security, p. 4.

4 VERVAELE, Terrorism And Information Sharing Between The Intelligence And Law Enforcement Communities, p. 3.

5 As amended on 27.03.2015, published at the Official Gazette n° 2751, 04.07.1934.

6 YENISEY, Kolluk Hukuku, p. 331.

1. The Legal Framework of Monitoring the Communication Process

Aside from investigation on a crime, the recording of communication data may be required in order to prevent a crime or for intelligence purposes.

The admissible restrictions to the right to the freedom of communication enshrined at article 22 of the Constitution of 1982 are enumerated exhaustively by the said article. Those possible restrictions are the following: the protection of national security; public order; prevention of crime; protection of public health and public morals and protection of the rights and freedoms of others. The Constitution imposes also that any decision should be taken by a judge; a decision by an authorized agency being possible in case of peril in delay with subsequent approval by a judge.[7]

The provisions on the preventive monitoring of communication are enshrined in additional article 7 of the Law n° 2559 on Duties and Powers of Police, in additional article 5 of the he Law n° 2803 on Gendarmerie[8] and, finally, in article 6 of the Law n° 2937 on the State Intelligence Services and the Establishment of the National Intelligence Agency. The modalities of the monitoring of telecommunication are subject to the Regulation on the Principles and Procedure of the Intercepting, Monitoring and Recording Correspondence through Telecommunication, (referred to as "Regulation").[9]

1.1. The Concept Of Telecommunication And The Modalities Of Interception

At the subparagraph (r) clause of article 3 of the Regulation,"*all kinds of sign, symbol, sound and image and data that can be transformed into electric signals, transceivers, optic, electronic, magnetic, electromagnetic, electrochemical, electro mechanic and other transmission systems*" are defined as telecommunication tools. This definition is applicable to the interception of such communications. Based on it, e-mail, voice mail and chat, as well as communication through mobile and fix phone lines are deemed to be telecommunication.

There are four types of communication interception regulated by the above mentioned laws on preventive recording. There are the following ones: i) metering of correspondence through telecommunication; ii) phone tapping; iii) recording of communication and iv) evaluation of data related to transmitting signals. Unlike the recording of communication for law enforcement purposes, in accordance with article 135 of the Code of Criminal

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7 şen, Türk Hukuku'nda Telefon Dinleme, p. 39-40.

8 As amended on 27.03.2015, published at the Official Gazette n° 17985, 12.03 1983.

9 Published at the Official Gazette n° 25989, 10.11.2005.

Procedure[10], preventive recording does not allow the localisation of a mobile phone as a measure of communication interception.

The listening and recording of telecommunication encompasses all the conversations which are taking place through all technical means of telecommunication.[11] The ability to control telecommunication does not cover the surveillance by technical means including voice and image recording[12].

Article 3 (i) of the Regulation indicates in a more precise way that the metering of telecommunication should take place without impacting the content of the communication.

The telecommunication signal is defined as all the data used for communication within a network or for billing purpose.[13]

1.2. The Aim Of The Monitoring

The first paragraph of additional article 7(1) of the Law on Duties and Powers of Police admits the interception of telecommunication as a part of intelligence activities[14] aiming at the prevention of crime.

The usage of the term "prevention" in these statements allows the monitoring of telecommunications even in the absence of committed crime. Since the concern is not the detection of a committed crime, the logical conclusion of this article is the fact that the whole Turkey can be tapped, which has in fact happened.[15] Before the amendment enacted in 2015,

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10 For the surveillance of communications for the purpose of law enforcement investigation under article 135 of the Turkish Criminal Procedure Code, please see YENISEY, Criminal Procedure Law in Turkey, p. 22 *seq.*

11 Article 3 (h) of the Regulation.

12 İlhan, Türkiye'de Telekomünikasyon Yoluyla Yapılan İletişimin Önleme Amaçlı Denetlenmesi, p. 789.

13 Article 3 (p) of the Regulation.

14 These purposes are listed as "*taking protective and preventive measurements on national and territorial integrity of the state, its constitutional order and public security and maintaining safety and public orde*r" under the additional article 7 of the Law on Duties and Powers of the Police.

15 AKSOY, illustrates this scandal: "*In June 2008 a development that could come to be described as a scandal took place. It was revealed that the 11th High Criminal Court of Ankara had ruled that all details of communication made by means of telecommunications throughout Turkey from the Telecommunications Directorate (Telekomünikasyon İletişim Başkanlığı, TIB) were to be obtained and delivered to the Intelligence Department of the General Directorate of Security. It became clear that the decision made by the Court for the period April 25 – July 25, 2007, had previously been made for the period January 26 – April 25, 2007, that a similar decision had also been made in November 2007, and that this practice had become routine, fully and permanently violating the right to privacy*." See AKSOY, The Gendarmerie, p. 180.

the Court of Cassation had decided that court is not allowed to order a nationwide interception of telecommunication or an interception concerning telecommunication data outside of its own jurisdiction.[16] Now the legal provisions explicitly state that the identity of the monitored person should be mentioned.

The Gendarmerie has also a competence to intercept telecommunication in order to prevent crimes outside of the municipalities or when there is no competent police organisation.

The Turkish National Intelligence Organisation can use the preventive monitoring of communication in order to fulfil its duties, under article 6 (2) of the Law on the State Intelligence Services. The Turkish National Intelligence Organisation operates in an extremely wide arena and exercises an extensive authority in accordance with Law on the State Intelligence Services.[17]

While performing duties mentioned in the law with the aim of ensuring the security of State, revealing the spying activities, detecting the disclosure of the State Secrets and preventing the terrorist activities the communication

16 Turkish Court of cassation ("Yargıtay"), 9th Criminal Chamber, 4.6.2008, 8074/7160.

17 The Duties of the National Intelligence Organization are defined in an extremely vague way at Article 4 of the said law.
Article 4 - The duties of the Turkish National Intelligence Organization are as follows:
a) to procure national security intelligence on immediate and potential activities carried out in or outside the country targeting the territorial and national integrity, existence, independence, security, Constitutional order and all elements that constitute the national strength of the Republic of Turkey, and to deliver this intelligence to the President, the Prime Minister, the Secretary General of the National Security Council and to the relevant institutions;
b) to meet the intelligence needs and requirements of the President, the Prime Minister, the Secretary General of the National Security Council and of the relevant Ministries in formulation and implementation of the plans regarding the national security policy of the State;
c) to make proposals to the National Security Council and the Prime Minister on directing the intelligence activities of public institutions;
d) to provide consultancy in technical issues regarding the intelligence and counter intelligence activities of public institutions and to provide assistance in the establishment of coordination between them.
e) to deliver the information and intelligence, the General Staff deems necessary for the Armed Forces, to the Headquarters of the General Staff;
f) to carry out other duties determined by the National Security Council;
g) to carry out counter-intelligence activities.
The Turkish National Intelligence Organization cannot be assigned with duties other than those listed above and cannot be led to carry out activities other than intelligence regarding the national security of the State.
The duties, powers and responsibilities of the Turkish National Intelligence Organization are determined by a regulation approved by the Prime Minister.

means can be detected, intercepted, recorded and its signal information can be evaluated.

It is not clear what constitutes activities carried out to target the existence, independence, security, and all elements that constitute the national strength of the Republic of Turkey. Nonetheless, bearing in mind the difficulty and risks of imprecision inherent in such an approach, it is important to allow concerned persons to seek legal remedies. [18]

2. The Authorisation Of Monitoring

2.1 Criminal Charges Making Possible The Monitoring Of Communication

The second paragraph of additional article 7 of the Law on Duties and Powers of Police and additional article 5(1) of the Law and Gendarmerie limits the use of monitoring to the prevention of those crimes mentioned at article 250 of the Code of Criminal Procedure. The said legal provision has been removed and then it was decided that all other provision making reference to it should be construed as a reference to article 10 of the Law on the Fight Against Terrorism. Again, in 2014, article 10 of the Law on the Fight Against Terrorism was removed by the Law n° 6526. According to article 14 of the transitional provision of the Law on the Fight Against Terrorism, reference to the former article 250 of the Code of Criminal procedure should be construed as a direct reference to the provision of the Criminal Code that where listed there. Those crimes are producing and trading with narcotic or stimulating substances committed within the activities of a criminal organization, crimes committed by using coercion and threat within an organization formed in order to obtain unjust economic gain, and crimes against national security, against constitutional order and operation of constitutional rules crimes against national defence and the crime against state secrets and espionage.[19]

The fact that there is no clear and defined list of the crimes for which the Polices forces, the Gendarmerie and the National Intelligence Organisation can resort to the monitoring gives rise to serious concerns since the case law of European Court of Human Rights requires that legal provisions in this respect should be clear and foreseeable[20].

Under paragraph 3 of Article 6 of the Law on the State Intelligence Services,

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[18] BERKSOY, Military, Police and Intelligence in Turkey, p. 47.

[19] Except articles 305, 318, 319, 323, 324, 325 and 332. For a translation of the Turkish Criminal Code please see BIÇAK&GRIEVES.

[20] For a recent summary of the general principles deriving from the European Cour of Human Rights' case law, see, ECHR, *Roman Zakharov v. Russia* [GC], n 47143/06, para. 227-231, 04.12.2015.

Turkish Intelligence Organisation can detect the communication in case of a serious threat against the fundamental features of the state referred to in Article 2 of the Constitution and the democratic rule of law with the aim of ensuring the security of the State, revealing spying activities, detecting the disclosure of State secrets and preventing terrorist activities. The statement "in case of a serious threat against the fundamental features of the State referred to in Article 2 of the Constitution and the democratic rule of law" likewise carries no clarity and extends the discretionary power of the organization. "*This broad mandate requires democratic oversight of the organization to ensure the prevention of human rights violations*".[21]

Under paragraph 11 of Article 6 of the Law on the State Intelligence Services it is accepted to monitor, by a simple decision of the administrator of the State Intelligence Services, or by its substitutes, and without having to fulfil the other legal requirements, communications that are taking place in foreign countries, or among foreigners, communications through public phones, as well as communications of members of State Intelligence Services, of people working with the States Intelligence Service or who have applied for such a job.

2.2. The Authority Responsible For Taking the Decision

The decision to monitor telecommunication for preventive purposes is taken by the police forces, the gendarmerie or the intelligence services in accordance with the legal provision regarding their organisation and for the fulfilment of their duties[22]. The competence to order the monitoring for preventive purposes is regulated in the three laws in a similar way.

Additional article 7(1) of the Law on Duties and Powers of Police, additional article 5 of the Law on Gendarmerie and article 6 of the Law on Intelligence Services provides that the recording and evaluation of electronic signals of correspondence through telecommunication decision can be delivered by one of the judge of the Ankara Higher Criminal Court. However those legal provisions do not indicate which one of the eleven different Higher Criminal Courts seating in Ankara is competent. Besides, they have also been criticized for putting on the shoulders of one single judge the overwhelming task to decide on applications dealing with nationwide operational intelligence operations of the police forces, the gendarmerie and the intelligence forces.[23]

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21 BERKSOY, Military, Police and Intelligence in Turkey, p. 47.

22 BULDUK, Ceza Muhakemesinde Telekomünikasyon Yoluyla Yapılan İletişimin Adli ve Önleme Amaçlı Denetlenmesi, p.195.

23 YENISEY, Kolluk Hukuku, p .332.

In cases of peril in delay[24], other authorized enforcement agencies' officers may issue an interception order: The general director of Turkish National Police or the chief of intelligence office of police[25], the chief of General Command of Gendarmerie or the chief of Intelligence Office of Gendarmerie[26] and Undersecretary or Deputy Undersecretary of The Turkish Intelligence Organization[27].

The decision of the authority above mentioned shall be submitted for the approval of the judge having jurisdiction within twenty-four hours. The judge shall announce his decision within forty-eight hours from the time of the written order; when the times expires or the judge decides otherwise, the measure shall be automatically lifted. In such a case the records of the content of interception shall be deleted not later than ten days, the situation shall be explained in a written report, which shall be kept to be kept for inspection.

2.3 The Monitoring Decision and Its Duration

The decision of monitoring rendered by the judge or the competent authority shall include two groups of information.[28] The first group of information contains the identity of the individual, upon whom the measure is going to be applied, the nature of the tool of communication, the number of the telephone, or the code that makes it possible to identify the connection of the communication.

The second group of information includes the nature of the measure, the reasons for such interception, its extent and its duration.

The decision on the measure may be given only for a maximum duration of three months; this period may be extended for three months but no more than three times. In cases of struggling against continuing threats caused by the activities of the terrorist organization extensions can be decided by judge for several times, not more than three month for each time. With other words, the monitoring of communication can be implemented without a limitation in time, provided that a judge is ordering its renewal at least every three months. Since the procedure to follow in order to continue the monitoring is same as for the first decision ordering it, the judge shall assess every time it orders the

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[24] Regarding Article3 (f) of the Regulation the delay in peril is given when there is a risk that evidence could be lost if the competent authorities does not intervene immediately; or if there is a risk that without intervention the suspect person could not be identified or may escape.

[25] Additionnal article 7, Law no. 2559 on Duties and Powers of Police.

[26] Additionnal article 5, Law no. 2803 on Gendarmerie.

[27] Article 6, Law no. 2937 on the State Intelligence Services on Gendarmerie.

[28] YÜKSEL, Intelligence Surveillance Of Wire Communications, p. 1313-1326.

renewal whether the condition to order it are still met.[29]

There are no limits as to the individual whose communication may be monitored for preventing purpose. This is clearly contrary to the principle enshrined in the case law of the European Court of Human Rights according to which the law should describe in a clear way the category of persons whose communication may be monitored.[30]

Under Turkish law, it is now uncontested that the communication of the suspect or the accused with individuals enjoying the privilege of refraining from testimony, such as a witness, shall not be recorded. But such a limitation is not valid for the monitoring with intelligence purpose. With other words, it is easy to monitor communications of a person with his wife/husband or lawyer.[31]

For the monitoring of communication with judicial purposes, the condition is the existence strong grounds of suspicion *based on concrete evidence* indicating that the crime has been committed and there is no other possibility to obtain evidence. Such a suspicion threshold is not required for the monitoring of communication for intelligence purposes. When entertaining an application for monitoring, the judge cannot do any reference to these criteria. However, it is suggested that the applying authority should mention some reasonable reasons why the application could be granted.[32] Otherwise, this could be considered as an infringement of the core aspects of fundamental rights and freedoms.

The monitoring of communication without any ground of suspicion constitutes a crime as defined by article 132 and 137 of the Criminal Code. For this reasons, when applying it is necessary to demonstrate the existence of clues allowing to suspect that a crime will be committed.[33] Since the law itself does not give any indication as to the level of suspicion required in order to grant such an application, the monitoring of communication is not subjected to a sufficient control by a judicial authority.

3. The Implementation Of The Monitoring Decision And Its Lifting

The decision rendered in accordance with additional article 7 of the Law

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29 YOKUŞ SEVÜK, Kolluk Tarafından Suçun Önlenmesine, p. 48.

30 See ECHR, *Association For European Integration And Human Rights and Ekimdzhiev v. Bulgaria*, n° 62540/00, 30.01.2008, para.75.

31 TAŞKIN, s. 197-198;

32 YENISEY, Kolluk Hukuku, p. 333.; ŞEN, Türk Hukuku'nda Telefon Dinleme, s. 49.

33 AKSU, Özgürlük ve Güvenlik Dengesinde Önleyici Amaçlı İletişimin Denetlenmesinin Temel Hak Ve Özgürlükler Açısından Değerlendirilmesi, p. 254.

on Duties and Powers of Police, additional article 5 of the Law on Gerdarmerie and article 6 of the Law on intelligence services shall be enforced immediately by the officials of the institutions providing the telecommunications service. The beginning and end, the date and time of the interaction as well as the identity of the individual who is enforcing the decision shall be put into the records.

The judicial decisions and the written orders are not directly sent to the operators. They are sent by electronic means to the Telecommunication Presidency through a special communication channel decided by the Presidency. After an investigation by the Presidency concerning the conformity of the decision to the Regulation[34], they are directly implemented by sending authority under the supervision of the Presidency. A record of the whole operation is drawn with mention of the identity of person implementing the monitoring as well as the day and hour of the beginning and the end of the monitoring. Decision not being in accordance with the Regulation should not be implemented.

Unlike the decision authorizing the interception, the decision to putting end the monitoring does not need to be given by a judge. As mentioned above, in cases where there is a peril in delay, unapproved decisions shall be invalid. Moreover, if there are no grounds for the interception anymore, the decision shall not be applied.

3.1 The Information Obtained Through Monitoring

Even if the preventive monitoring of telecommunication is subject to different conditions and procedural rules than the judicial monitoring, the two types of monitoring cannot always be clearly separated. Through preventive monitoring, it is possible to collect evidence that a crime is being commited. It is difficult to assert where the task of the preventive police forces ends. Besides, the legislation makes possible to order both the preventive and the judicial monitoring of the same communication.Article 21/A subparagraph (c) of the Regulation states that “when the same communication is subject to different written orders by the competent authority, or decisions by a prosecutor or a judge” the Presidency of the Telecommunication “is entrusted with the duty to make the data available in real time to all the authorities by executing the orders simultaneously”.

An other issue in this respect, it the question whether evidence of a crime that is being commited or has been stopped at the stage of attempt collected through preventive monitoring can be used, or not, in the subsequent criminal

[34] See art. 17/c of the Regulation.

trial[35]. In accordance with the three law, the result of preventive monitoring of communication can only be used in order to fulfil the duties under the laws authorizing it and for taking preventive measure against the commission of crimes.

They can also be used within the framework of criminal investigation in order to substantiate a sufficient suspicion that a crime has been committed. However, the result of preventive recording cannot be used as direct evidence within the course of criminal proceeding.[36]

3.2 The Supervision Of The Monitoring Of Communication

At the end of the monitoring, any recording of communication should be destroyed within ten days. In case of failure to destroy the data through a definite procedure despite the expiry of legally prescribed period, the persons responsible from this failure may be prosecuted under article 138 of the Turkish Criminal Code and sentenced to imprisonment from six months to one year.

Since it is not necessary to inform the person whose communication has been monitored at the end of the monitoring, individual are not aware of monitoring and are not in position to challenge them before the courts.

The monitoring of communication in breach of the relevant legal provision is punished as illegal monitoring, a crime under the Turkish Criminal Code. The preventive monitoring of communication cannot be considered as a judicial measure in order to investigate crimes, but rather as a pure administrative act[37]. Accordingly, the State may be held liable for any breach of the relevant legislation, as it is the case for every administrative action. In a case decided in 2000, the Turkish Council of State, that is the Supreme Administrative Court, approved a judgment of the 10th Administrative Court of Ankara declaring the State liable for "gross negligence" since some police officers had wiretapped the President of the 8th Criminal Chamber of the Court of Cassation without any authorization[38].

Conclusion

The preventive monitoring of communication when a crime as not yet

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35 KAYMAZ, İletişimin Denetlenmesi, p. 531.

36 Turkish Court of cassation, Plenary Assembly of the Court of Cassation (penal), 9-93/95, 17.05.2011.

37 KAYMAZ, İletişimin Denetlenmesi, p. 441.

38 Council of State, 10th Chamber, E. 2000/2926, K. 2000/6227, 06.12.2000 (cited by KAYMAZ, İletişimin Denetlenmesi, p. 444).

been committed should be subjected to strict conditions as it is the case with the monitoring within the course of criminal investigations[39]. The preventive monitoring of communication, that is before a crime has been committed, is easier and simpler than the judicial monitoring[40].

Being an important interference with the right to communication, the preventive monitoring of communication is subjected to the prior approval of a judge, except when there is peril in delay, but the scope of the judicial control is not clearly mentioned in the relevant legal provisions.

In accordance with article 8 of the European Convention on Human Rights and article 13 of the Turkish Constitution, when the judge is ordering the preventive monitoring, or approving a written order in this respect, he should strike a fair balance between the necessity to preserve the public order and the right of individual to effectively avail himself of the freedom of communication.

Since a clear line should be drawn between crime prevention and criminal investigation, the legal provisions have been criticized for not explaining clearly when the preventive monitoring is finishing and, correspondingly, when the judicial monitoring is beginning as well as for not having indicated the competent authority in charge with the decision on the necessity to involve the criminal prosecutors.[41]

The information to give to the individual subjected to preventive monitoring after it has been lifted should be dealt by a legal provision. The lack of it has for consequence that individuals cannot avail themselves effectively of the right and freedom enshrined in article 40 of the Turkish Constitution.

Beside it can be also mentionned the existence of the Law on the Regulation of Internet Publications and the Fight Against Crimes Committed by Publication on Internet n°5651 which was put into effect in 2007.[42] Its articles 5(2) and 6(2) oblige, hosting and internet services providers to store all data related to their hosting activities for up to two years and to make them available to the Presidency upon request. This regulation is in absolute contradiction with the case law of the Court of Justice of the European Union. Namely, the Court, on 8 April 2014, in the joint cases of *Digital Rights Ireland* and *Seitinger and Others*[43] declared invalid the Data Retention Directive 2006/24/EC laying down the obligation on the providers of publicly available electronic communication services or of public communications networks to retain all traffic and location

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39 YOKUŞ SEVÜK, Kolluk Tarafından Suçun Önlenmesine, p. 55.

40 ünver, y.,& HAKERI, H.,. Ceza Muhakemesi Hukuku, p. 743 *seq*

41 CENTEL &, ZAFER, Ceza Muhakemesi Hukuku, p. 446.

42 As amended on 06.02.2014, published in Official Gazette, Date: n°26530, .23.05. 2007.

43 Joined Cases C-293/12 and C-594/12, ECLI:EU:C:2014:238.

data for periods from six months to two years, in order to ensure that the data were available for the purpose of the investigation, detection and prosecution of serious crime, as defined by each Member State in its national law. The Court stressed that even though the directive did not permit the retention of the content of the communication, the traffic and location data covered by it might allow very precise conclusions to be drawn concerning the private lives of the persons whose data had been retained.

The monitoring and recording of phone calls made by inmates within the framework of article 66 of the Law n° 5275 on the Enforcement of Prison sentences and security measures are considered also as preventive recording of communication data[44]

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[44] KUNTER&YENISEY&NUHOĞLU, Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku, p. 791.

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AN ANALYSIS ON THE AMENDMENTS ON ADMINISTRATIVE JURISDICTION THROUGH LAWS NO.6545 AND NO.6552

6545 ve 6552 Sayılı Kanunlar İle İdari Yargıya İlişkin Kanunlarda Yapılan Değişiklikler Üzerine Bir İnceleme

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ABSTRACT

This study examines the amendments to Laws publicly known as the 5th judicial package (Law no. 6545) and 6th judicial package (Law no. 6552) and the amendments in the field of administrative justice, and explicates the amendments that are considered unconstitutional. The study further focuses on the regulations that are amended or revised by these Laws, but are considered unnecessary from our perspective. The study also includes some procedural amendments that are more urgent and essential than the amendments to the Administrative Procedure Law, which constitute the main focus of this study. First, the amendments regarding administrative justice brought by Law no. 6545 may be outlined as follows: The structure and duties of Regional Administrative Courts, related to an appeal system which has been (partially) lacking in the administrative justice, are defined. Furthermore, the appeal is integrated into the system as a legal remedy. With this, the law defines the Regional Administrative Court decisions that can be appealed to the Council of State and modifies other Administrative Procedure Law provisions in consideration of the new system. Correction of a decision is no longer a legal remedy in the system. An immediate judicial procedure, which already exists in the French system, is introduced; however, the procedure is different than the practice in France. Second, Law no. 6552 adds to the Administrative Procedure Law a specific judicial procedure related to central and common exams. Article 28 of the Administrative Procedure Law, regarding the results of administrative justice decisions, was also amended by this Law. Nevertheless, this amendment was cancelled by the Constitutional Court for being unconstitutional. This study provides detailed explanations about each amendment mentioned above and offers solutions to the amendments that are considered problematic.

Keywords: Administrative Law, Administrative Justice, Administrative Procedure Law, Appeal System, Regional Administrative Court.

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ÖZET

Çalışmada, kamuoyunda 5. yargı paketi (6545 sayılı Kanun) ve 6. yargı paketi (6552 sayılı Kanun) olarak adlandırılan Kanunlar ile idarî yargı alanında yapılan değişiklikler incelenmekte ve Anayasa'ya aykırı olduğu düşünülen düzenlemeler açıklanmaktadır. Ayrıca bu Kanunlarla değiştirilen veya yeni düzenlenen ancak kanımızca yapılmasına gerek bulunmayan düzenlemelerin neler olduğu ve gerekçeleri üzerinde durulmaktadır. Aslında bu çalışmanın konusunu oluşturan ve İdarî Yargılama Usûlü Kanunu'nda yapılan değişikliklere nazaran çok daha acil ve ihtiyaç duyulan usûl düzenlemelerinin neler olduğu belirtilmektedir. Öncelikle 6545 sayılı Kanun incelendiğinde, bu Kanun ile idarî yargıya ilişkin olarak getirilen düzenlemelerin genel hatlarıyla şu şekilde olduğu görülmektedir: Yürürlük tarihi daha sonraki bir tarihe bırakılan ve idarî yargıda eksik ya da kısmî olarak nitelendirebileceğimiz istinaf sistemiyle ilişkili olarak bölge idare mahkemelerin yapısı ve görevleri düzenlenmektedir. İstinaf ayrıca kanun yolu olarak yerini almaktadır. İstinaf sisteminin kanun yolu olarak idarî yargıya girmesiyle, Danıştay'da temyiz edilebilecek olan bölge idare mahkemesi kararlarının neler olduğu hüküm altına alınmakta ve ilgili diğer İYUK maddeleri yeni sisteme uygun olarak değiştirilmektedir. Ayrıca kararın düzeltilmesi kanun yolu kaldırılmaktadır. Fransa'da mevcut olan ancak Fransız uygulanmasından farklı şekilde bir ivedi yargılama usûlü getirilmektedir. 6552 sayılı Kanun incelendiğinde ise, bu Kanun ile merkezî ve ortak sınavlara ilişkin ayrı bir yargılama usûlünün İdarî Yargılama Usûlü Kanunu'na getirildiği görülmektedir. İdarî yargı kararlarının sonuçlarını düzenleyen İYUK'nun 28.maddesi de bu Kanun ile değiştirilmiş ancak bu değişiklikler Anayasa Mahkemesi tarafından Anayasa'ya aykırı bulunarak iptal edilmiştir. Çalışmada yukarıda belirtilen Kanunlar ile getirilen yeni düzenlemelerin her biri hakkında açıklamalar yapılmakta ve sorun oluşturduğu düşünülen düzenlemelere çözüm önerileri getirilmektedir.

Anahtar Kelimeler: İdare Hukuku, İdarî Yargı, İdarî Yargılama Usûlü Kanunu, İstinaf, Bölge İdare Mahkemesi.

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Introduction

Substantial amendments have been made, primarily in legal remedies, in administrative jurisdiction especially through Law No.6545 and partially through Law No.6552. An intermediate appellate system was created and regulations were introduced to regulate regional administrative courts in the form of intermediate appellate courts according to this system. With the intermediate appellate system introduced in administrative jurisdiction, the legal remedy of appeal was regulated again, the legal remedy of revision of a decision was annulled and reversal for the sake of law was redrafted into an "appeal for the sake of law". In addition, two new jurisdiction procedures,

urgent trial proceedings and jurisdiction procedures for central examinations were regulated under the Administrative Jurisdiction Procedures Law (AJPL), which is the basic law of the administrative jurisdiction. Amendments were made in Article 28 of AJPL that regulated the administrative jurisdiction results in accordance with the Law No.6552; however, these amendments were abolished claiming that they were deemed unconstitutional by the Supreme Court. The amendments and regulations made in the administrative jurisdiction through Laws No.6545 and 6552 are not limited to those given above and these amendments and regulations are analyzed and the necessary explanations are made in the present study when appropriate. The amendments that are made through first the Law No.6545 and then the Law No.6552, respectively, are tried to be described in the study based on the dates of acceptance by the law maker.

1. Amendments in the Administrative Jurisdiction through Law No.6545

It is no doubt that the most important amendment made in the administrative jurisdiction through the Law No.6545 is the intermediate appellate system. With the introduction of the intermediate appellate system in administrative jurisdiction, regulations were made to allow for the functioning of regional administrative courts as courts of appeal. Therefore, the changes made for the regional administrative courts, which were made in the Law No. 2576, must be analyzed before the appeals system regulated by Law No. 6545.

1.1. Restructuring of Regional Administrative Courts

Article 3 of Law No. 2576 and Article 3 of Law No. 6545 were amended and it was decided that regional administrative courts would be consisted of a presidency, a council of chairmen, chambers, a justice commission and departments[1]. It was foreseen in this regulation that administrative courts

[1] **Law No. 6545, Article 3:** Article 3 of the Law No.2567 and dated 06.01.1982 on the Establishment and Duties of Regional Administrative Courts and Administrative Courts and Tax Courts was amended as follows.
"Article 3: 1.Regional administrative courts consist of a presidency, a council of chairmen, chambers, a regional administrative court justice committee and departments.
2. Regional administrative courts have at least two chambers, including administration and tax. The number of chambers could be increased or decreased by the Supreme Board of Judges and Prosecutors on the proposal of the Ministry of Justice where necessary.
3. The chambers have a president and sufficient amount of members.
4. The Supreme Board of Judges and Prosecutors appoint chairmen and members to regional administrative courts."

would have at least two chambers, administration and tax chambers, so that they could function as courts of intermediate appellate.

Another provision set by the Law No.6545 on the implementation of the intermediate appellate system in administrative jurisdiction is related to the duties of regional administrative court[2]. With this provision, the main task of the regional administrative courts was designed as examining and concluding the appeal applications[3]. In parallel to the restructuring of regional administrative courts, the duties of the chairman of the regional administrative court have also been regulated again[4]. In addition, as administrative courts are comprised of chambers, administrative courts committee of chairmen has been formed. It has been stipulated that the committee of chairmen of the regional administrative court would consists of the chairman of the regional administrative court and the chairmen of chambers[5].

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2 **Law No. 6545, Article 103:** The following provisions were annulled.
a) Articles 8 and 9 of the Law No.2567 and dated 06.01.1982 on the Establishment and Duties of Regional Administrative Courts and Administrative Courts and Tax Courts. (Since the duties of the Regional Administrative Courts and the Chairman of the Regional Administrative Courts were reorganized, these provisions were annulled.)

3 **Law No. 6545, Article 4:** The following Article 3/A was added into the Law No.2576 after Article 3.
"Duties of the regional administrative courts:
"Article 3/A: Duties of the regional administrative courts are as follows:
a) Examine and conclude applications of intermediate appellate.
b) Resolve the disputes on the duties and powers of the administrative and tax courts in the jurisdiction.
c) Carry out duties assigned with other laws."

4 **Law No. 6545, Article 5:** The following Article 3/B was added into the Law No.2576 after Article 3.
"Duties of a chairman of a regional administrative court:
"Article 3/B: Duties of a chairman of a regional administrative court are as follows:
a) Represent the court.
b) Preside over the committee of chairmen of the regional administrative court and the justice committee, carry out the decisions taken.
c) Preside over one of the chambers of the regional administrative court.
d) Ensure that the court works in a consistent, efficient and regular way and take the measures he/she deems appropriate in this regard.
e)Carry out general administrative work of the administrative court.
f)Control the officers of the regional administrative courts.
g) Apply to the committee of chairmen to eliminate the discrepancy between the final decisions taken by the chambers in similar cases.
h) Carry out duties assigned by laws."

5 **Law No. 6545, Article 6:** The following Article 3/C was added into the Law No.2576 after Article 3.
"Duties of the committee of chairmen of the regional administrative court:

According to the new regulation, the most important duty of the chairman of the regional administrative court is possibly to apply to the committee of chairmen to request the elimination of the final decisions taken by the chambers in similar cases rather than only presiding over the committee of chairmen of regional administrative court. Indeed, in similar cases, in case of a discrepancy and inconsistency between the final decisions taken by the regional administrative chambers or between the final decisions taken by the chambers of different regional administrative courts; if the related regional administrative court chambers or those who are entitled to apply to the remedy of intermediate appellate request the elimination of this discrepancy or inconsistency ex officio or based on a justification, submitting it to the Council of State along with its own opinion if the claim is deemed appropriate is also considered among the duties of the committee of chairmen of the regional administrative court. As we will discuss later, one of the most important criticisms for the appeal system introduced in the administrative jurisdiction is that the discrepancy between the final decisions taken by the same or difference chambers of regional administrative courts would eliminate the unity of case law, which would damage the credibility of law. Especially

"Article 3/C: 1.The committee of chairmen of the regional administrative court consists of the chairman of the regional administrative court and the chairmen of chambers.
2. In the absence of the chairman of the regional administrative court, the most senior chairman of chamber presides over the committee.
3. In case the chairman of the chamber has an excuse, the most senior member of that chamber attends the committee.
4.The duties of the committee of chairmen of the regional administrative court are as follows:
a) In order to ensure specialization based on the intensity and nature of the assigned tasks, determine the division of labor between the chambers of the regional administrative court and to conclude the division of labor disputes that arise among the chambers.
b) In case where a chamber is not able to meet its member for legal or actual reasons, appoint relevant members from other chambers.
c)In similar cases, in case of a discrepancy and inconsistency between the final decisions taken by the regional administrative chambers or between the final decisions taken by the chambers of different regional administrative courts; if the related regional administrative court chambers or those who are entitled to apply to the remedy of intermediate appellate request the elimination of this discrepancy or inconsistency ex officio or based on a justification, submit it to the Council of State along with its own opinion if the claim is deemed appropriate.
h) Carry out duties assigned with laws.
Articles 39 and 40 of Council of State Law No.2575 and on 06.01.1982 apply for the requests to be made in accordance with clause c of the paragraph 5.4
6. Committee of Chairmen are gathered in full and decide by majority. In case of the equality of votes, the party with the chairman is considered to have achieved the majority."

the chambers of different regional administrative courts would not be able to know each other's' decisions and this would create different decisions on the same issues. Other courts have no obligation to comply with the decisions taken by the courts, including regional administrative courts. However, courts have an obligation to comply with the decisions made by the Council of State Board of Unification of Case Laws[6]. Hence, it was stipulated in the new regulations that in case of any discrepancy or inconsistency between the final decisions taken by the same or difference chambers of regional administrative courts, the committee of chairmen of the regional administrative court would submit this issue to the Council of State and case laws would be unified upon the decision of the Council of State Board of Unification of Case Laws ultimately, as discussed above. However, it would be a highly optimistic approach to believe that this new regulation will solve the problem. This is because it is all known that the Council of State Board of Unification of Case Laws has not functioned as required so far. According to Article 39 of the Council of State Law, the Council of State Board of Unification of Case Laws is authorized to decide on the unification of case laws or the amendment of unified case laws where necessary in case of any discrepancy or inconsistency between the decisions taken by the judicial chambers of Council of State or the own decisions taken by the administrative and tax chamber committees or the separate decisions taken by them. The fact that there are a considerable amount of discrepancies between the decisions taken by the same or different chambers of the Council of State and the committee could not eliminate these case law discrepancies appears to support our opinion that the discrepancies or inconsistencies between the final decisions taken by the same or different regional administrative courts cannot be eliminated by the Council of State Board of Unification of Case Laws.

In Article 7 of the Law No.6545 and Article 3/D included in the Law No:2576, the duties of the regional administrative court chambers are stipulated. The duties of the chambers foreseen to function as intermediate appellate courts include examining and concluding the intermediate appellate applications against final decisions that are taken by the first instance courts and can be taken to an intermediate appellate court[7]. As we will analyze it in detail in

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6 Council of State Law, article 40/4.

7 **Law No. 6545, Article 7:** The following Article 3/D was added into the Law No.2576 after Article 3.
"Duties of chambers:
Article 3/D: Duties of chambers of regional administrative courts are as follows:
a)Examine and conclude the intermediate appellate applications against final decisions

the intermediate appellate section of our study, to mention it briefly, each decision taken by first instance courts is not subjected to intermediate appellate examination of regional administrative court chambers. The appeal system brought by the Law No. 6545 in the administrative jurisdiction is a unique system which can be described as incomplete or partial intermediate appellate. According to the new regulation, some decisions of first instance courts are not subjected to intermediate appellate examination as they are concluded in first instance courts. In addition, some decisions of first instance courts have been subjected directly to appeal examination and not mentioned in intermediate appellate application. In addition, in accordance with Article 25 of Council of State Law, the remedy of intermediate appellate cannot be sought against the final decisions taken for the cases where the Council of State proceeds as the first instance court as regulated in Article 24 of the Council of State Law, while the remedy of appeal can be sought.

To mention briefly here, new administrative jurisdiction organization brought by the Law No.6545 includes also the qualifications and appointment of chairman of the regional administrative court, chairmen and members of chambers, working procedures of regional administrative courts and the new regulations and amendments on justice commission of regional administrative courts, departments and court officials[8]. However, the procedure regulations

that are taken by the first instance courts and can be appealed.
b) Examine and conclude the objections against the decisions made by the first instance courts on suspension of execution requests.
c) Resolve the duty and authority disputes between the first instance courts that fall into the judicial locality.
d) In case that an actual or legal obstacle to hearing a suit by the competent first instance court in the judicial locality arises or hesitation in the boundaries of judicial locality of two courts or two courts are decided to be authorized to hear the same case; decide on the transfer or the stated case to another court that falls into the judicial locality of the regional administrative court or on the designation of the competent court.
e) Carry out other duties assigned by laws."

[8] **Law No. 6545, Article 8:** The following Article 3/E was added into the Law No.2576 after Article 3.
"Qualifications and appointment of chairmen of the regional administrative court, chairmen and members of chambers:
Article 3/E: 1. The chairmen and chairmen of chambers of regional administrative courts are selected by the Supreme Board of Judges and Prosecutors among the administrative jurisdiction judges and prosecutors who are in first tier and have not lost the qualities that require to be first tier, while members of chambers are selected among the ones who become first tier and have not lost their qualities that require to be first tier.
2. Chairman and members of Council of State chamber can be appointed to the chairmanship of regional administrative court or to the chairmanship of chamber for four years by the Supreme Board of Judges and Prosecutors upon their requests. Same procedures apply in the appointment

that aim at adapting the administrative jurisdiction organization into the

to another regional administrative court as well. The capacity, position, salary and allowance and all kinds of personal rights of those who are appointed in this way are protected; their salaries and allowances and all kinds of financial and social rights continue to be paid from the budget of the Council of State; disciplinary and criminal investigations and prosecutions are subjected to the provisions on Council of State members; the period of time they spend in this position is considered to be spend as a Council of State member. These people cannot participate in the tasks and operations carried out in the Council of State by the Council of State members; cannot be a candidate and vote in the elections of Council of State except for the membership of the Supreme Board of Judges and Prosecutors.

Law No. 6545, Article 9: The following Article 3/F was added into the Law No.2576 after Article 3.

"Meeting and decision:

Article 3/F: 1.Each chamber is convened with the participation of a chairman and two members. The negotiations are held confidentially and decisions are made by the majority of vote.

2. If a chamber cannot be convened due to legal or actual reasons, the missing members are substituted from other chambers by the decision of the committee of chairmen, and if not possible, with the members appointed as authorized by the Supreme Board of Judges and Prosecutors from other regional administrative courts.

3.In the absence of the chairman of chamber due to legal or actual reasons, the most senior member of the chamber presides over the chamber."

Law No. 6545, Article 10: The following Article 3/G was added into the Law No.2576 after Article 3.

"Justice commission of regional administrative court:

"Article 3/G: 1.A justice commission of regional administrative court is available in each regional administrative court.

2. The commission consists of two primary members selected by the Supreme Board of Judges and Prosecutors among the chairmen of chambers under the presidency of the regional administrative chairman. The Supreme Board of Judges and Prosecutors determines two substitute members among the chairmen or members of chamber. In the absence of the chairman, the most senior primary member participated in the commission, in the absence of primary members, substitute members participate in the commission based on their seniority.

6. Commission is gathered in full and decides by majority.

The justice commission of regional administrative court carries out the duties specified in Articles 114 and 115 of the Judges and Prosecutors Law No.2802 and on 24.02.1983 and the duties assigned by other laws."

Law No. 6545, Article 11: The following Article 3/H was added into the Law No.2576 after Article 3.

"Departments:

Article 3/H: 1. Sufficient amount of clerk's office department and administrative affairs departments and other required departments are established in regional administrative courts, chambers and justice commissions.

2. In each department, a head of the department and sufficient amount of officers are available.

Law No. 6545, Article 12: Article 12 of Law No.2576 was amended as follows including its heading.

"Departments and court officers:

Article 12: 1. In each court, a clerk's office is established.

2. Financial and technical affairs departments are also established where deemed necessary by the Ministry of Justice.

3. In each department, a head of the department and sufficient amount of officers are available.

intermediate appellate system will not be discussed. To mention briefly, it appears that the appointment of the chairmen and members of regional administrative courts will be carried out by HSYK in parallel to the regulation before the Law No.6545. A new regulation brought by the Law No.6545 is the establishment of a justice commission of regional administrative courts in each regional administrative court. In Law No.6545 and Article 3/H included and the amended Article 12 of the Law No.2576, it is stipulated that an editorial department will be created in regional administrative courts, administrative courts and tax courts. In addition, related departments of financial and technical affairs will also be established by the Ministry of Justice where necessary.

To mention briefly, although it was regulated that the date when the Ministry of Justice[9] would establish regional administrative courts within three months as of the enforcement of the Law No.6545 and the establishment of regional administrative courts, their judicial localities and the date when they would take office throughout the country would be announced in the Official Gazette, this has not happened so far[10]. In our opinion, it does not seem possible to put these regulations that have introduced the intermediate

Law No. 6545, Article 13: The term "ten million lira" stated in paragraph 1 of additional Article 1 of the Law No.2567 was amended by "a thousand Turkish lira".

9 In order to determine the procedures and principles of the execution of administrative affairs and clerk's office's services of chairmanship of regional administrative court, committee of chairmen, regional administrative court chambers, administrative courts and tax courts and the justice commission of the regional administrative court, Regulations on Execution of Administrative Affairs and Clerk's Office Services of Regional Administrative Courts, Administrative Courts and Tax Courts were issued by the Ministry of Justice. See. Official Gazette on 11.07.2015/29413.

10 **Law No.6545, Article 14:** The following interim article was included in the Law No.2576.
"Interim 20: 1. The Ministry of Justice establishes regional administrative courts foreseen in the amended Article 3 of this Law within three months following the effective date of this Law. The establishment of regional administrative courts, their judicial localities and the date when they will take office throughout the country are announced in the Official Gazette. The existing regional administrative courts continue their service until the date when the newly established regional administrative courts take office.
2.As of the date when the new regional administrative courts take office, the files in the existing regional administrative courts are transferred to the new regional administrative courts based on their judicial localities and distributed to the related chambers.
3.The chairmen of such courts, chairmen and member of chambers are appointed by the Supreme Board of Judges and Prosecutors before the new regional administrative courts take office. The appointment of other staff that will work in regional administrative courts is performed within the same period of time.
4.The justice commissions of the new regional administrative courts are established as of the date when these courts take office."

appellate system in administrative jurisdiction into practice soon. We have a judicial case example in this regard. The fact that regional administrative courts have not been put into practice for the last ten years following the enactment of the Law No.5235 and dated 26.09.2004 on the Establishment, Duties and Authorities of First Instance Courts and Regional Administrative Courts in the judicial justice supports our opinion. As a matter of course, the provisions that have been brought by the Law No.6545 on legal remedies in administrative jurisdiction will be implemented after the establishment of the regional administrative courts[11].

By the way, another issue that should be criticized is on the law making technique of law makers in Turkey. As can be seen in the Laws No.6545 and No.6552 we discuss in our study, the lawmaker make the related legal regulations under "omnibus" bills and postpone the infrastructure and other elements that require these legal regulations to be put into practice and will be generally carried out by the administration. We believe this approach is not right. On the other hand, the infrastructure and other elements that would allow for a change in the administrative jurisdiction structure should be created first and then the related legal regulations should be made by the law-maker. The coordination between the administration and TGNA is of great importance. As is seen in the regulations introduced by the Laws No.6545 and No.6552, some provisions considered to be related to the administrative jurisdiction have been put into effect, while the effective date of some has been postponed. This approach makes our legal system more complicated and consequently the legal security of people[12] is damaged and the law practitioners are adversely affected by this situation.

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11 **Law No. 6545, Article 27:** The following interim article was included in the Law No.2577.
"Interim Article 8: 1. The provisions on legal remedies in administrative jurisdiction in this Law apply to the decisions taken after the regional administrative courts established in accordance with the amended Article 3 of this Law take office throughout the country. Regarding the decisions taken before such date, the provisions on the legal remedies that are in effect on the date of the decision apply.
2. Until regional administrative courts take office, the fees foreseen for the remedy of appeal and regulated by this Law are charged in the objections against the decisions taken by administrative and tax courts."

12 "The fact that people are able to trust in the state, to develop their material and spiritual assets and to benefit from fundamental rights and freedoms can only take place in a legal system where legal security and rule of law are ensured…" The decision of the Supreme Court, Decision Date:09.04.2014, Docket:2014/38, Decision:2014/80, Official Gazette Date and Number:23.05.2014/29008. See. http://www.anayasa.gov.tr/Kararlar Databank, Access Date:03.06.2015.

1.2. Urgent trial Procedures in Administrative Jurisdiction

A new aspect brought by the Law No.6545 in administrative jurisdiction is the urgent trial procedures. The urgent trial procedure introduced in administrative jurisdiction to accelerate proceedings was adopted from France. However, this regulation is much different from the urgent trial procedures in French administrative jurisdiction[13]. In the accelerated decisions in the French administrative proceeding procedures, rules are foreseen to ensure urgent decision-making process. For example, the accelerated decisions to be taken in urgent trials are taken by a single judge defined as "urgent decisions judge"[14]. In the French administrative jurisdiction, different proceeding procedures have been regulated depending on whether cases have urgent nature or not. For example, an administrative judge is able to take a decision that stops

[13] "Urgent decisions can be analyzed in two types in France, except for special accelerated decisions. The requirement of urgency is sought in some of the accelerated decisions so that the decision can be taken, while it is not sought in some of the decisions. There are three different types of accelerated decisions bonded by the requirement of urgency. These are as follows: 1. Suspending accelerated decisions that allow for the suspension of an administrative proceeding, 2.Libertarian accelerated decisions that appear as an expression of the quest of being effective in the administrative jurisdiction concerning the protection of basic rights and freedoms, 3.Protective accelerated decisions that allow for taking protective measures. There are also three different types of accelerated decisions not bonded by the requirement of urgency: 1.Detecting accelerated decisions in order for material events to be detected by an expert as are, 2.Exploratory accelerated decisions that allow for having determinations that include more comprehensive assessments through many instruments on material events, 3.Prepaid accelerated decisions that allow for making a certain amount of payment without filing a case against the creditors of the administration or waiting for the conclusion of the case, if already filed." For detailed information for these accelerated decision types, please see. Bülbül, Erdoğan, "Fransız İdarî Yargılama Hukukunda İvedi Yargılama Usûlleri Reformu", Danıştay ve İdarî Yargı Günü Sempozyumu, Danıştay Başkanlığı Yayını, Ankara, 2002. s.63-95.

[14] "In the system created in France considering that a single judge can make faster decisions, the urgent decisions judge delegated specific authorities is a not a separate jurisdiction from the court. The point is that a special jurisdiction procedure has been issued in the court of the judge. Therefore, the accelerated decisions judge does not reject a petition given to obtain an accelerated decision but including a material request, yet refers it to the related court committee. In addition, in case of requests posing a serious challenge or requiring a discussion, the accelerated decisions judge is entitled to refer them to the related court committee...The accelerated decisions judge or the court committee referred by the judge take interim decisions under any circumstances. Therefore, the accelerated decisions judge may alter or abolish his/her decisions upon a request of anybody and in case of new situations. For the same reason, it is also possible for the judge to make a decision in accordance with a request rejected before. However, the accelerated decisions judge is not entitled to make a decision on the material requests and this is why the judge, for example, cannot decide on the annulment of an administrative proceeding." Please see for detailed information. Bülbül, agm, s.85-87.

the work, operations or actions of the administration within forty eight and seventy two hours in immediate cases where basic rights and freedoms are expressively, unlawfully and severely violated[15].

It is also seen that the rules of urgent trial procedures introduced in France have been simplified, facilitated and shortened to accelerate the jurisdiction process[16]. This is also seen in the urgent trial procedures introduced in the Turkish administrative jurisdiction procedures by the Law No.6545. For example, the times of the urgent trial procedures have been shortened compared to the general times in administrative jurisdiction procedures. The time of filing a case in urgent trial procedures has been determined to be thirty days. In these procedures, it has been regulated that the first examination will be performed within seven days, the time of defense is fifteen days as of the notification of the petition and this period of time could be extended for fifteen days only for once, a decision will be made within a month at the latest as of the consummation of the file in such cases, remedy of appeal can be resorted to within fifteen days as of the date of notification against the final decisions made by the first instance court, the appeal petitions may be responded by the other party within fifteen days, the appeal request will be finalized within two months at the latest and the decision will be notified within a month at the latest[17]. In a case filed claiming that shortening of the time to bring an action, resort to the remedy of appeal and respond to appeal petitions damages the right to legal remedies and the right to fair trial in the cases subjected to the urgent trial procedures, the Supreme Court did not deem the related rule unconstitutional claiming that: "It is evident that shortening of the time to bring an action, resort to the remedy of appeal and respond to appeal petitions by the rules in dispute intervenes in

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15 Akbaba, Ahmet, "Fransız İdarî Yargı Sistemine Bir Bakış", Ankara Barosu Dergisi, Sayı:2, Ankara, 2014. s.441.; "The implementation of urgent trial procedure in France depends of the co-occurrence the following four elements: Urgency, severity of the violation, expressive unlawful nature of a decision and the restriction of a basic freedom that should not be confused with an ordinary right." See. Bülbül, agm, s.63-95.

16 Bülbül, agm, s.85-86.

17 "In France, as the purpose of the accelerated decisions is to make an decision immediately in essence within the possible best times, the trial procedures have been attempted to be facilitated based on this requirement. This facilitation attempt had led to some various regulations consistent with the urgency of the accelerated decisions in terms of duties and authorities, in the trial process and in legal remedies...In France, the common regulation on legal remedies for all the accelerated decisions bound and not bound by the requirement of urgency is that the time of legal remedy foreseen against these decisions is determined to be fifteen days as of the notification period." See. Bülbül, agm, s.87-94.

the right to legal remedies. However, this intervention is understood to be based on a legal purpose for resolving the disputes arising in the urgent trial procedures by being brought to the judicial authorities immediately. Given the purpose of accelerating the trial process in the cases subjected to the urgent trial procedures, the times stated in the rules in dispute for bringing an action, resorting to a remedy of appeal and responding to appeal petitions are not too short to make the preparation of petitions and acquiring of their annexes impossible or to make them substantially difficult and they do not restrict the exploitation of the right to reply immoderately[18]" In addition, the Supreme Court did not deem the provision regulating that the time of defense is fifteen days as of the notification of the petition and this period of time could be extended for fifteen days only for once unconstitutional in the urgent trial procedures: Given that the administrative authorities establishing the proceedings subjected to the urgent trial procedures have the information and documents required in the resolution of the cases to be brought against these proceedings and they should have the qualified staff to turn this information into a plea of defense, it is concluded that the projected fifteen-day period is enough and reasonable for them to submit their pleas of defense. In addition, in case the time is not enough depending on the quality of the case, the time to submit a plea of defense can be extended fifteen days more. Moreover, administrative jurisdiction authorities are entitled to make all kinds of examinations they deem necessary for the resolution of the dispute in accordance with the principle of ex officio examination rather that hinging upon to the claims introduced by the administration in the plea of defense. In this respect, restricting the time to submit a plea of defense to fifteen days for the public interest in order to finalize the cases subjected to the urgent trial procedures immediately is at the discretion of the law maker and no aspect is seen that conflicts with the principles of the state of law in

[18] "In Article 36 of the Constitution, no restriction is foreseen on the right to legal remedies, while it cannot be say that this is an absolute right that must not be restricted in any way. It is accepted that the rights having an unforeseen specific restriction reason have some restrictions due to the nature of the right. In addition, although no restriction reason is included in the article regulating the right, these rights may be restricted based on the rules specified in other Articles of the Constitution. However, these restrictions cannot be contrary to the guarantees specified in Article 13 of the Constitution. In accordance with Article 13 of the Constitution, restrictions on fundamental rights and freedoms cannot be contrary to the requirements and the principle of proportionality of the democratic social order and the secular Republic and cannot harm the essence of freedoms either. " Decision of the Supreme Court, Decision Date:19.03.2015, Docket: 2014/149, Decision:2015/31, Date and Number of Official Gazette:13.06.2015/29385. See. http://www.anayasa.gov.tr/Kararlar Databank, Access Date:23.06.2015.

the rule.[19]" In addition, the rejoinder and duplicatio phases were annulled assuming that the file is consummated by submitting the plea of defense or the elapse of submitting a plea of defense in the cases subjected to the urgent trial procedures. The Supreme Court concluded that this regulation was not against the Constitution: "It is understood that the rejoinder and duplicatio phases have been annulled to finalize the trial process as soon as possible in the cases subjected to the urgent trial procedures. In the stated cases, parties can submit their claim, defense and evidence by a petition for each. Hence, the case file would reach the decision-making phase by being consummated as soon as possible. In this context, vesting the right to allegation and defense by a petition for each in parties by annulling the rejoinder and duplicatio phases to accelerate the trial process is at the discretion of the law-maker. With the rule in dispute, the right to rejoinder of the plaintiff is annulled and the courts are entitled to ask for all kinds of information and documents from parties or third parties that would affect the resolution of the dispute in accordance with the principle of ex officio examination applied in the administrative jurisdiction procedures. Accordingly, not vesting the right to rejoinder in the plaintiff to accelerate the trial process in the cases subjected to the urgent trial procedures does not have any nature to preclude the right to legal remedies or to make it substantially difficult.[20]"

In the urgent trial procedures introduced by the Law No.6545 in the administrative jurisdiction, it is stipulated that the provisions of Article 11 of AJPL do not apply. To put it more explicitly, the purpose of resorting to the administration is to ensure that the proceedings of the administration which are alleged to be contrary to the laws are corrected without seeking a legal remedy. It might be suggested that this regulation in the urgent trial procedures is right as the resolution of the disputes through administration applications is very limited in Turkey, no results could be achieved in practice through administration applications rather than a waste of time in the elimination of the administrative proceedings and actions claimed to be contrary to the law, and briefly, the administrative application is not an effective way. The Supreme Court stated that the provision on not applying Article 11 of AJPL in the urgent trial procedures was not contrary to the Constitution for the

[19] Decision of the Supreme Court, Decision Date:19.03.2015, Docket: 2014/149, Decision:2015/31, Date and Number of Official Gazette:13.06.2015/29385. See. http://www.anayasa.gov.tr/Kararlar Databank, Access Date:03.06.2015.

[20] Decision of the Supreme Court, Decision Date:19.03.2015, Docket: 2014/149, Decision:2015/31, Date and Number of Official Gazette:13.06.2015/29385. See. http://www.anayasa.gov.tr/Kararlar Databank, Access Date:03.06.2015.

following reasons: "In the rule in dispute, it is stipulated that Article 11 of the Law No.2577 does not apply in the urgent trial procedures. Accordingly, in the event that the concerned people resort to the administration against the administrative proceedings discussed in the cases subjected to the urgent trial procedures for the withdrawal, annulment or amendment of the proceeding before filing a case, the thirty-day term of litigation projected for the disputes of urgent trial procedures continues. The application of the concerned people to the administration for the proceedings initiated against them and this application results in an adverse outcome delay the submission of the dispute to jurisdiction for a certain period time. It is understood that the law maker has established the rule that stipulates the application of the concerned people to the administration for the disputes arising from the proceedings subjected to the urgent trial procedures for the disputes to be resolved immediately by judicial authorities before they file a case does not stop the term of litigation. In order to resolve the disputes arising from the proceedings subjected to the urgent trial procedures in judicial authorities immediately, the fact that the rule stipulating that the application of the concerned people to the administration for these proceedings before they file a case does not stop the term of litigation is at the discretion of the law maker. In addition, the rule in dispute does not abolish the right to apply to the administration for the proceeding initiated against the concerned people and impose any restriction on litigation either.[21]"

We would like to point out that the regulation on the immediate conclusion of the proceedings such as taking an interim decision, carrying out an investigation and an expert examining or hearing an expert trial on the disputes to be subjected to the urgent trial procedures is relevant and proper for the projected procedures.

In Article 20/A included in the Law No.2577 through the Law No.6545, it is stated that the disputes arising from the proceedings to be subjected to the urgent trial procedures have been identified restrictively. Accordingly, it appears at first look that the disputes that concern the public directly and are for the benefit of the public directly when they are resolved immediately are identified as the ones to be subjected to the urgent trial procedures in our opinion[22].In our opinion, the disputes arising from the proceedings specified

[21] Decision of the Supreme Court, Decision Date:19.03.2015, Docket: 2014/149, Decision:2015/31, Date and Number of Official Gazette:13.06.2015/29385. See. http://www.anayasa.gov.tr/Kararlar Databank, Access Date:03.06.2015.

[22] **Law No. 6545, Article 18:** The following Article 20/A was added into the Law No.2574 after

in the relevant article are the ones that should be immediately resolved for the public interest, which means it fits with the purpose of the regulation. The Constitution Court also deemed the implementation of the urgent trial procedures in the disputes arising from the proceedings specified in Article 20/A included in the Law No.2577 unconstitutional in its decision. "It is understood from the reason of the article in dispute that some administrative cases arising from the proceedings such as tender, privatization and urgent

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Article 20.
"Urgent trial procedures:
"Article 20/A: 1. The urgent trial procedures apply in the disputes arising from the following proceedings:
a)Tender proceedings except for the tender ban.
b)Urgent expropriation proceedings.
c)Privatization High Council decisions.
d)Sales, allocation and leasing proceedings in accordance with the Law on Encouragement of Tourism No.2634 on 03.12.1982.
e)In accordance with the Environment Law No. 2872 on 09.08.1983, decisions taken as a result of an environmental impact assessment except for administrative sanction decisions.
f)Cabinet decisions taken in accordance with the Law No.6306 on Transformation of Disaster Risk Areas on 16.05.2012.
2.In the urgent trial procedures:
a)The term of litigation is thirty days.
b)The provisions of Article 11 of this Law do not apply.
c)The first examination is carried out within seven days, and the petition and attachments are notified.
d)The defense time is fifteen days following the notification of the petition, which may be extended up to fifteen days only for once. The file is deemed to be consummated when the defense is submitted or the time to submit a defense is expired.
e)The decisions on the request for suspension of execution cannot be objected.
f)These cases are resolved within one month from the consummation of the file. The proceedings such as taking an interim decision, performing an investigation or an expert examination or holding a hearing are concluded immediately.
g)The remedy of appeal can be resorted within fifteen days from the date of notification for final decisions.
h)Petitions of appeal are examined and notified within the first three days. The provisions not contrary to this Article 48 of this Law apply by analogy.
i)The time to respond to the petitions of appeal is fifteen days.
j)If the Council of State deems the information obtained on material facts sufficient or the appeal is only on legal points or the material mistakes in the decision appealed are possible to be corrected as a result of an examination performed by The Council of State on the document, the Council of State takes a decision on the merits of the case. Otherwise, the Council of State takes a new decision on the merits by carrying out the necessary review and investigation on its own. However, it sends the file back by reversing the judgment in case it deems that the appeal against the decisions taken upon the first investigation is rightful. The decisions made on appeal are final.
k)Appeal claims are settled within two months at the latest. The decision is notified within a month at the latest."

expropriation are dragged on causes legal ambiguity, it may lead to some consequences impossible or hard to tolerate for both the administration and the plaintiffs; therefore, the disputes arising from the cases in which the conclusion judicial process is of great importance such as tenders, urgent expropriation, privatization, and sales, allocation and leasing proceedings, environmental impact assessment and transformations of the areas bearing a natural disaster risk in accordance with the Law on the Encouragement of Tourism are subjected to different judicial procedures compared to other administrative disputes so that they could be immediately concluded. The fact that the disputes arising from the administrative proceedings specified in the rule in question are subjected to the urgent trial procedures considering the public interest in order to resolve them immediately due to their significance and nature is at the discretion of the law-maker and no conflict is found between the principles of a state of law regulated in Article 2 of the Constitution and Article 125 that regulates the judicial remedy against all kinds of actions and proceedings of the administration.[23]"

As it is discussed above, it is foreseen in the Law No.6545 that the final decisions taken by the first instance court on the disputes arising from the proceedings subjected to the urgent trial procedures can be appealed. To briefly mention, the Council of State performs a legality control in the remedy of appeal in the administrative jurisdiction in general[24]. The appeal review of the disputes subjected to the urgent trial procedures is different. As such, in accordance with Article 20/A of AJPL, the Council of State sends the file back to the first instance court by reversing the judgment in the disputes to be subjected to the urgent trial procedures as a result of the examination on the document only if it deems that the appeal against the decisions taken upon the first investigation is rightful. Apart from that, if the Council of State deems the information obtained on material facts sufficient or the appeal is only on legal points or the material mistakes in the decision appealed are possible to

[23] Decision of the Supreme Court, Decision Date:19.03.2015, Docket: 2014/149, Decision:2015/31, Date and Number of Official Gazette:13.06.2015/29385. See. http://www.anayasa.gov.tr/Kararlar Databank, Access Date:23.06.2015.

[24] In accordance with Articles 49 and 50 of AJPL, the Council of State as the court of appeal reverses a decision in case of a reason that requires the reversal of the decision taken by the related authority and sends the related case file to the related authority who takes the decision for a new decision. In case of no reasons for a reversal, the Council of State takes an approval decision. If it appears as a result of the appeal review that material mistakes and deficiencies or mistakes in decisions can be corrected, the decision is approved after being corrected or as included in the new regulation, if the reason of the decision is wrong or deficient, it is approved after the reasons is changed.

be corrected as a result of an examination performed by The Council of State on the document, the Council of State takes a decision on the merits of the case. Otherwise, the Council of State takes a new decision on the merits by carrying out the necessary review and investigation on its own[25]. The decisions made on appeal are final. As is seen, the appeal review of the disputes to be subjected to the urgent trial procedures has been regulated in the form of making a decision on the merits rather than reversing or approving the decision of the first instance court as in the general appeal review as a rule[26]. From this perspective, the appeal review regulated in the provisions of the urgent trial procedures is compared to the intermediate appellate review. [27]. In fact, it is seen that the appeal reviews of the disputes for which urgent trial procedures apply are subjected to the objection review rules performed by the regional administrative courts in accordance with Article 45 of the AJPL. Therefore, the administrative jurisdiction where the objection remedy rules apply can be said to have its own appeal review, even though they are partial. There is no doubt that the reason for introducing such a regulation is to ensure a faster jurisdiction and decision-taking process.

The Council of State filed a case in the Supreme Court claiming that shortening the times for the first review in regional administrative or administrative courts, notification of petitions and attachments, conclusion as of the consummation of the file, review and notification of petitions of appeal and conclusion of the appeal request and notification of the decision and vesting the Council of State the right to decide on the merits during the appeal process violate the right to a fair trial. The Supreme Court concluded that this regulation was not against the Constitution: "With the rules in dispute, the Council of State and first instance courts are held responsible for

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25 "In France, the Council of State primarily examines whether the accelerated decisions judge has made a mistake in the assessment of the material incident, especially in the assessment of the requirement of urgency, and in case of a mistake, the Council of State can reverse the decision subjected to the appeal and after the reversal, it can make a new decision on the request." Bülbül, agm, s.94.

26 It should be noted that the appeal review for the disputes to be subjected to trial procedures for central and common exams is stated to be regulated in the same way in Article 20/B of the AJPL.

27 In the cases subjected to the urgent trial procedures, the right to seek a remedy of intermediate appellate has been annulled and the procedures on applying directly to the remedy of appeal have been introduces and the Council of State has been given the authority to make similar controls as in the remedy of intermediate appellate review." Decision of the Supreme Court, Decision Date:19.03.2015, Docket: 2014/149, Decision:2015/31, Date and Number of Official Gazette:13.06.2015/29385. See. http://www.anayasa.gov.tr/Kararlar Databank, Access Date:03.06.2015.

performing judicial proceedings within a certain period of time besides, the Council of State is vested the authority to decide on the merits by carrying out an investigation and examination during the appeal process. Therefore, it is foreseen that the cases subjected to the urgent trial procedures are resolved by judicial authorities and concluded with a final judgment within a short period of time. The terms specified in the rules in question are not final but regulatory terms and serves the purpose of concluding the cases subjected to the urgent trial procedures immediately by judicial authorities. The fact that judicial authorities do not perform judicial proceedings within the specified times does not lead to any loss of right for parties. In this regard, the rules in question established for the public interest in order to conclude the cases subjected to the urgent trial procedures immediately by judicial authorities are at the discretion of the law-maker and they do not harm the right to a fair trial and they are also in compliance with Article 141 of the Constitution which stipulates the conclusion of cases with the least costs and within the shortest time possible.[28]"

1.3. Intermediate Appellate in Administrative Jurisdiction

Intermediate appellate reviews are done by regional administrative courts in administrative jurisdiction. Different judicial orders and intermediate appellate systems are known to be established in different countries on the issues such as how the intermediate appellate reviews are made, which ones of the decisions taken by the first instance courts are subjected to the remedy of intermediate appellate, which one of the decisions taken by regional administrative courts on intermediate appellate reviews are final and which one of them can be appealed, namely secondary or tertiary jurisdiction, etc. In

[28] "In Article 141 of the Constitution, it is explicitly stated that '*the jurisdiction is liable to conclude cases with the least costs and within the shortest time possible*', which highlights the need for finalizing cases within a reasonable period of time. In accordance with such principle, the state has to take efficient precautions that would prevent cases from lasting unnecessarily. In this context, regulation of the judicial system and especially the judicial procedures in a way to allow for the conclusion of the judicial processing within a reasonable period of time and excluding the procedural laws to lead to the unnecessary extension of cases is a part of the principle of trial within a reasonable time. However, it is beyond dispute that the legal measures that would be taken for this purpose should not pose an obstacle to a fair and right decision for the merits. Determining the judicial procedures that are consistent with these principles is at the discretion of the law-maker in accordance with Article 142 of the Constitution." Decision of the Supreme Court, Decision Date:19.03.2015, Docket: 2014/149, Decision:2015/31, Date and Number of Official Gazette:13.06.2015/29385. See. http://www.anayasa.gov.tr/Kararlar Databank, Access Date:03.06.2015.

this part of the study, primarily brief information is given on the intermediate appellate concept and then the intermediate appellate system introduced in the administrative jurisdiction procedures through the Law No.6545 is highlighted and then solutions are proposed where necessary against the problems that may arise on this issue.

1.3.1. Intermediate Appellate Concept

Intermediate appellate, which literally means 'starting over' in Arabic, means appealing a decision given by a trial court to a higher court in law[29]. Intermediate appellate is a legal remedy. The legal remedy enables a party thinking that the decision taken in a trial court is unfair and unlawful to take the decision to a higher court[30]. Intermediate appellate is a legal remedy which is regulated to audit final decisions taken by first instance courts and not concluded yet both materially and legally and to eliminate existing illegalities[31]. Correction, improvement or cancellation of the decision taken by courts, in other and general words, re-revising them are ensured through the methods called "remedy" in judicial procedures. Legal remedy is a legal instrument that enables one of the parties in the trial to request a final decision to be revised and eliminated on the issues against him/her[32].

In the administrative jurisdiction law, the legal remedies to be sought for the unascertained court decisions are called "ordinary legal remedies", while the legal remedies to be sought for the ascertained court decisions are called "extraordinary legal remedies"[33]. In this regard, the remedy of intermediate appellate appears as an ordinary remedy.

In French laws, the remedy of intermediate appellate in the administrative jurisdiction system has been organized as a legal remedy that aims at correcting, improving or abolishing the decisions taken in first instance courts by second

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29 Turkish Language Society Dictionary, See. http://www.tdk.gov.tr/genel sözlük htm, Access Date17.07.2015.

30 Yıldırım, Turan, İdarî Yargı, Beta Yayınları, 2.Baskı, İstanbul, 2010. s.513.

31 Çınar, Ali Rıza, "İstinaf", Fasikül Aylık Hukuk Dergisi, Yıl:2, Sayı:8, Ankara, 2010. s.14-15.

32 Kuru, Bâki/Arslan, Ramazan/Yılmaz, Ejder, Medenî Usûl Hukuku, Yetkin Yayınları, 7.Baskı, Ankara, 1995. s.717 vd.; Alangoya, H. Yavuz, Medenî Usûl Hukuku Esasları, İstanbul Üniversitesi Yayınları, İstanbul, 2003. s.471.; Üstündağ, Saim, Medenî Yargılama Hukuku, Cilt:I-II, Nesil Matbaacılık, 7.Baskı, İstanbul, 2000. s.816.; Yıldırım, Kâmil, Hukuk Devletinin Gereği: İstinaf, Nesil Matbaacılık, İstanbul, 2000. s.1.

33 Çağlayan, Ramazan, İdarî Yargıda Kanun Yolları, Seçkin Yayınevi, 1.Baskı, Ankara, 2002. s.18.

instance courts[34]. It is also regulated that the decisions taken as a result of the second review of intermediate appellate can be appealed as a rule. In the French administrative jurisdiction system, it seems that courts carry out tertiary judicial activities in the form of the Council of State, administrative intermediate appellate courts and administrative courts[35].

The main purpose of legal remedies and the remedy of intermediate appellate is to ensure taking fair decisions in a material case, accelerating trial process[36], improving the law and ensuring the unity of case law and law[37]. The common purpose of the remedy of intermediate appellate and administrative jurisdiction procedures is to protect personal rights of an individual[38].

Intermediate appellate as a legal remedy means; "The situation where a second judge who is determined before and mentioned in the legal regulations on trial procedures examines the same case thoroughly again by replacing the first judge unconditionally and accepts or changes the decision of the first judge.[39] Intermediate appellate is also called as; "a trial where the final decision of the first instance court hearing the case for the first time and the legal rules applies are controlled and amended if necessary by the superior court"[40].

To briefly mention, it seems there are different opinions about the benefits or the necessity of the remedy of intermediate appellate[41]. In our opinion,

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34 Konuralp, Halûk/Hanağası, Emel, "Fransız Hukukunda İptal Amaçlı İstinaf Yolu", Mahâllî İdarelere Hizmet Dergisi Aylık Yayını (MİHDER), Sayı:1, Ankara, 2007. s.13.

35 Karabulut, Şehnaz Gençay, "Fransa'da İdarî İstinaf Mahkemelerinin Kararlarına Karşı Temyiz Başvurusu ve İncelenmesi", Bkz. http://www.danistay.gov.tr/2-FRANSADA_İdarî _istinaf.htm, Erişim Tarihi:20.06.2015. s.1.

36 It is stated that intermediate appellate does not serve a purpose of accelerating the judicial process; on the contrary, it would slow down the intermediate appellate system; therefore, the main purpose of intermediate appellate is to ensure fair and rightful trial. See. Yıldırım, Nevhis Deren, "Teksif İlkesi Açısından İstinaf", Türkiye Barolar Birliği-İstinaf Mahkemeleri Uluslararası Toplantısı, Ankara, 2003. s.95.

37 Please see for detailed information on this issue. Alangoya, age, s.473vd.; Üstündağ, age, s.817vd.; Yıldırım, Hukuk Devletinin Gereği: İstinaf, s.5vd.

38 Yıldırım, Kâmil, "Kanun Yolu Olarak İstinaf", Türkiye Barolar Birliği-İstinaf Mahkemeleri Uluslararası Toplantısı, Ankara, 2003. s.72.

39 Baş, Zuhâl Bereket, "İdarî Yargılama Hukuku Açısından İstinaf ve Kabulü Sorunu", Danıştay Dergisi, C.27, S.11, Ankara, 1996. s.94.

40 Yenisey, Feridun, Ceza Muhakemesi Hukukunda İstinaf ve Tekrar Kabulü Sorunu, Fakülteler Matbaası, İstanbul, 1979. s.4.

41 "It is alleged that hearing a trial that has been heard in regional administrative courts again in the Council of State in the intermediate appellate system, which is the appeal authority (which is applicable only in the cases that might be appealed exclusively) would cause

the fact that regional administrative courts are able to make a decision on the merits of the decisions taken by the first instance courts in the review of intermediate appellate is appropriate in terms of protecting the legal security, the right to fair trial and to legal remedies more effectively[42].

It seems that maintaining the status of the Council of State as the court of case-law and establishing regional administrative courts to perform an intermediate appellate review becomes a necessity to conclude the trial in a secure and rapid way. It appears that regional administrative courts should become intermediate appellate courts in order to ensure that courts function efficiently, effectively, rapidly and securely and to strengthen audit jurisdiction[43].

Reducing the case load of the Council of State as a court of appeal through turning regional administrative courts into intermediate appellate courts in administrative jurisdiction would ensure that it performs its main functions of improving law and securing unity of case law, in other words, serving as a "case law court" in a better way[44].

1.3.2. Intermediate Appellate System Introduced by Law No.6545

Excess workload that has appeared over time in administrative jurisdiction as in the case of judicial jurisdiction brings up an intermediate appellate system in the administrative jurisdiction. The legal remedy of objection in the administrative jurisdiction has been annulled and the intermediate appellate system has been introduced through the Law No.6545[45]. Regional

waste of time." See. Akyılmaz, Bahtiyar, "Yargı Kararlarının Temyiz Öncesi Kesinleşmesi", İdarî Yargıda İstinaf Semineri, Antalya, 2009. s.169 vd.; "It is stated that different case laws may appear in case multiple regional administrative courts are available in the intermediate appellate system." See. Sancaktar, Oğuz, "İdarî Yargıda İstinaf Sistemi Üzerine Düşünceler", Prof.Dr. Aydın Zevkliler'e Armağan, Sayı:8, İzmir, 2013. s.2246.; However, using the remedy of the unity of case law decision more effectively in the Council of State can ensure unity of case law among regional administrative courts.; Please see for detailed information on the necessity of establishing intermediate appellate courts. Avcı, Mustafa, "İdarî Yargıda İstinaf", TBB Dergisi, Sayı:96, Ankara, 2011. s.188 vd.

42 Kuru, Bâki, "İstinaf Mahkemeleri Kurulurken", Adalet Dergisi, Sayı:5-8, Ankara, 1963. s.550 vd.

43 See. Avcı, agm, s.188vd.

44 See. Kuru, agm, s.550-551.; Erem, Faruk, "İstinaf Mahkemeleri", Ankara Üniversitesi Hukuk Fakültesi Dergisi, Cilt: VII, Sayı:12, Ankara, 1950. s.12-15.; Kuru/Arslan/Yılmaz, age, s.723.; Tanrıver, Süha, "Adliye Mahkemeleri ile Üst Mahkemelerin Kuruluş ve Görevleri Hakkındaki Kanun Tasarısı ile ilgili Bazı Düşünceler", Banka ve Ticaret Hukuku Dergisi (BATİDER), Cilt: XVIII, Sayı:1-2, Ankara, 1995. s.151-157.

45 **Law No. 6545, Article 19:** Article 45 of Law No.2577 was amended as follows including its heading.

administrative courts have been reorganized as intermediate appellate courts. To mention briefly, the intermediate appellate system introduced by the Law No.6545 can be defined as an incomplete or partial intermediate appellate as the decisions taken by the regional administrative courts as a result of the intermediate appellate review are final as a rule. This is because a tertiary trial procedure needs to be present in a full intermediate appellate system.

Upon the regulation of the remedy of intermediate appellate, an intermediate appellate application should be made in the regional administrative court within the judicial locality of the first instance courts authorized and assigned to hear the case brought against the final decisions taken by the administrative and tax courts which are the first instance courts,

"Intermediate appellate:
Article 45: 1.The remedy of intermediate appellate can be sought against the decisions of administrative and tax courts in the regional administrative court within the judicial locality of the court within thirty days as of the notification of the decision, notwithstanding any provisions to the contrary. However, the decisions taken by administrative and tax courts regarding the actions for nullity for tax cases not exceeding five thousand Turkish lira in value and full administrative actions and proceedings are final and they cannot be appealed in an intermediate appellate court.
2. Intermediate appellate is subjected to appeal forms and procedures. The files are sent to the regional administrative court regardless of the addressing and requests in the petitions of legal remedy against the decisions to be appealed in an intermediate appellate court.
3. The regional administrative court agrees on the rejection of the intermediate appellate if it deems the decision taken by the first instance court lawful as a result of its reviews. If the material mistakes can be corrected, the court makes the same decision by making the necessary correction.
4. The regional administrative court agrees on the reversal of the decision taken by a first instance court by accepting the intermediate appellate application if it deems the decision taken by the first instance court unlawful. In this case, the regional administrative court makes a new decision on the merits. If necessary during the review, the decision-making court or another administration or tax court may be rogatory. The rogatory court performs the necessary proceedings primarily and immediately.
5. In case the regional administrative court finds the intermediate appellate application made against the decisions upon the first review rightful, and the case has been examined by a court that is lack of jurisdiction or authority or by a rejected or prohibited judge, the court decides on the annulment of the decision taken by the first instance court and sends the file to the related court. The decisions taken by the regional administrative court in accordance with this paragraph are final.
6. The decisions which cannot be appealed and are taken by regional administrative courts are final in accordance with Article 46.
7. The judge who makes the decision or participates in the decision subjected to an intermediate appellate application cannot attend the review of the same case by the regional administrative court through intermediate appellate.
8. The cases subjected to the urgent trial procedures cannot be appealed through the remedy of intermediate appellate."

except for the cases to be heard by the Council of State as the first instance court and the decisions finalized in first instance courts and the disputes to be subjected to the trial procedures on urgent and central and common exams.

In accordance with Article 45 of the AJPL, the remedy of intermediate appellate can be sought against the decisions of administrative and tax courts in the regional administrative court within the judicial locality of the court within thirty days as of the notification of the decision, notwithstanding any provisions to the contrary in other laws. It is seen that the time to resort to an intermediate appellate court has been regulated the same as the time to resort to an appeal. It is also seen that both the intermediate appellate and the appeal remedies cannot be exercised against some of the decisions rendered by first instance courts. However, the decisions taken by administrative and tax courts regarding the actions for nullity for tax cases not exceeding five thousand Turkish lira in value and full administrative actions and proceedings are final and they cannot be appealed in a court of intermediate appellate and in a court of appeal. In our opinion, this provision restricts the legal security, the right to a fair trial and the right to legal remedies which are very important and indispensable elements of the principle of state of law; therefore it is not right. This is because the justice system must be established in at least two instances in terms of the rule of law. Illegality, errors or omissions might be in question in the decisions rendered by first instance courts. Therefore, carrying out the judicial jurisdiction with at least two or ideally three instance system could ensure taking more accurate and proper decisions and most importantly, protecting personal rights. If the value of the dispute in question is between five thousands and a hundred thousand Turkish Lira, they could only be appealed in an intermediate appellate court rather than seeking an appeal remedy. If the value of the dispute in question is a thousand Turkish Lira and above, an appeal application can be made against the decision rendered by the regional administrative court on the outcome of the review in the Council of State.

According to Article 45 of AJPL, intermediate appellate review has been subjected to the appeal manner and procedures. The files are sent to the regional administrative court regardless of the addressing and requests in the petitions of legal remedy against the decisions to be appealed in an intermediate appellate court. The regional administrative court agrees on the rejection of the intermediate appellate if it deems the decision taken by the first instance court lawful as a result of its reviews. If the material mistakes in the decision can be corrected, the court makes the same decision by making

the necessary correction. The purpose of this regulation is to accelerate the trial process and to prevent waste of time that arises when the decision is sent back to first instance courts due to immaterial mistakes. The regional administrative court agrees on the reversal of the decision taken by a first instance court by accepting the intermediate appellate application if it deems the decision taken by the first instance court unlawful. In this case, the regional administrative court makes a new decision on the merits. The main distinction between the intermediate appellate remedy and the appeal remedy in essence is that regional administrative courts do not send the decision back to the first instance court as a rule as a result of the intermediate appellate review and make a decision on the merits. However, in exceptional cases, regional administrative courts send the decision back to the first instance court.

In accordance with the new Article 45 of AJPL, if necessary during the review, the decision-making court or another administration or tax court may be rogatory. The rogatory court performs the necessary proceedings primarily and immediately. As is seen, a rogatory court has been established for the intermediate appellate remedy in administrative jurisdiction procedures. Before the Law No. 6545, there is no regulation in the Administrative Jurisdiction Procedures Law on rogatory and no reference has been made to the provisions of the Code of Civil Procedures in Article 31 of the same Law[46]. For this reason, the 6th Chamber of the Council of State decided that

[46] Whether the provisions of the Code of Civil Procedures apply on the procedural matters not regulated in the Administrative Jurisdiction Procedures Law and for which whether the provisions of the Code of Civil Procedures apply is not regulated maintains its presence as an important issue in the administrative jurisdiction procedures. This issue can be resolved by regulating the procedural remedies required in the administrative jurisdiction procedures based on the characteristics of the administrative jurisdiction procedures in the Administrative Jurisdiction Procedures Law in detail. In the doctrine, there are some authors who state that the provisions of the Code of Civil Procedures may apply for the procedural matters not regulated in the Administrative Jurisdiction Procedures Law and for which whether the provisions of the Code of Civil Procedures apply is not regulated; "In the case where no clear reference is made by the Administrative Jurisdiction Procedures Law, it can be considered that the gaps encountered in the administrative jurisdiction are eliminated using the judicial administration method … The fact that the Council of State, as a court of case law, fills in the gaps encountered in the judicial method benefiting from the general principles of law and the general provisions of the Code of Civil Procedures is so natural." See. Gözübüyük, A. Şeref/Tan, Turgut, İdare Hukuku: İdarî Yargılama Hukuku, Cilt:II, Güncellenmiş 5.bası, Turhan Kitabevi, Ankara, 2012. s.754.; It is stated that "in the French administrative law, administrative jurisdiction can apply the provisions of the legal jurisdiction procedures and can also establish procedural rules similar to the provisions of the legal jurisdiction procedures in the cases where any reference is made to the legal jurisdiction methods". See., Ramazan, İdarî Yargıda Kanun Yolları, Seçkin Yayınevi,

collecting evidence by rogatory was not possible in administrative courts[47]. In the doctrine, an author stated that collecting evidence by rogatory should be possible in administrative courts[48]. As a result of the introduction of the rogatory body by the Law No.6545 in Article 45 of the AJPL that regulates the intermediate appellate remedy, we believe one should accept that first instance courts in administrative jurisdiction can also benefit from the rogatory body. This is because; rogatory has been regulated in the AJPL even though it is regulated within a provision regulating the intermediate appellate remedy[49]. Even the Supreme Military Administrative Court and the Court of Jurisdictional Disputes decided on the implementation of a procedural matter not regulated in the law could apply[50].

2.Baskı, Ankara, 2011. s.147.; On the other hand, there are some authors who state that the provisions of the Code of Civil Procedures cannot apply.; "The procedural rules are in public order in the Continental European legal orders including Turkey as well. In this jurisdiction, an administrative judge is not entitled to create law and therefore to apply procedural rules not regulated in the law and not referring to other laws." See. Özay, İl Han, "Tartışmalar", I.İdare Hukuku Kongresi, I.Kitap: İdarî Yargı, Ankara, 1990. s.335.; please also see. Yıldırım, Ramazan, "Türk İdarî Yargısında Yargılamanın Yenilenmesi", Prof.Dr. Nuri Çelik'e Armağan, Cilt:I, İstanbul, 2001. s.433.

47 Decision of the 6th Chamber of Council of State, Decision Date:08.05.1991, Docket:1990/7429, Decision:1991/1027, See. Danıştay Dergisi, Sayı:84-85, Ankara, 1992. s.432-433.

48 Çağlayan, age, s.242.; In our opinion, it is possible to state that the administrative judge in charge of protecting public order and personal rights on the matters not regulated in the Administrative Jurisdiction Procedures Law and for which whether the provisions of the Code of Civil Procedures apply is not regulated should decide on the application of legal trial procedures provisions that are consistent with the characteristics of the administrative jurisdiction procedures and facilitate legality control. Indeed, it appears that administrative jurisdictions apply the Code of Civil Procedures in case no reference is made to the legal trial procedures. See. Eroğlu, Yaşar, "Danıştay Kanunu'yla Hukuk Usûlü Muhakemeleri Kanunu'na Atıf Yapılmayan Hâllerde Hukuk Usûlü Muhakemeleri Kanunu Hükümlerinin Danıştay'da Uygulanışı", Danıştay Dergisi, Sayı:8, Ankara, 1973. s.26.

49 In the doctrine, it is stated that procedural remedies have to be regulated in the laws on trial procedures they will be applied to or even by reference to other laws so that they could be implemented. See. Bilgen, Pertev, "Kanunların Uygulanmasının Anayasa Mahkemesi Tarafından Durdurulması", Anayasa Yargısı, Sayı:12, Ankara, 1995. s.179,184.; Güran, Sait, "Anayasa Mahkemesi'nin İşlevi ve Bu Bağlamda Yürürlüğün Durdurulması", Anayasa Yargısı, Sayı:12, Ankara, 1995. s.196.; Güran, Sait, "Anayasa Yargısında Yürütmeyi Durdurma", Anayasa Yargısı, Sayı:2, Ankara, 1986. s.150.; Gözler, Kemal, Türk Anayasa Hukuku Dersleri, Ekin Kitabevi, Bursa, 2000. s.504.

50 Both the Supreme Military Administrative Court and the Court of Jurisdictional Disputes decided that a declaratory action not regulated as a type of lawsuit in Article 2 of the Administrative Jurisdiction Procedures Law as a procedural rule can be handled in the administrative jurisdiction. See. Supreme Military Administrative Court, decision of Committee of Chambers, Decision Date:03.07.1997, Docket:1997/84, Decision:1997/62, Askerî Yüksek İdare Mahkemesi Kararlar Dergisi, Sayı:12, Genel Kurmay Basımevi, Ankara,

In accordance with the administrative jurisdiction procedures, one of the new regulations made in the administrative jurisdiction via the Law No.6545 is the stipulation of the fact that the principle of ex officio examination will be effective in the review of intermediate appellate to be carried out by regional administrative courts[51]. Administrative jurisdiction procedures have different characteristics than legal trial procedures[52]. In the legal trial procedures, the *principle of ex officio examination* has been adopted instead of the principle of bringing the case by the parties[53]. In the principle of ex officio examination,

1998. s.105. Decision of the Court of Jurisdictional Disputes, Decision Date:13.06.1988, Docket: 1988/9, Decision:1988/15, Date and Number of Official Gazette:26.10.1988/19971.; Decision of the Court of Jurisdictional Disputes, Decision Date:23.12.1991, Docket: 1991/43, Decision:1991/44, Date and Number of Official Gazette:13.02.1992/21141. See http://www.resmîgazete.gov.tr/Arşiv-Fihrist-Düstur. Access Date:09.05.2015.; In the doctrine, it is claimed that the types of actions regulated in the Administrative Jurisdiction Procedures Law are not limited and a declaratory action can also be upheld through case laws. See. Erkut, Celâl, "Tespit Davasının İdarî Bir Dava Türü Olarak Kabulüne İlişkin Uyuşmazlık Mahkemesinin Yaklaşımı", İdare Hukuku ve İlimleri Dergisi, Sayı:1-3, İstanbul Üniversitesi Yayınları, İstanbul, 1989. s.5vd.; Çağlayan, Ramazan, İdarî Yargıda Kanun Yolları, Seçkin Yayınevi, 1.Baskı, Ankara, 2002. s.114.

51 **Law No. 6545, Article 17:** The first sentence of the first paragraph of Article 20 of Law No.2577 was amended as follows.
"The Council of State, regional administrative courts and administrative and tax courts carry out all kinds of reviews for the court cases they handle by themselves."

52 Administrative jurisdiction procedures apply in the administrative cases on administrative proceedings and actions. Administrative proceedings and actions fall within the jurisdiction of the administrative law as a rule. Please see for the characteristics of the administrative law. Atay, E. Ethem, İdare Hukuku, Turhan Kitabevi, Ankara, 2006. s.34 vd.; Akyılmaz, Bahtiyar/Sezginer, Murat/Kaya, Cemil, Türk İdare Hukuku, 2.Baskı, Seçkin Yayıncılık, Ankara, 2011. s.36 vd.; Gözler, Kemal, İdare Hukuku, Cilt:I, 2.Baskı, Ekin Kitabevi, Bursa, 2009. s.63 vd.; Giritli, İsmet/Bilgen, Pertev/Akgüner, Tayfun/Berk, Kahraman, İdare Hukuku, 4.Bası, Der Yayınları, İstanbul, 2011. s.14 vd.; Günday, Metin, İdare Hukuku, 10.Baskı, İmaj Yayınevi, Ankara, 2011. s.27vd.

53 The principle of ex officio examination has been regulated by Article 20/1 of the AJPL amended by the Law No.6545 as in the following: "The Council of State, regional administrative courts and administrative and tax courts carry out all kinds of reviews for the court cases they handle by themselves. The courts may ask the submission of the documents they deem necessary and of any kinds of information within the predetermined times from the parties and other related authorities. The decisions in this regard have to be fulfilled within due time by the related authorities…"; Please see for detailed information on the principle of ex officio examination in administrative jurisdiction procedures. Oğurlu, Yücel, "Danıştay Kararları Işığında İdarî Yargılama Usûlünde Re'sen Araştırma İlkesi", Atatürk Üniversitesi Erzincan Hukuk Fakültesi Dergisi, 75'inci Yıl Armağanı, Cilt:II, Sayı:2, Erzincan, 1998. s.121 vd.; Aslan, Zehreddin, "Türk İdarî Yargı Sisteminde Re'sen Araştırma İlkesi", İstanbul Üniversitesi Siyasal Bilgiler Fakültesi Dergisi, Sayı:23-24, İstanbul, Ekim 2000/Mart 2001. http://www.sbf.istanbul.edu.tr/dergi/sayi23-24.htm. Access Date:18.07.2015.; Yıldırım, Turan, İdarî Yargı, Beta Yayınları, 2.Baskı, İstanbul, 2010. s.498-500.; Gözübüyük,

courts are authorized to collect information and evidence as well as the parties of the lawsuit. In a decision taken by the 5th Chamber of the Council of State, what should be understood from the principle of ex officio examination is explained as in the following: "…The principle of ex officio examination is also implemented as the investigation of a legal reason claimed to be the merits of the proceeding in dispute and the collection of information and documents with merits, it is also understood as the examination of the issues such as duties, authorities and terms that are inarguably accepted to be related to the public order in the administrative law even though they are not brought forward by the parties …[54]"

As mentioned briefly above, a regional administrative court performing an intermediate appellate review does not send the related decision to the first instance court and decides on the merits as a rule. However, the exceptions of this rule have been regulated in Article 45 of the AJPL. Accordingly, there are three situations where the regional administrative court performing an intermediate appellate review sends the related decision to the first instance court and does not make a decision on the merits. These are: 1. When the court finds the application of the intermediate appellate against the decisions taken rightful upon the first review, 2. The case has been handled by a court that is lack of jurisdiction or authority, 3. The case has been handled by a rejected or prohibited judge. In case of the presence of at least one of the situations above, the regional administrative court decides on the annulment of the first instance court decision and sends the file to the appropriate court by adopting the application of the intermediate appellate. It seems that the first instance courts have to follow the decision of the regional administrative courts as the decisions taken by them in this regard are conclusive.

Administrative jurisdiction procedures have been established in the form of a two-tier jurisdiction as a rule through the intermediate appellate system brought to the administrative jurisdiction by the Law No. 6545. This is

A. Şeref/Tan, Turgut, İdare Hukuku: İdarî Yargılama Hukuku, Cilt:II, Güncellenmiş 5.bası, Turhan Kitabevi, Ankara, 2012. s.757.

[54] Decision of the 5th Chamber of the Council of State, Decision Date: 08.12.1987, Docket: 1985/815, Decision: 1987/1723, the Council of State Magazine, Issue: 70-71, Ankara, 1988. s.277.; The principle of ex officio examination does not mean a legality control will be performed. The administrative jurisdictions cannot perform a legality control, the administrative jurisdiction authority is limited to the control of compliance with law. In addition, administrative jurisdictions cannot make a decision in a way that would eliminate the discretionary power of the administration. See. Administrative Jurisdiction Procedures Law (AJPL), Article 2/2.

because, in accordance with Article 45 of the AJPL, the decisions of regional administrative courts that cannot be appealed as per Article 46 of the AJPL are conclusive. The conclusive decisions taken by the regional administrative courts on the cases regarded as restricted as per Article 46 of the Administrative Jurisdiction Procedures Law upon an intermediate appellate review can be appealed in the Council of State. As mentioned above, the decisions taken by administrative and tax courts regarding the actions for nullity for tax cases *not exceeding five thousand Turkish lira in value* and full administrative actions and proceedings are conclusive and they cannot be appealed in a court of intermediate appellate and in a court of appeal. As is seen, the administrative jurisdiction procedures have been changed into mixed and peculiar procedures that carry out one-tier, two-tier and three-tier trial procedures through new regulations.

According to the new Article 45 of the AJPL, the cases subjected to the urgent trial procedures and regulated in accordance with Article 20/A of the AJPL cannot be appealed in the intermediate appellate courts but in courts of appeal. Since this is regulated in Article 20/A of the AJPL clearly and in detail, it is not necessary for this regulation to be stated in Article 45 of the AJPL again. By the way, as we will discuss in the next sections, it should be noted that the decisions subjected to the trial procedures on central and common examinations introduced in administrative jurisdiction by the Law No.6552 can be appealed not in the courts of intermediate appellate but in the courts of appeal. In a case brought in the Supreme Court claiming that the lack of the right to seek an intermediate appellate remedy in the cases subjected to the urgent trial procedures deprives the party against whom a decision has been made of the right to legal remedy in such cases and renders people defenseless against the administration, the Supreme Court has not deemed the related regulation unconstitutional claiming that: “It is understood that the lawmaker foresees a different legal remedy system to accelerate the trial procedures in the cases subjected to the urgent trial procedures. In this context, the right to seek a remedy of intermediate appellate has been annulled in the cases subjected to the urgent trial procedures and the procedures on applying directly to the remedy of appeal have been introduced and the Council of State has been given the authority to make similar audits as in the remedy of intermediate appellate review. Indeed, in the subparagraph g of the paragraph 2 of Article 20/A of the Law No.2577, it is stipulated that he decisions subjected to urgent trial procedures can be appealed in the courts of appeal within fifteen days, while in the subparagraph i, it is stipulated that the Council of State carries

out the necessary examination and investigation in the appeal review and decides on the merits and the decisions taken are conclusive. In this regard, in order to conclude the cases subjected to the urgent trial procedures by going through a legal remedy review as soon as possible, annulling the remedy of intermediate appellate is at the discretion of the law maker and there is nothing against the principle of fair trial in the rule.[55]"

To mention briefly, the rules for the suspension of execution have been protected in the remedy of intermediate appellate as it has been in the appeal remedy in administrative jurisdiction. According to Article 52 of the AJPL, having resorted to the appeal remedy does not suspend the execution of decisions by itself. However, regional administrative courts authorized to review the intermediate appellate application may decide on the suspension of execution for these decisions on guarantee. In case of a recourse to the remedy of intermediate appellate against the decisions on the dismissal of the case, making a decision on the suspension of the execution for the proceeding in dispute requires the existence of the conditions stated in Article 27 of the AJPL; therefore, which indicates that there is no novelty in this regard.[56].

The fact that intermediate appellate courts review the decisions taken by first instance courts in legal and material aspects once again constitutes a guarantee of taking fair decisions. Knowing that the decisions will be reviewed again may cause first instance courts to be more careful and precise in deciding and in this regard, the introduction of the remedy of intermediate

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55 "The right of recourse to legal remedies is under the right to legal remedies and to fair trial guaranteed by Article 36 of the Constitution and this right does not require all the disputes to be subjected to two or three-tier jurisdiction necessarily. Accordingly, the law maker has the discretion to determine the legal remedies to be resorted to the decisions made by the jurisdictions considering the nature of the disputes unless they are against the fundamental principles and guarantees specified on jurisdiction in the Constitution." Decision of the Supreme Court, Decision Date:19.03.2015, Docket: 2014/149, Decision:2015/31, Date and Number of Official Gazette:13.06.2015/29385. See. http://www.anayasa.gov.tr/Kararlar Databank, Access Date:23.06.2015. It is not possible not to agree with the reasons of the Supreme Court. This is because the justice system must be established in at least two instances in terms of the rule of law. Illegality, errors or omissions might be in question in the decisions rendered by first instance courts. Therefore, carrying out the judicial jurisdiction with at least two or ideally three instance system could ensure taking more accurate and proper decisions and most importantly, protecting personal rights.

56 **Law No. 6545, Article 25:** The "appeal" stated in the headline of Article 52 of the Law No.2577 has been amended into "intermediate appellate"; the "appeal remedy" into "intermediate appellate remedy"; the "its appeal" into "its recourse to the intermediate appellate" and the "appeal of the decisions" in the last sentence into "recourse to the remedy of appeal or intermediate appellate against the decisions."

appellate is positive. However, we think that it would be more appropriate to have a three-tier trial system in the administrative jurisdiction system as a rule as in the judicial trial system instead of a two-tier one (in the system introduced, the three-tier trial is an exception). This is because a three-tier trial system is more reliable compared to a two-tier trial system. Moreover, the establishment of courts of intermediate appellate ensures that the courts of appeal can fulfill their main tasks such as developing case-law and ensuring the unity of case law[57].

1.4. Appeal in Administrative Jurisdiction and Amendments Made by the Law No.6545

Before the Law No. 6545, appeal in the administrative jurisdiction was regulated as an ordinary legal remedy where the legality of the final decisions taken by the judicial chamber of the Council of State and the first instance courts of administrative jurisdiction is controlled[58]. Before moving on to the amendments made in the appeal remedy in administrative jurisdiction by the Law No.6545, a short statement on appeal should be given. First of all, it should be noted that judicial decisions of courts are subjected to an appeal review. Namely, the decisions taken by courts on their administrative duties cannot be subject to appeal[59]. In addition, the final decisions made by courts can be appealed. The court decisions that result in judge's keeping his/her hands off the case, in other words, that end the judicial activity are final decisions[60]. It should be noted that whether the final decisions of courts are meritorious or procedural makes no difference in terms of the ability to recourse to the appeal remedy. Hence, not only the final decisions of the courts that terminate disputes with prejudice but also the final procedural decisions that lead courts to keep their hands off the dispute are subject to the appeal review[61].

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57 Kuru, Bâki, "İstinaf Mahkemeleri Kurulurken", s.550-551.; Erem, agm, s.12-15.; Kuru/Arslan/Yılmaz, age, s.723.; Tanrıver, agm, s.151-157.

58 Please see for detailed information on appeal remedy. Gözübüyük/Tan, age, s.1028 vd.; Çağlayan, İdarî Yargılama Hukuku, s.599 vd.; Çağlayan, İdarî Yargıda Kanun Yolları, s.41 vd.; Kalabalık, Halil, İdarî Yargılama Hukuku, Değişim Yayınları, 1.Baskı, Sakarya, 2003. s.347 vd.; Gözübüyük, A. Şeref, Yönetsel Yargı, Turhan Kitabevi, Güncelleştirilmiş 26.Bası, Ankara, 2007. s.492 vd.; Karavelioğlu, Celâl, Açıklama ve Son İçtihatlarla İdarî Yargılama Usûlü Kanunu, C.II, Karavelioğlu Hukuk Yayınevi, 6.Baskı, Ankara, 2006. s.1672 vd.

59 Çağlayan, İdarî Yargıda Kanun Yolları, s.41 vd.; Çağlayan, İdarî Yargılama Hukuku, s.599 vd.

60 Gözübüyük, Yönetsel Yargı, s.494.; Çağlayan, İdarî Yargılama Hukuku, s.602.

61 Therefore, interim decisions of courts are not subject to appeal by themselves; however, they could be subject to appeal together with the final decisions that terminate the dispute. Çağlayan, age, s.601. "Decisions taken in a trial are interim decisions...The

It appears that the appeal provisions of the Administrative Jurisdiction Procedures Law Have also been changed with the introduction of the intermediate appellate system in administrative jurisdiction by the Law No.6545. According to the new regulation, the appeal remedy is the legality audit for the final decisions taken by regional administrative courts on the cases deemed limited upon the first review of intermediate appellate in accordance with Article 46 of the Administrative Jurisdiction Procedures Law and the final decisions handled by the judicial chambers of the Council of Case as first instance courts in accordance with Article 24 of the Council of State Law and the final decisions taken by first instance courts on the disputes to be subjected to the trial procedures on urgent, central and common examinations[62]. The appeal authority is the Council of State and the term of

decisions on a dispute and taken by the Council of State, administrative and tax courts upon the first review due to the omissions in the petition and the cases brought by a non-lawyer representative cannot be appealed..." Gözübüyük, Yönetsel Yargı, s.494.; Please see for detailed information on interim decisions in administrative jurisdiction. Çağlayan, İdarî Yargıda Kanun Yolları, s.47-51.

62 **Law No. 6545, Article 20:** Article 46 of Law No.2577 was amended as follows.
"Article 46: The decisions taken by judicial chambers of the Council of State and by regional administrative courts on the following cases can be appealed in the Council of State within thirty days as of the notification of the decision, notwithstanding contrary provisions in other laws:
a) Actions for nullity filed against regulatory proceedings.
b)Actions filed against the tax proceedings exceeding a thousand Turkish lira, full judicial proceedings and administrative proceedings.
c)Actions for nullity filed against the proceedings that result in a dismissal from a particular profession, public service or student status.
d)Actions for nullity filed against the proceedings that hinder the performance of a particular business activity for an indefinite period of time or for thirty or more days.
e)Actions for nullity filed against the proceedings of appointments through a common bylaw, direct appointment and dismissal, and appointment, direct appointment and dismissal proceedings of head of departments and higher level public officers.
f) Actions arising from zoning plans and subdivision proceedings.
g)Actions arising from the decisions taken upon the appeal of the Central Commission for Natural Heritage Protection and the Supreme Council of Preservation of Cultural Heritage and from the implementation of the Bosphorus Law No. 2960 and dated 11.18.1983.
h) Actions filed against the proceedings of the implementation of the related legislation on mining, quarrying, forestry, geothermal and natural mineral waters.
ı) Actions filed against the examinations for nation-wide education or the execution of a profession or an art or entry examinations for public services.
i)Actions arising from the implementation of the legislation on granting an operating permission for shore facilities such as ports, cruise ports, marinas, piers, docks, fuel oil and liquefied petroleum gas pipelines.
j)Actions arising from the implementation of the Law No.3996 on 08.06.1994 on Performing Some Investments and Services within the Framework of Build-Operate-Transfer Model

appeal is thirty days as of the notification of the decision[63]. It appears that the term of appeal of the Law No.6545 but the scope of appeal has been changed. The final decisions taken by the regional administrative courts turned into courts of intermediate appellate on the disputes deemed as limited in Article 46 of the AJPL can be appealed. In addition, the final decisions taken by first instance courts on the disputes to be subjected to the trial procedures on urgent, central and common examinations can also be appealed. In accordance with Article 25 of Council of State Law, there has been no change on the ability to recourse to the appeal against the final decisions taken for the cases where the Council of State handles as a first instance court as regulated in Article 24 of the Council of State Law.

Through the Law No.6545, amendments have been also made in Article 48 of the AJPL which stipulates provisions on a petition of appeal. Accordingly, the Council of State or the regional administrative court that makes the appeal decision gives a period of fifteen days to the person concerned to edit and complete the deficiencies in the petition of appeal in accordance with Article 3 of the AJPL. In addition, the Council of State or the regional administrative court decides that no appeal request has been made in case the deficiencies in the petition of appeal are not completed within the given time. Moreover, the following amendments have been made in Article 48 of the AJPL through the Law No.6545: In case all of the required fees and costs are not paid when submitting a petition of appeal, it is notified by the decision-making authority to the appellant in writing that they should be paid in seven days (it used to be fifteen days before the Law No.6545), otherwise, it would be regarded as withdrawn from the appeal. In case the fees and costs are not paid within the given time, the related authority decides to regard the decision as not having been appealed. After the decision is appealed after the legal time has been expired or if it is about a final decision, the decision-making authority decides to reject the appeal. The decisions taken on the assumption of not having been appealed as stated in the paragraph 2 of Article 48 of the AJPL

and the Law No.4283 on 16.07.1997 on the Establishment and Operation of a Generating Plant through Build-Operate-Transfer Model and the Regulation of Energy Sales.

k) Actions arising from the implementation of Free Zones Law No.3218 on 06.06.1985.

l) Actions arising from the implementation of the Law No.5403 on Soil Protection and Land Use on 03.07.2005.

m) Actions filed against the decisions taken by regulatory and supervisory authorities on the market or the sector they are in charge. "

63 Please also see appeal in administrative jurisdiction. Onar, Sıddık Sami, İdare Hukukunun Umumî Esasları, 3.Baskı, C.III, Hak Kitapevi, İstanbul, 1966. s.1992.

can be appealed by the related authority within seven days as of the date of notification. In accordance with the amended Article 48 of the AJPL and Article 21 of the Law No.6545, if it is understood that the necessary fees and costs have not been paid when submitting the petition of appeal, the petition has not been issued in accordance with Article 3 of the AJPL, the appeal has not been taken within the legal time or it has been about a final decision, the decisions mentioned in the paragraphs 2 and 6 of Article 48 of the AJPL are made conclusively by the related chamber and committee of the Council of State where the file is transferred.

Articles 49 and 50 of the Administrative Jurisdiction Procedures Law on appeal have been also amended by the Law No.6545; however, the appeal reasons have been protected in general terms[64]. The reasons for appeal

[64] **Law No. 6545, Article 22:** Article 49 of Law No.2577 was amended as follows including its heading.
"Decisions to be taken on the appeal review:
Article 49: 1.As a result of the review of appeal, the Council of State;
a) Upholds the decision if it deems it lawful. Upholds the decision by changing its reason, in case it deems the reason wrong or incomplete, and even if the consequence of the decision is lawful.
b) Upholds the decision by correcting it in case of material mistakes and correctable deficiencies or mistakes in the decision without requiring the decision to be subjected to a new trial.
2.As a result of the review of appeal, the Council of State reverses the judgment;
a)If a case outside of duties and powers has been handled,
b)If an unlawful decision has been taken,
c) If mistakes or deficiencies that may affect the decision are available in the implementation of procedural provisions.
3. The finalized part is stated in the Council of State Decisions in case decisions are partially upheld and reversed.
4. In the appeal review of the cases handled by the Council of State as a first instance court, the provisions of this Article and Article 50 apply, except for insistence.
5. The judge who makes the decision to be subjected to appeal or participates in the decision-making process cannot attend the appeal review of the same case."
Law No. 6545, Article 23: Article 50 of Law No.2577 was amended as follows.
"Article 50: 1.The decision taken as a result of the appeal review is sent to the decision-making authority together with the file. This decision is notified to the parties within seven days as of the date when the file is delivered.
2.The related authority first examines the file upon the decision of reversal rendered as a result of the appeal review and decides again by completing the investigation proceedings, if any.
3.The regional administration court may comply with the decision of reversal taken by the Council of State or insist on its decision.
4.If it complies with the decision of reversal taken by the Council of State, the appeal review of that decision is made restrictedly in accordance with the decision of reversal.
5.If the regional administrative court does not comply with the decision of reversal

regulated in Article 49 of the Administrative Jurisdiction Procedures Law include the following: The court of appeal reverses the judgment as a result of the review it conducts in case that a case outside of duties and powers has been handled, unlawful decisions have been made and *mistakes or deficiencies that may affect the decision are available* in the implementation of procedural provisions. It seems that all the appeal reasons mentioned in the Law No.2577 are related to the improper implementation of a legal rule. Although the issue of duties and power mentioned among the appeal reasons is a procedural issue and contradiction to procedural provisions is regulated in a separate provision, we believe it is not necessary to say that the mistake mentioned here in duties and power is not a simple procedural one. It should be also expressed that the public order has the authority to implement this Law in accordance with Article 32/2 of the AJPL.

The term "illegality" stated in Article 49 of the AJPL includes the Constitution, international treaties, laws, general regulatory proceedings of the administration, general principles of law and customary law[65]. Court case-laws do not constitute a reason for appeal. However, the decisions of the Council of State Board of Unification of Case Laws are binding for courts (Council of State Law, Art. 40/4), the fact that a contradiction to the decisions of the unity of case law constitutes a illegality that may be accepted as a reason for appeal is unquestionable.

In the previous regulation of Article 49 of the AJPL, the reason for appeal "non-compliance with procedural provisions" has been amended as stated above. It is understood that as the law-maker regulates the requirement of *having errors or deficiencies that would affect the decision in the implementation of procedural provisions as a condition of reversing a decision, the law-maker removes the mistakes and deficiencies that would not affect the decision in the implementation of procedural provisions* among the reasons for reversing a decision. The authority of appeal decides which ones of the mistakes or deficiencies, if any, in the procedural provisions implemented in the decision subject to appeal affect the decision. We believe that the

and insists on its decision, the request is examined and concluded by the Council of State, Committee of Administrative or Tax Judicial Chambers depending on the matter. Compliance with the decisions taken by the Council of State, Committee of Administrative or Tax Judicial Chambers is compulsory."

65 Gözübüyük/Tan, age, s.1035.; Kuru, Bâki, Hukuk Muhakemeleri Usûlü, Demir Yayınları, 6.Baskı, İstanbul, 2001. s.4533-4534.; Sivrihisarlı, Ömer, Hukuk Yargılamasında Maddî Hukuka İlişkin Temyiz Nedenleri ve Yargıtay Denetiminin Kapsamı, Doktora Tezi, İstanbul, 1978. s.27.

reason for this amendment made by the law-maker in the appeal reasons regarding the implementation of procedural provisions might be to prevent the reversal of the decision due to incidental or simple procedural mistakes or deficiencies. Therefore, it is aimed to avoid keeping courts busy and increasing the workload due to simple procedural mistakes and deficiencies

In accordance with Articles 49 and 50 of AJPL, the Council of State as the court of appeal reverses a decision in case of a reason that requires the reversal of the decision taken by the related authority and sends the related case file to the related authority who takes the decision for a new decision. In case of no reasons for a reversal, the Council of State takes an approval decision. If it appears as a result of the appeal review that material mistakes and deficiencies or mistakes in decisions can be corrected, the decision is approved after being corrected or as included in the new regulation, if the reason of the decision is wrong or deficient, it is approved after the reasons is changed. It would not be wrong to say that these amendments aim to ensure that the decision is not reversed due to simple mistakes, deficiencies or errors and the trial process is accelerated.

In accordance with Article 50/3 of the AJPL, the regional administrative court may comply with the decision of reversal taken as a result of a review by the Council of State upon the appeal of the final decisions regarded as limited in Article 46 of the AJPL or may insist on its decision[66]. In accordance with the new regulation introduced in Article 50/4 through the Law No.6545, if complied with the reversal taken by the Council of State, the appeal review of this decision is made "restrictedly with the compliance with the reversal". In other words, the Council of State handles the same decision that it has reversed before again, it performs the appeal review as to check the compliance with the previous reversal and does not render a new or another judgment. Therefore, it audits whether the related authority has rendered a judgment based on the reasons for the reversal and also eliminates the vicious circle regarding the continuous appeal of the related decisions. -

It should be briefly noted here that a re-trial is not held in the appeal remedy without doubt. In other words, the incidents and evidence examined

[66] To mention briefly, the judicial chamber making the decision cannot insist on its decision against the reversal taken as a result of the appeal review of the cases to be handled by the Council of State as a first instance court in accordance with Article 49 of the AJPL. It means that the judicial chamber of the Council of State making the decision as a first instance court has to comply with the reversal rendered by the Council of State, Committee of Administrative or Tax Judicial Chambers. Gözübüyük, Yönetsel Yargı, s.512.

by the related authority are not assessed again. The court of appeal cannot do any research for new information and documents as a rule but conducts investigations over the case file[67]. However, the facts and evidence that appear after the decision of the relevant authority and that affect the given decision can be suggested in the appeal remedy[68]. This is because; the purpose in all the judicial activities is to reveal the material fact.

To mention briefly, the most important difference between remedy of appeal and intermediate appellate is that the review of intermediate appellate is limited to legality audit. It means that the facts and evidence examined by the related authority during the appeal review as a rule are not subjected to an assessment. In accordance with the new regulation introduced by the Law No.6545, the regional administrative court reviews the decision taken by the first instance court in terms of both legality and materiality in an intermediate appellate review except that it finds the intermediate appellate application against the decisions rendered upon the first review rightful and the case has been handled by a court that is lack of jurisdiction or authority by a rejected or prohibited judge[69]. As the court of appeal, if the Council of State sees a illegality in its review, it reverses the judgment and sends the case file to the relevant decision-making authority to render a new judgment in accordance with the reversal. If the regional administrative court deems the decision subjected to the intermediate appellate rightful as a court of intermediate appellate, it decides on the rejection of the intermediate appellate application (correcting the material mistakes in the decision, where possible). If the regional administrative court does not deem the decision taken by the first instance court rightful in its review, it annuls the decision of the first instance court and concludes the case on its merits. There is no doubt that the decision taken by the regional administrative court as the court of appeal is not the decision taken by the first instance court, it is a new decision[70] and it is a final decision except the decisions that are regarded as restricted in Article 46 of the AJPL and can be appealed.

1.5. Appeal for the Sake of the Law Amended by the Law No.6545

To mention briefly under this heading, the heading of Article 51 of the AJPL "reversal for the sake of law" was amended into "appeal for the sake of

67 Çağlayan, İdarî Yargıda Kanun Yolları, s.94.
68 Gözübüyük, Yönetsel Yargı, s.493.; Gözübüyük/Tan, age, s.1028 vd.
69 Akil, Cenk, İstinaf Kavramı, Yetkin Yayınları, Ankara, 2010. s.205.
70 Yılmaz, Ejder, İstinaf, Yetkin Yayınları, Ankara, 2005. s.22vd.

law" by the Law No.6545 and the amendments that comply with other new regulations have been made in the Article[71]. The reversal is a legal decision taken as a result of the legal remedy review and therefore, it is possible to say that the amendment made in the heading of the related Article is to the point. The appeal for the sake of law can be defined as an extraordinary legal remedy among all legal remedies. This is because the appeal for the sake of law is a legal remedy that can be sought against the administrative jurisdiction decisions concluded without going through a remedy review since no ordinary legal remedy is foreseen or even if it is foreseen[72].

As it used to be before the Law No.6545, the reversal in the appeal for the sake of law does not have any consequences on the decision concluded before[73]. It should also be noted that we believe it is not important that the cases handled by the Council of State as a first instance court have not been mentioned in the new regulation of Article 51 of the AJPL which has been amended by the Law No.6545. This is because '*the decisions concluded without going through an appeal review'* are mentioned in the new regulation. The final decisions handled by the Council of State as a first instance court can be appealed; therefore, if these decisions are finalized without going through an appeal review, it is true that they could be appealed for the sake of law. In Article 51 of the AJPL, the reason for regulation the appeal for the sake of law can be said to ensure revealing the finalized decisions contrary to law and taking decisions in compliance with the applicable laws by administrative jurisdictions and therefore ensuring the unity of case-law albeit partially.

1.6. Elimination of the Correction of a Decision through the Law No. 6545

Another novelty introduced by the Law No. 6545 is that Article 54 of the

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71 **Law No.6545,** Article 24: The heading of Article 51 of the Law No.2577 has been amended into "Appeal for the sake of law", while "the decisions of the regional administrative decisions and the ones taken by administrative and tax courts and the Council of State as the first instance courts" stated in the first paragraph into "the final decisions concluded by administrative and tax courts and regional administrative courts and intermediate appeal or" and "the court or the Council of State" states in the second paragraph into "the authority".

72 Çağlayan, İdarî Yargılama Hukuku, s.623 vd. Çağlayan, İdarî Yargıda Kanun Yolları, s.100-104.; Kalabalık, age, s.353. Gözübüyük, Yönetsel Yargı, s.515.; Gözler, Kemal/Kaplan, Gürsel, İdare Hukuku Dersleri, Ekin Yayınevi, 14.Baskı, Bursa, 2013. s.850.

73 See. Gürkan, Mehmet Fatih/Deniz, Yusuf/Boz, Selman Sacit, "İdarî Yargıda Kanun Yararına Bozma", Selçuk Üniversitesi Hukuk Fakültesi Dergisi, 30.Yıl Armağanı, Cilt:21, Sayı:1, Konya, 2013. s.105-127.

AJPL, which is the remedy of "correction of a decision", has been annulled[74]. In addition, the decisions stated in Article 47 of the AJPL that cannot be appealed have been annulled with the introduction of new regulations and the intermediate appellate system in administrative jurisdiction. It should be noted that the abolishment of *correction of the decision* introduced in the trial system as a peculiar remedy due to the absence of intermediate appellate courts, if it is possible that regional administrative courts acquire the qualifications of courts of intermediate appeal and make a new judgment on the merits in the intermediate appellate review as a rule or the material mistakes in the decision of the first instance court, they make the necessary correction and the decision. In our opinion, abolishment of the remedy of correction of a decision is only good to reduce the complaints saying that the intermediate appellate system would prolong the cases[75]. Besides, the fact that the final decisions taken by regional administrative courts as a result of their intermediate appellate decisions are conclusive, the final decisions taken by the judicial chambers of the Council of State as a first instance court are subjected to the appeal review, the final decisions taken by first instance courts on the disputes for which the trial procedures on urgent, central and common examinations are foreseen are subjected to the appeal review and these decisions are finalized by deciding on the merits in the appeal as a rule invalidates the reason for the abolishment of the remedy of correction of a decision, in our opinion. Similarly, the remedy of correction of a decision has been abolished with the introduction of regional administrative courts and intermediate appellate remedy in judicial jurisdiction system; however, the final decisions taken by the intermediate appellate courts can be appealed as a rule in the judicial jurisdiction. That is to say, a three-tier trial mechanism is available in the judicial jurisdiction system. As the illegalities, mistakes and deficiencies that may appear in the decisions of regional administrative courts can be revised in the third level jurisdiction, it is possible to say that abolishment of the remedy of correction of a decision in the judicial jurisdiction is reasonable and rightful. In administrative jurisdiction, if we set aside the decisions on the cases that will be finalized in the first level, any decision is subject to the three-tier trial system, except for the final decisions taken by regional administrative courts on the cases foreseen to be appealed

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74 **Law No. 6545, Article 103:** The following provisions were annulled. …
b) Articles 47 and 54 of the Administrative Jurisdiction Procedures Law No.2577 on 06.01.1982.

75 Yılmaz, age, s.98.; It is also stated that the intermediate appellate system slows down the trial process. See. Yıldırım, "Teksif İlkesi Açısından İstinaf", s.95.

in Article 46 of the AJPL. In addition, the rule stating that the final decisions taken by the judicial chambers of the Council of State on the cases that they will handle as first instance courts are subjected to an appeal review has been maintained exactly, and the Council of State cannot make a decision on the merits during the appeal review as a rule. Therefore, it seems that a two-tier trial system is maintained here as a rule. It should be considered that unlawful, wrong or incomplete decisions may be taken at any time regardless of a decision given on the merits of the related case in the second level jurisdiction in administrative jurisdiction. Therefore, the fact that the remedy of the correction of a decision in administrative jurisdiction has been abolished under the new regulations is, in our opinion, not consistent with the principles of legal security and the right to legal remedies, which are the indispensable elements of a state of law. However, the Supreme Court has not deemed the legal provision that abolishes the remedy of the correction of a decision in administrative jurisdiction unconstitutional: "It is understood that the remedy of correction of a decision has been abolished in administrative jurisdiction considering that filing a remedy of correction of a decision following the appeal remedy would prolong the trial process with the adoption of the intermediate appellate system in administrative jurisdiction. In this regard, in order to prolong the trial process unnecessarily in administrative jurisdiction, the rule that stipulates the abolishment of the remedy of correction of a decision considering the public interest is at the discretion of the law-maker and the abolishment of the stated remedy which ensures reviewing a decision made by the appeal authority by the same authority for the second time does not have any aspects that harm the right to fair trial.[76]"

2. Amendments in the Administrative Jurisdiction through Law No. 6552

When the Law No.6552 is examined, it seems that the regulations introduced in administrative jurisdiction through this Law are as follows: Article 20/B has been included to come from Article 20/A of the Administrative Jurisdiction Procedures Law No.2577 with the heading of trial procedures on central and common examinations. Article 28 of the Administrative Jurisdiction Procedures Law, which regulates the results of the administrative jurisdiction decisions, has been amended. It should be noted immediately that execution of the amendments made in Article 28 first suspended by the

[76] Decision of the Supreme Court, Decision Date:19.03.2015, Docket: 2014/149, Decision:2015/31, Date and Number of Official Gazette:13.06.2015/29385. See. http://www.anayasa.gov.tr/Kararlar Databank, Access Date:23.06.2015.

Supreme Court and then abolished. The abolished provisions are discussed in the study briefly. The reason for the discussion, despite the cancellation of the related provisions, is that they are related to the results of the administrative jurisdiction decisions, which is a highly important issue in administrative jurisdiction. In our opinion, it is beyond question that the implementation of administrative jurisdiction decisions is so important just like administrative jurisdiction decisions. Here, first the trial procedure on central and common examinations and then the results of the administrative jurisdiction decisions are analyzed.

2.1. Trial Procedures on Central and Common Examinations in Administrative Jurisdiction

As is in the urgent trial procedures, a new trial procedure has been foreseen on central and common examinations with the insertion of Article 20/B of the Administrative Jurisdiction Procedures Law by Article 96 of the Law No.6552[77].

[77] **Law No. 6552, Article 96:** The following Article 20/B has been included to come after the Article 20/A of the Administrative Jurisdiction Procedures Law No.2577 on 06.01.1982.
"Trial procedures on central and common examinations
"Article 20/B: 1.In the trial procedures on the cases filed for the central and common examinations organized by the Ministry of Education and the Student Selection and Placement Center, proceedings for these examinations and the examination results:
a) The term of litigation is ten days.
b) The provisions of Article 11 of this Law do not apply.
c) The first examination is carried out within seven days, and the petition and attachments are notified.
d) The defense time is three days following the notification of the petition, which may be extended up to three days only for once. The file is deemed to be consummated when the defense is submitted or the time to submit a defense is expired.
e) The decisions to be taken in request for suspension of execution cannot be appealed.
f) These cases are resolved within fifteen days from the consummation of the file. The proceedings such as taking an interim decision, performing an investigation or an expert examination or holding a hearing are concluded immediately.
g) The remedy of appeal can be resorted within five days from the date of notification for final decisions.
h) Petitions of appeal are examined and notified within three days. The provisions not contrary to this Article 48 of this Law apply by analogy.
i) The time to respond to the petitions of appeal is five days.
j) If the Council of State deems the information obtained on material facts sufficient or the appeal is only on legal points or the material mistakes in the decision appealed are possible to be corrected as a result of an examination performed by The Council of State on the document, the Council of State takes a decision on the merits of the case. Otherwise, the Council of State takes a new decision on the merits by carrying out the necessary review and investigation on its own. However, it sends the file back by reversing the judgment in case it deems that the appeal against the decisions taken upon the first investigation is rightful. The decisions made on appeal are final.

As is in the urgent trial procedures, it seems that the reason for the introduction of the trial procedures on central and common exams is to accelerate the trial process. The terms introduced in the urgent trial procedures have been shortened compared to the overall terms in the administrative jurisdiction procedures, while the trial procedures in central and common examinations have been shortened further compared to the urgent trial procedures. While the term of litigation is thirty days in the urgent trial procedures, the term of litigation is determined to be ten days in the trial procedures on central and common examinations. Besides, while it is regulated that the time to prepare a defense is fifteen days as of the notification of the petition and can be extended for fifteen days for once, this time is three days in the trial procedures on central and common examinations and can be extended for maximum three days for once. While a decision can be made within one month at the latest as of the consummation of the file in the cases subjected to the urgent trial procedures, this time is fifteen days in the trial procedures on central and common examinations. In the urgent trial procedures, the final decisions taken by the first instance court can be appealed within fifteen days as of the notification date, while this time is reduced to five days in the trial procedures on central and common examinations. In the trial procedures on central and common examinations, it is regulated that the petitions of appeal are reviewed and notified within three days, as in the urgent trial procedures. The time for a reply to the petitions of appeal has been shortened compared to the urgent trial procedures. While the term of litigation is fifteen days in the urgent trial procedures, the term of litigation is determined to be five days in the trial procedures on central and common examinations. Consequently, while it is regulated in the urgent trial procedures, the appeal system is finalized within two months at the latest and the decisions is notified within one month maximum, it is stipulated in the trial procedures on central and common examinations that the appeal system is finalized within fifteen days at the latest and the decision is notified within seven days.

As in the urgent trial procedures, it is stipulated in administrative jurisdiction that the decisions to be taken for suspension of execution in the cases where the trial procedures on central and common examinations

k) Appeal requests are settled within fifteen days at the latest. The decision is notified within seven days at the latest.

2. The suspension of execution and the annulment decisions in the cases filed on the central and common examinations organized by the Ministry of Education and the Student Selection and Placement Center, proceedings for these examinations and the examination results apply to result in favor of the people taking these exams."

cannot be appealed. It would not be wrong to say that this regulation also aims to accelerate trial procedures. In a case filed in the Supreme Court claiming that the abolishment of the remedy of appeal against the decisions taken on the requests for suspension of execution in the cases subjected to the urgent trial procedures restricts the right to legal remedies by abolishing the suspension of execution, the Supreme Court did not deem the related regulation unconstitutional[78]. However, the fact that the decisions on the suspension of execution cannot be appealed is incompatible with the state of law. The procedures to be carried out to accelerate the judicial activities by the law-maker should not be to remove privileged and important remedies of the state of law. In other words, it should be to make them more functional and rapid rather than restricting the control of illegalities.

It is stipulated that the proceedings such as taking an interim decision in the trial procedures on the central and common examination, performing an investigation or an expert examination or holding a hearing are concluded immediately in order to accelerate the trial process, as in the urgent trial procedures. In making regulations that would aim to conclude judicial decisions urgently, the right to a fair trial and the right to legal remedies should not be restricted as a requirement of a state of law. As mentioned above, we believe the rule stipulating that the term for recourse to the remedy of appeal against the final decisions taken by the first instance court in the trial procedures on the central and common examination is restricted to five days as of the notification of the decision by the Law No.6552 may lead

[78] In the Constitution, the remedy of suspension of execution is included, while there are no provisions that require the projection of an appeal remedy against the decisions taken on the request for suspension of execution. Therefore, whether granting an appeal right against the decisions of suspension of execution is at the discretion of the law-maker. As the decisions taken on the appeal of suspension of execution is an interim decision like the decision of suspension of execution, they are not binding in terms of the decision to be taken on the merits. The main purpose of the urgent trial procedures is to ensure that the trial is concluded with a final decision within the shortest time possible. It is understood that the law-maker has abolished the appeal remedy against the decisions on the suspension of execution in the cases subjected to the urgent trial procedures. In this regard, the abolishment of the appeal remedy against the decisions on the suspension of execution in the cases subjected to the urgent trial procedures to accelerate the trial process is at the discretion of the law- maker and the abolishment of the remedy of appeal that allows for the revision of the decision on the suspension of execution does not include any aspects that harm the right to fair trial. Decision of the Supreme Court, Decision Date:19.03.2015, Docket: 2014/149, Decision:2015/31, Date and Number of Official Gazette:13.06.2015/29385. See. http://www.anayasa.gov.tr/Kararlar Databank, Access Date:23.06.2015.

to loss of rights.. Therefore, a fair, reasonable and acceptable balance should be created between the right to a fair trial and the right to legal remedies with the acceleration of trial process in accordance with the principles of state of law and administrative law while establishing legal rules.

In Article 20/B of the AJPL it is regulated that the suspension of execution and the annulment decisions in the cases filed on the central and common examinations organized by the Ministry of Education and the Student Selection and Placement Center, proceedings for these examinations and the examination results apply to result in favor of the people taking these exams." According to this regulation, in case of the cancellation of the examination in a case filed against an examination specified in the provision, the people who take the exam should be regarded that they pass the exam. The cancellation of an exam question, wrong evaluation of the exam results and in similar cases, the proceedings that would be in favor of the person who takes the exam should be established by the administration. This is because provision of legal security and protection of legitimate expectations with vested rights are the main duties of the legal administration. The purpose of the related regulation can be said to ensure this main duty of the administration.

2.2. Results of the Administrative Jurisdiction Decisions

In Article 28 of the Administrative Jurisdiction Procedures Law, some amendments were made by the Law No.6552[79]. Given the new regulation, it was seen at first sight that the implementation of judicial decisions would come to a formal state. However, the Supreme Court first suspended the execution

[79] **Law No. 6552, Article 97:** The third and fourth sentences of paragraph 1 of Article 28 of the Law No.2577 were amended as follows and the following sentence was added into the paragraph.
"However, the court decisions taken on the proceedings such as external or direct appointment or appointment by proxy to the positions bearing the titles shown in the Tables 1 and 2 in the attachment of the Law No.2451 on Appointment in Ministries and Subsidiaries on 23,04.1981 and to the positions of head of department and higher, even if they are subjected to different appointment procedures, and to the law enforcement positions, except civil servant positions, and also dismissal from these positions, displacement regarding these positions and changes of duty and title are fulfilled within two years by appointing the related person to another position in accordance with his/her vested right to a monthly salary. The implementation of the aforementioned proceedings on this staff is not regarded as the losses that are difficult or impossible to recover.
Non-performance of the case decisions on the proceedings stated in the third sentence of the paragraph hereby cannot be subjected to a criminal proceeding and investigation; however, disciplinary provisions are reserved."

of these amendments first[80] and then decided on their cancellation[81].

In the amendments made in Article 28 of the Administrative Jurisdiction Procedures Law No.6552 and abolished by the Supreme Court, it was stipulated that the implementation of the above-mentioned proceedings on civil servants stated in this rule would not be regarded as one of the states which result in the losses difficult of impossible to recover. It should be noted that, the rules on the remedy of suspension of execution are regulated in Article 125 of the Constitution. Accordingly, a decision stating that *"In case the fact that losses that are difficult or impossible to recover have arisen and the administrative proceeding is explicitly contradictory to law co-occurs as a result of the implementation of the administrative proceeding, the execution is suspended"* can be made. In the paragraph 6 of Article 125 of the Constitution, it is concluded that *"The decision of suspending the execution can be limited by law depending on the state of emergency, martial law, mobilization, war and national security, public order and overall health reasons"*. According to the Supreme Court; "The rules on the suspension of execution can be freely regulated by the law-maker like other judicial procedures law if they remain within the scope of Article 125 of the Constitution and are not contradictory to other basic rules of the Constitution.[82]" In this scope; "although the restriction of the suspension of execution, *'is at the discretion of the law-maker but this discretion is clearly not unlimited and arbitrary. Material and concrete reasons should be available to make a regulation that restricts the suspension of execution based on the reason for a public order specified by the law-maker in the Constitution'*. In addition, the state of law regulated in Article 2 of the Constitution is based on not restricting the right to legal remedies but extending the judicial control of the administration[83]. Briefly,

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80 Decision of the Supreme Court, Decision Date:02.10.2014, Docket: 2014/149, Decision:2015/14 (Suspension of Execution), Date and Number of Official Gazette: 09.01.2015/29140. See. http://www.anayasa.gov.tr/Kararlar Databank, Access Date:23.06.2015.

81 Decision of the Supreme Court, Decision Date:02.10.2014, Docket: 2014/149, Decision:2015/151, Date and Number of Official Gazette:01.01.2015/29223. See. http://www.anayasa.gov.tr/Kararlar Databank, Access Date:23.06.2015.

82 Decision of the Supreme Court, Decision Date:21.06.1991, Docket: 1991/20, Decision:2015/17, Date and Number of Official Gazette:30.09.1992/21361. See. http://www.anayasa.gov.tr/Kararlar Databank, Access Date:03.06.2015.

83 "The state of law regulated in Article 2 of the Constitution is a state that is established based on human rights, strengthens these rights and freedoms, performs lawful acts and actions, creates a fair legal order in each field and maintains and improves it, avoids unconstitutional situations and manners, makes law sovereign in all government organs, regards itself as abiding by the Constitution and laws and is open to the judicial

the remedy of '*suspension of execution' is a very effective part of the right to action as a tool that increasing the control effectiveness of the jurisdiction*[84]". The Supreme Court has annulled the provision of the Law No.6552 regulating that the implementation of all kinds of proceedings such as appointment, dismissal or change or duty and title in the positions specified in the Tables 1 and 2 in the attachment of the Law No.2451, or the positions of head of department and higher, even if they have different appointment procedures, and in law enforcement positions cannot be regarded as the situations that cause losses difficult of impossible to recover with the following reasons: "The rule in dispute regulates that some proceedings performed by the administration cannot be regarded as the situations that cause losses difficult of impossible to recover for the concerned people. Therefore, one of the requirements to make a decision on the suspension of execution, which is '*causing losses that are difficult or impossible to recover*' is ignored by the law-maker and therefore, administrative jurisdictions are prevented from making a suspension of execution decision. In accordance with the rule, as the prevention of exercising the authority to suspend execution is a situation that exceeds the reasons for restricting this authority as foreseen in the paragraph 6 of Article 125 of the Constitution and harms the merits of the right and also causes the judicial control to be restricted by depriving one of the most powerful instruments of the administrative jurisdiction … The ability to decide on the suspension of execution in the cases where the implementation of an administrative proceeding would cause losses that are difficult or impossible to recover, is an important possibility that enable people to exercise their right to legal remedies and any regulation that abolishes or cancels this remedy would be contradictory to the right to legal remedies specified in Article 36 of the Constitution… Given these issues, it is concluded that individuals have been deprived of the remedy of suspension of a decision, which enables

control." Decision of the Supreme Court, Decision Date:09.04.2014, Docket: 2014/38, Decision:2015/80, Date and Number of Official Gazette:23.05.2015/29008. See. http://www.anayasa.gov.tr/Kararlar Databank, Access Date:03.06.2015.

[84] "The 'suspension of execution' is also included in the case concept. The authority of suspension of execution of the court is a stage within the duty of hearing and concluding the case. The decision on suspending the execution is a pre-implementation of the principle of unity of law. This decision is a section in which the result is different from the decision but still related to that case. Accepting that the body authorized to make the final decision cannot decide on the other part of the case does not comply with the full exercise of the judicial power." Decision of the Supreme Court, Decision Date:21.10.1993, Docket: 1993/33, Decision:2015/-2, Date and Number of Official Gazette:06.11.1993/21750. See. http://www.anayasa.gov.tr/Kararlar Information Bank, Access Date:05.06.2015.

them to exercise their right to legal remedies more effectively with the rule in dispute in an unconstitutional manner[85]". According to the Supreme Court, "… As it is essential to ensure and protect basic rights and freedoms of individuals in a state of law, individuals should be given assurances that would enable them to seek a right to legal remedies more effectively… The fact that court decisions cannot be changed, legislation and execution cannot intervene in or abolish the legal situations that have arisen by finalized judicial decisions are among the main principles of a state of law… Therefore, the administration should comply with the final decisions taken for it in order to protect the constitutional assurances of the person who is a party to the legal case and to ensure legality… Having doubts on the belief and confidence in justice would make the judicial organ that protects the justice regarded as the basis of a state and that is authorized to secure the justice non-functional, and when the perception that a judicial decision is not binding is created, the administration would be given the opportunity to act arbitrarily… Taking a dispute before a court and requesting the implementation of the decision taken by the court is an indispensable requirement of the right to legal remedies that allows for the trial to have a result. The right to access to a court, which is a requirement of the right to legal remedies also requires the decision taken as a result of the trial to be implemented exactly and urgently. The regulations that make court decisions inapplicable would also make the right to access to court meaningless...In the rule in dispute, the regulations on the appointment of a concerned person to another position within two years are introduced in order to implement the judicial decisions taken on some administrative proceedings such as appointment to and dismissal from some positions with a title and law enforcement positions (excluding civil servants). Therefore, the remedy of implementing the judicial decisions taken as a result of the implementation of the above-mentioned proceedings by the related administrations exactly and urgently has been abolished, which may cause that the court decisions taken

[85] "Given the fact that the proceedings stated in the rule in dispute do not have any other characteristics than other administrative proceedings, the decision of the suspension of execution may be taken when the conditions that the administrative proceeding is explicitly contradictory to law and it causes losses difficult or impossible to recover if implemented co-occur, it is clear that prevention of taking the decision of suspension of execution by accepting in advance that some proceedings do not cause losses difficult or impossible to recover does not ensure public interest and protect public order. Public order is further disturbed where law is excluded and justice becomes ineffective." Decision of the Supreme Court, Decision Date:02.10.2014, Docket: 2014/149, Decision:2015/151, Date and Number of Official Gazette:01.01.2015/29223. See. http://www.anayasa.gov.tr/Kararlar Databank, Access Date:23.06.2015.

by the administrative jurisdiction authorities on the related people remain inconclusive... The fact that the administration carries out court decisions is a main duty in accordance with the principle of bindingness specified in Article 138 of the Constitution and it does not have an alternative option to delay or not implement decisions[86]".

As is known, as a result of accepting the request for suspension of execution by the courts or inherent consequence of the action for nullity in the cases filed by public officers against appointment proceedings is that the concerned person returns his/her duty. As in the regulation annulled by the Supreme Court, the decisions that do not allow for the public officers to return their previous duties simply means that the judicial decisions are not explicitly implemented and this is clearly against the principle of state of law regulated in Article 2 of the Constitution[87]. It should be also noted

[86] "In Article 2 of the Constitution, it is stated that the Republic of Turkey is a state of law. A state of law is a state that is established based on human rights, strengthens these rights and freedoms, performs lawful acts and actions, creates a fair legal order in each field and maintains and improves it, avoids unconstitutional situations and manners, makes law sovereign in all government organs, regards itself as abiding by the Constitution and laws and is open to the judicial control...The fact that people trust in the state, build their material and spiritual presence, benefit from the fundamental rights and freedoms can only take place in a legal system that ensures legal security and the rule of law. Keeping the judicial remedy applicable against the acts and actions of the state is not enough to ensure legal security and rule of law, the decisions taken by the judicial authorities should also be implemented without delay. Although a proceeding is determined to be contradictory to law as a result of the judicial control, not implementing the judicial decision on the abolishment of the proceeding makes keeping the judicial remedy applicable against the acts and actions of the state meaningless. This is because legal security can be ensured not by determining illegalities but also eliminating them with all their consequences. Taking effective measures that would ensure the bindingness of court decisions and their urgent implementations is one of the minimum requirements of the state of law...The most effective judicial protection mechanism that individuals have against the administration in terms of the right to legal remedies is an action for nullity. In an action for nullity, the administrative proceeding is annulled in case a contradiction to legal rules is determined and therefore, the legal adherence of the administration and protection of the legal order are maintained. In this regard, making the legal results that the individuals seeking legal remedies would like to acquire ineffective through a legislative act eliminates the feeling of trust in the state. This does not complies with the right to legal remedies and the principles of legal security and state of law." Decision of the Supreme Court, Decision Date:02.10.2014, Docket: 2014/149, Decision:2015/151, Date and Number of Official Gazette:01.01.2015/29223. See. http://www.anayasa.gov.tr/Kararlar Databank, Access Date:23.06.2015.

[87] These have been also stated in the illegality arguments alleged by the plaintiffs in the action for nullity filed in the Supreme Court: "…In today's modern state of law, the control of the administration that has the authority to exercise the public power to carry out the

that public officers return their previous duties as a result that the illegality is determined by a decision taken by the court if they claim an illegality is in question in the appointment proceedings against which they have brought a case. It is assumed that the decisions taken in the actions for nullity in administrative jurisdiction invalidate the proceeding in dispute right from the start, and in other words, the proceeding annulled is assumed not to have arisen in the legal realm and not to have been performed at all[88]. It should be briefly stated that judicial decisions do not deliver a retrospective consequence by themselves and the administration is in charge of ensuring the implementation of the annulled proceeding[89]. When the administrative

public interest by independent judicial bodies is of great importance in ensuring that the administration abides by legal rules. The judicial control is accepted as an obligatory requirement to protect fundamental rights and freedoms of the ruled and to enable the rulers to act in compliance with law. Therefore, the judicial control is indispensable in a state of law...However, the control of the administration by independent judicial bodies is not enough to discuss a state of law; the decisions taken by administrative judicial bodies should also be implemented by the administration. For this reason, it is foreseen as a Constitutional rule that the legislative and executive bodies cannot change court decisions under any circumstances, nor delay their implementation...The Constitutional rules that serve as the highest agreement in a modern state of law are the fundamental binding and authoritative legal rules. As required by the Constitutional rules, implementation of court decisions as they are and without any delay is obligatory just because they are the judicial decisions, regardless of their being right and fair. In a democratic state of law that aims to ensure and secure human rights and freedoms, social justice and social well-being and welfare, not implementing a decision despite the Constitutional and legal rules would make those legal regulations stay on paper and trivialize them...In the Turkish doctrine, the common definition of a state of law is the protection of fundamental rights and freedoms of an individual against the coercion of the superior state and the limitation and supervision of the public power. In addition, one of the most effective means of achieving the principle of state of law is the actions for nullity filed against the proceedings of the administration; and it is not acceptable not to implement judicial decisions in a real state of law and there is no need to say that it is compulsory to implement judicial decisions. Implementation of court decisions is a natural consequence of the principle of "state of law…"Decision of the Supreme Court, Decision Date:02.10.2014, Docket: 2014/149, Decision:2015/151, Date and Number of Official Gazette:01.01.2015/29223. See. http://www.anayasa.gov.tr/Kararlar Databank, Access Date:23.06.2015.

88 Yıldırım, İdarî Yargı, s.529.; please also see. Atay, E. Ethem, "İptal Davasının Nitelikleri ve İptal Kararlarının Uygulanması", Danıştay ve İdarî Yargı Günü Sempozyumu, Danıştay Yayınları, Ankara, 2007. s.61.

89 As is known, the actions for nullity in administrative jurisdiction ensure the validity of the legal states before performing the related proceeding. In other words, the decisions taken by administrative jurisdiction authorities on actions for nullity have two sorts of effects on the proceeding in dispute; elimination of the proceeding in dispute and other related proceedings performed depending on it as of the date when they are carried out and returning the legal status before the performance of the proceeding, which means bringing the legal order into the state of undisturbed at all. Decision of the Supreme Court,

proceeding is assumed to be unavailable, the administration should return the public officer exactly to his/her previous duty without any delay. In case of the annulment of the proceedings that result in the dismissal of public officers from their duty, the administration has to return all the financial and personal rights of the public officers retrospectively[90]. It should be also noted that the administration has to take the necessary actions within thirty days as of the notification of the court decision on the annulment or suspension of execution to the administration in accordance with Article 28 of the AJPL. In accordance with this provision, the administration has to take an action on the matter in dispute immediately, the thirty-day period mentioned in the related provision is the final period that the administration has to follow in case of an extension of the final decision to be taken by the administration due to Force Majeure or an unexpected situation. Namely, it is essential for the administrative jurisdiction decisions to be implemented immediately and without any delay in terms of time. Therefore, the administration has to take actions without waiting for this thirty-day period stated in this provision (if Force Majeure or unexpected situations do not arise). In this case, giving a two-year period to implement the judicial decisions to the administration is inexplicable in any terms including legal security and right to legal remedies as in the amendments in Article 28 of the AJPL.

As stated above as well, in the amendments introduced in Article 28 of the Administrative Jurisdiction Procedures Law through the Law No.6552 and abolished by the Supreme Court, it is stipulated that non-performance of the case decisions on the proceedings stated in this rule cannot be subjected to a criminal proceeding and investigation. According to Article 160 of the Law on Criminal Procedure, "The public prosecutor begin investigating the truth as soon as he finds out a case giving the impression that a crime has been committed through notification or another way in order to decide whether a criminal case should be filed or not." In addition, in Article 170 of the Law on Criminal Procedure, it is stipulated that in case the evidence collected at the end of the investigation process constitutes adequate suspicion that the crime has been committed, the Public Prosecutor issues a bill of indictment. According to these provisions, the Public Prosecutor is in charge of investigating the truth as soon as he finds out a case giving the impression that a crime

Decision Date:02.10.2014, Docket: 2014/149, Decision:2015/151, Date and Number of Official Gazette:01.01.2015/29223. See. http://www.anayasa.gov.tr/Kararlar Databank, Access Date:23.06.2015.

90 Yıldırım, İdarî Yargı, s.529.

has been committed through notification or another way in order to decide whether a criminal case should be filed or not and if deemed necessary, issuing a bill of indictment and filing a criminal case regardless of the nature and type of the warning, complaint and the case giving the impression that a crime has been committed. However, in accordance with the amendment made in Article 28 of the AJPL abolished by the Supreme Court, the public prosecutor carry out any proceedings and fulfill its duties even if he finds out a case giving the impression that a crime has been committed their duties, which was not compatible with being a state of law[91]. The Supreme Court abolished this regulation, which was clearly contradictory to the Constitution, with the following reasons: "…Implementation of court decisions is an element that completes the judicial process and enables the trial to deliver a result. In case the decision is not implemented, the trial would not make any sense either… Implementation of judicial decisions is considered under the '*right to access to court*'. Accordingly, the fact that the court renders a decision at the end of the trial is not enough and this decision should be implemented effectively as well. In case that there are regulations that make final decisions inapplicable in a manner that delivers a results against one of the parties or the implementation of court decisions is hindered by any means in the legal system, '*the right to access to court*' becomes meaningless… The obligation to implement court decisions is ruled out by regulating that non-performance of the judicial decisions taken on the proceedings stated in the rule in dispute cannot be subjected to a criminal proceeding and investigation; therefore this allows for the impunity of an act that involves a crime…[92]".

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91 "A state of law stated in Article 2 of the Constitution is a state that performs lawful acts and actions, respects human rights, strengthens these rights and freedoms, creates a fair legal order in each field and maintains and improves it, avoids unconstitutional situations and manners, abides by the Constitution and rule of law and is open to the judicial control. Implementation of court decisions, which is the most concrete reflection of law and justice, is a requirement of being a 'state of law" and understanding of "an administration adhering to law', which is one of its indispensable conditions." Decision of the Supreme Court, Decision Date:27.09.2012, Docket: 2012/22, Decision:2015/133, Date and Number of Official Gazette:11.10.2012/28494. See. http://www.anayasa.gov.tr/Kararlar Databank, Access Date:07.06.2015.

92 "…In Article 138 of the Constitution, no rules of exception have been provided in favor of the legislative and executive bodies and administrative authorities regarding the compliance with court decisions and fulfillment of these decisions without changing them. In state where judicial decisions are not fulfilled on time by the related public authorities, it is not possible for individuals to exercise their rights and freedoms fully provided to them by judicial decisions. Therefore, the state is liable to prevent loss of rights that may occur against individuals by allowing for the execution of judicial decisions on time and to protect and secure the trust and respect that individuals have in public

Conclusion

The provisions on legal remedies of the AJPL have been amended by the Law No.6545 and the remedy of appeal has been abolished and the intermediate appellate system has been adopted in administrative jurisdiction as an important amendment. Regional administrative courts have been reorganized as intermediate appellate courts. The intermediate appellate system is a three-tier trial system in essence and the final decisions taken as a result of the intermediate appellate review should not be conclusive and be subjected to the appeal review of the higher court *as a rule*. In the French judicial jurisdiction system, the final decisions taken by first instance courts are subjected to the second instance intermediate appellate review and the decisions rendered at the end of this review can be appealed as a rule. In the French administrative jurisdiction system, courts carry out three-tier judicial activities as the Council of State, administrative intermediate appellate courts and administrative courts. The intermediate appellate system introduced in the administrative jurisdiction procedures by the Law No.6545 in Turkey foresees two-tier trial procedures as a rule. Namely; as the final decisions for the cases to be concluded in first instance courts and the final decisions to be rendered on the disputes foreseen to be subjected to the urgent trial procedures on and those on central and common examinations can be appealed, except for the final decisions taken by first instance courts on these disputes, the fact that the decisions taken by first instance courts can be appealed in intermediate appellate courts as a rule and the decisions of the regional administrative courts that will perform the intermediate appellate review cannot be appealed in accordance with Article 46 of the AJPL shows that the intermediate appellate system in administrative jurisdiction

authorities and the legal system. Therefore, not implementing and the judicial decisions that fulfill an indispensable duty and remaining them inconclusive is unacceptable in terms of protecting and securing the feelings of trust and respect that individuals have in public authorities and the legal system in a state where the rule of law prevails...The principle of respecting the final decision is accepted as one of the general principles of law specific to the international legal order. The obligation to implement judicial decisions regulated in the last paragraph of Article 138 of the Constitution without delay is a requirement of the principle of respect finalized decisions which is also accepted one of the general principles of law. This is because a final binding decision taken by the jurisdiction becomes non-functional for one of the parties that incur loss, the assurances provided by the right to a fair trial would become meaningless …" The Supreme Court Decision, Decision Date:02.10.2014, Docket:2014/149, Decision:2014/151, Date and Number of Official Gazette:01.01.2015/29223. See. http://www.anayasa.gov.tr/Kararlar Databank, Access Date:23.06.2015.

has a *two-tier trial procedures as a rule*. It is possible to call the intermediate appellate system that includes a two-tier trial as incomplete or partial. In should be also noted that, the intermediate appellate system introduced in administrative jurisdiction by the Law No.6545 is not only an incomplete one but also a peculiar model. This is because, as stated above also, except for the presence of the two-tier trial system as a rule, some decisions of first instance courts are kept out of the remedy of intermediate appellate by being finalized in the first level or being directly subjected to the appeal review, which shows that we encounter a suis generis or complex intermediate appellate system in administrative jurisdiction.

It is clear that the main purpose of changing regional administrative courts into intermediate appellate courts in administrative jurisdiction through the Law No.6545 is to reduce the heavy workload of the Council of State. Recently, the periods of concluding the cases handled by the Council of State have increased substantially due to such heavy workload and excess amount of cases. In fact, this has reached to a level that violates the right to a fair trial, which does not have an acceptable aspect of it in the state of law. Reducing the heavy workload of the Council of State might ensure that the Council of State can allow for taking guiding and qualified court decisions as a court of case-law. Today, in almost all countries, the supreme courts which are the equivalent of the Council of State act as a court of case-law and there are second instance courts in charge of controlling the compliance of the decisions taken by first instance courts with incidents, laws and procedures, namely performing an intermediate appellate review. The fact that the final decisions rendered by first instance courts in administrative jurisdiction are subjected to an intermediate appellate review in regional administrative courts as a rule and these decisions are conclusive again as a rule as a result of new regulations is good for the Council of State to serve as a court of case-law with a reduced workload; however we assume that it is not enough. The number of cases to be handled by the Council of State as a first instance court should be decreased as well. It would be helpful in reducing the workload of the Council of State by making a regulation on settling the actions for nullity and full judicial cases to be filed against *the regulatory administrative proceedings of public administrations, organizations and institutions and the professional organizations with public institution status that would apply throughout the country and administrative cases arising from public services not foreseen to be resolved by arbitration and related concession conditions and contracts* by the Council of State as a first instance court. It can be stated that it should be

maintained to handle these disputes in the Council of State due to the reasons such as the importance of the regulatory proceedings to be implemented across the country, the overall prevalence of the cases to be filed against individual proceedings that have been carried out based on these regulatory proceedings, challenges to be encountered in duties and authorities if the regulatory proceeding and the individual proceeding are brought to a court together and ensuring the unity of case law. The administrative cases arising from public services not foreseen to be resolved by arbitration and related concession conditions and contracts can be maintained to be handled by the Council of State as a first instance court for similar reasons. The cases on other issues referred to in Article 24 of the Council of State Law can be handled by the administrative and tax courts authorized as first instance courts. Therefore, the number of cases that the Council of State will handle as a first instance court and its workload would be reduced.

One of the most important criticisms for the appeal system introduced in the administrative jurisdiction is that the discrepancy between the final decisions taken by the same or difference chambers of regional administrative courts would eliminate the unity of case-law, which would damage the credibility of law. Especially the chambers of different regional administrative courts would not be able to know each other's' decisions and this would create different decisions on the same issues. Other courts have no obligation to comply with the decisions taken by the courts, including regional administrative courts. However, courts have an obligation to comply with the decisions made by the Council of State Board of Unification of Case Laws. Hence, it was stipulated in the new regulations that in case of any discrepancy or inconsistency between the final decisions taken by the same or difference chambers of regional administrative courts, the committee of chairmen of the regional administrative court would submit this issue to the Council of State and case laws would be unified upon the decision of the Council of State Board of Unification of Case Laws ultimately, as discussed above. However, it would be a highly optimistic approach to believe that this new regulation will solve the problem. This is because it is all known that the Council of State Board of Unification of Case Laws has not functioned as required so far.

In accordance with Article 45 of the AJPL, the remedy of intermediate appellate can be sought against the decisions of administrative and tax courts in the regional administrative court within the judicial locality of the court within thirty days as of the notification of the decision, notwithstanding any provisions to the contrary in other laws. It is seen that the time to resort to

an intermediate appellate court has been regulated the same as the time to resort to an appeal. It is also seen that both the intermediate appellate and the appeal remedies cannot be exercised against some of the decisions rendered by first instance courts. However, the decisions taken by administrative and tax courts regarding the actions for nullity for tax cases not exceeding five thousand Turkish lira in value and full administrative actions and proceedings are final and they cannot be appealed in a court of intermediate appellate and in a court of appeal. In our opinion, this provision restricts the legal security, the right to a fair trial and the right to legal remedies which are very important and indispensable elements of the principle of state of law; therefore it is not right. This is because the justice system must be established in at least two instances in terms of the rule of law. Illegality, errors or omissions might be in question in the decisions rendered by first instance courts. Therefore, carrying out the judicial jurisdiction with at least two or ideally three instance system could ensure taking more accurate and proper decisions and most importantly, protecting personal rights. If the value of the dispute in question is between five thousand and a hundred thousand Turkish Lira, they could only be appealed in an intermediate appellate court rather than seeking an appeal remedy. If the value of the dispute in question is a thousand Turkish Lira and above, an appeal application can be made against the decision rendered by the regional administrative court on the outcome of the review in the Council of State. As is seen, the administrative jurisdiction procedures have been changed into mixed and peculiar procedures that carry out one-tier, two-tier and three-tier trial procedures through new regulations.

In accordance with the new Article 45 of AJPL, if necessary during the review, the decision-making court or another administration or tax court may be rogatory. The rogatory court performs the necessary proceedings primarily and immediately. As is seen, a rogatory court has been established for the intermediate appellate remedy in administrative jurisdiction procedures. As a result of the introduction of the rogatory body by the Law No.6545 in Article 45 of the AJPL that regulates the intermediate appellate remedy, we believe one should accept that first instance courts in administrative jurisdiction can also benefit from the rogatory body. This is because; rogatory has been regulated in the AJPL even though it is regulated within a provision regulating the intermediate appellate remedy.

It appears that the appeal provisions of the Administrative Jurisdiction Procedures Law have also been changed with the introduction of the intermediate appellate system in administrative jurisdiction by the Law

No.6545. According to the new regulation, *the appeal remedy* is the legality audit for the final decisions taken by regional administrative courts on the cases deemed limited upon the first review of intermediate appellate in accordance with Article 46 of the Administrative Jurisdiction Procedures Law and the final decisions handled by the judicial chambers of the Council of Case as first instance courts in accordance with Article 24 of the Council of State Law and the final decisions taken by first instance courts on the disputes to be subjected to the trial procedures on urgent, central and common examinations. Articles 49 and 50 of the Administrative Jurisdiction Procedures Law on appeal have been also amended by the Law No.6545; however, the appeal reasons have been protected in general terms. The reasons for appeal regulated in Article 49 of the Administrative Jurisdiction Procedures Law include the following: The court of appeal reverses the judgment as a result of the review it conducts in case that a case outside of duties and powers has been handled, unlawful decisions have been made and *mistakes or deficiencies that may affect the decision are available* in the implementation of procedural provisions. In the previous regulation of Article 49 of the AJPL, the reason for appeal "non-compliance with procedural provisions" has been amended as stated above. It is understood that as the law-maker regulates the requirement of *having errors or deficiencies that would affect the decision in the implementation of procedural provisions as a condition of reversing a decision, the law-maker removes the mistakes and deficiencies that would not affect the decision in the implementation of procedural provisions* among the reasons for reversing a decision. The authority of appeal decides which ones of the mistakes or deficiencies, if any, in the procedural provisions implemented in the decision subject to appeal affect the decision. We believe that the reason for this amendment made by the law-maker in the appeal reasons regarding the implementation of procedural provisions might be to prevent the reversal of the decision due to incidental or simple procedural mistakes or deficiencies. Therefore, it is aimed to avoid keeping courts busy and increasing the workload due to simple procedural mistakes and deficiencies

In accordance with Article 50/3 of the AJPL, the regional administrative court may comply with the decision of reversal taken as a result of a review by the Council of State upon the appeal of the final decisions regarded as limited in Article 46 of the AJPL or may insist on its decision. In accordance with the new regulation introduced in Article 50/4 through the Law No.6545, if complied with the reversal taken by the Council of State, the appeal review of this decision is made "restrictedly with the compliance with the

reversal". In other words, the Council of State handles the same decision that it has reversed before again, it performs the appeal review as to check the compliance with the previous reversal and does not render a new or another judgment. Therefore, it audits whether the related authority has rendered a judgment based on the reasons for the reversal and also eliminates the vicious circle regarding the continuous appeal of the related decisions. -

To mention briefly, the most important difference between remedy of appeal and intermediate appellate is that the review of intermediate appellate is limited to legality audit. It means that the facts and evidence examined by the related authority during the appeal review as a rule are not subjected to an assessment. In accordance with the new regulation introduced by the Law No.6545, the regional administrative court reviews the decision taken by the first instance court in terms of both legality and materiality in an intermediate appellate review except that it finds the intermediate appellate application against the decisions rendered upon the first review rightful and the case has been handled by a court that is lack of jurisdiction or authority by a rejected or prohibited judge. As the court of appeal, if the Council of State sees a illegality in its review, it reverses the judgment and sends the case file to the relevant decision-making authority to render a new judgment in accordance with the reversal. If the regional administrative court deems the decision subjected to the intermediate appellate rightful as a court of intermediate appellate, it decides on the rejection of the intermediate appellate application (correcting the material mistakes in the decision, where possible). If the regional administrative court does not deem the decision taken by the first instance court rightful in its review, it annuls the decision of the first instance court and concludes the case on its merits. There is no doubt that the decision taken by the regional administrative court as the court of appeal is not the decision taken by the first instance court, it is a new decision and it is a final decision except the decisions that are regarded as restricted in Article 46 of the AJPL and can be appealed. It should be briefly noted that the right to seek a remedy of intermediate appellate has been annulled in the cases subjected to the urgent trial procedures and the procedures on applying directly to the remedy of appeal have been introduced and the Council of State has been given the authority to make similar audits as in the remedy of intermediate appellate review.

The heading of Article 51 of the AJPL "reversal for the sake of law" was amended into "*appeal for the sake of law*" by the Law No.6545 and the amendments that comply with other new regulations have been made in the

Article. The reversal is a legal decision taken as a result of the legal remedy review and therefore, it is possible to say that the amendment made in the heading of the related Article is to the point. As it used to be before the Law No.6545, the reversal in the appeal for the sake of law does not have any consequences on the decision concluded before. It should also be noted that we believe it is not important that the cases handled by the Council of State as a first instance court have not been mentioned in the new regulation of Article 51 of the AJPL which has been amended by the Law No.6545. This is because the decisions finalized without going through an appeal review are mentioned in the new regulation. The final decisions handled by the Council of State as a first instance court can be appealed; therefore, if these decisions are finalized without going through an appeal review, it is true that they could be appealed for the sake of law. In Article 51 of the AJPL, the reason for regulation the appeal for the sake of law can be said to ensure revealing the finalized decisions contrary to law and taking decisions in compliance with the applicable laws by administrative jurisdictions and therefore ensuring the unity of case-law albeit partially.

Another novelty introduced by the Law No. 6545 is that Article 54 of the AJPL, which is the remedy of "correction of a decision", has been annulled. The Supreme Court has not deemed the legal provision that abolishes the remedy of the correction of a decision in administrative jurisdiction unconstitutional: However, in our opinion, abolishment of the remedy of correction of a decision is only good to reduce the complaints saying that the intermediate appellate system would prolong the cases. Besides, the fact that the final decisions taken by regional administrative courts as a result of their intermediate appellate decisions are conclusive, the final decisions taken by the judicial chambers of the Council of State as a first instance court are subjected to the appeal review, the final decisions taken by first instance courts on the disputes for which the trial procedures on urgent, central and common examinations are foreseen are subjected to the appeal review and these decisions are finalized by deciding on the merits in the appeal as a rule invalidates the reason for the abolishment of the remedy of correction of a decision, in our opinion. Similarly, the remedy of correction of a decision has been abolished with the introduction of regional administrative courts and intermediate appellate remedy in judicial jurisdiction system; however, the final decisions taken by the intermediate appellate courts can be appealed as a rule in the judicial jurisdiction. That is to say, a three-tier trial mechanism is available in the judicial jurisdiction system. As the illegalities, mistakes and deficiencies that

may appear in the decisions of regional administrative courts can be revised in the third level jurisdiction, it is possible to say that abolishment of the remedy of correction of a decision in the judicial jurisdiction is reasonable and rightful. In administrative jurisdiction, if we set aside the decisions on the cases that will be finalized in the first level, any decision is subject to the three-tier trial system, except for the final decisions taken by regional administrative courts on the cases foreseen to be appealed in Article 46 of the AJPL. In addition, the rule stating that the final decisions taken by the judicial chambers of the Council of State on the cases that they will handle as first instance courts are subjected to an appeal review has been maintained exactly, and the Council of State cannot make a decision on the merits during the appeal review as a rule. Therefore, it seems that a two-tier trial system is maintained here as a rule. It should be considered that unlawful, wrong or incomplete decisions may be taken at any time regardless of a decision given on the merits of the related case in the second level jurisdiction in administrative jurisdiction. Therefore, the fact that the remedy of the correction of a decision in administrative jurisdiction has been abolished under the new regulations is, in our opinion, not consistent with the principles of legal security and the right to legal remedies, which are the indispensable elements of a state of law.

An urgent trial procedure and trial procedures on central and common examinations have been introduced in administrative jurisdiction, and the term of litigation has been determined to be thirty days in the urgent trial procedures, and ten days in the trial procedures on central and common examinations. For example, the final decisions taken in the cases to be subjected to the trial procedures on central and common examinations can be appealed within fifteen days as of the notification date of the decision. The Supreme Court concluded that these regulations are in compliance with the Constitution. Establishing several trial procedures in administrative jurisdiction and shortening and diversifying the periods of time within these procedures can be considered to be reasonable in order to speed up the trial process in general, to avoid the loss of rights that may arise and to enable the administrative judicial decisions not to remain inconclusive. However, we believe what is ideal is to shorten trial periods and to simplify trial system and processes in order to ensure the indispensable requirements of a state of law such as legal security, the right to a fair trial and the right to legal remedies. In this context, the trial system should be easy, understandable and applicable rather than making it more complicated. Uniforming the terms within the trial system such ad the terms of litigation and terms of defense and appeal should

be regulated to allow for reasonable period of times so as not to cause losses of right and to hinder the right to a fair trial. Briefly, a fair, reasonable and acceptable balance should be created between the right to a fair trial and the right to legal remedies with the acceleration of trial process in accordance with the principles of state of law and administrative law while establishing legal rules.

In the disputes foreseen to be subjected to urgent trial procedures introduced in the administrative jurisdiction through the Law No.6545, Article 11 of the AJPL do not apply. Since the administrative application is not an effective way, it can be claimed that making such a regulation in urgent trial procedures is to the point. Indeed, the Supreme Court concluded that this regulation was not against the Constitution: In the disputes foreseen to be subjected to urgent trial procedures, shortening the response time of the administration to the application five days instead of not implementing Article 11 of the AJPL could be another remedy that should be considered.

As it is discussed above, it is foreseen in the Law No.6545 that the final decisions taken by the first instance court on the disputes arising from the proceedings subjected to the urgent trial procedures can be appealed. To briefly mention, the Council of State performs a legality audit in the appeal remedy in the administrative jurisdiction in general. The appeal review of the disputes subjected to the urgent trial procedures is different. As such, in accordance with Article 20/A of AJPL, the Council of State sends the file back to the first instance court by reversing the judgment in the disputes to be subjected to the urgent trial procedures as a result of the examination on the document only if it deems that the appeal against the decisions taken upon the first investigation is rightful. Apart from that, if the Council of State deems the information obtained on material facts sufficient or the appeal is only on legal points or the material mistakes in the decision appealed are possible to be corrected as a result of an examination performed by The Council of State on the document, the Council of State takes a decision on the merits of the case. Otherwise, the Council of State takes a new decision on the merits by carrying out the necessary review and investigation on its own. The decisions made on appeal are final. As is seen, the appeal review of the disputes to be subjected to the urgent trial procedures has been regulated in the form of making a decision on the merits rather than reversing or approving the decision of the first instance court as in the general appeal review as a rule. From this perspective, the appeal review regulated by the provisions of the urgent trial procedures is compared to the intermediate appellate review.

Indeed, in its decision in which it renders that these regulations are not contradictory to the Constitution, the Supreme Court stated that the remedy of intermediate appellate in the cases subjected to urgent trial procedures has been abolished and direct appeal procedures have been introduced, and the Council of State has been granted *the authority to control in a similar way in the remedy of intermediate appellate* in the appeal review. In fact, it is seen that the appeal reviews of the disputes for which urgent trial procedures apply are subjected to the objection review rules performed by the regional administrative courts in accordance with Article 45 of the AJPL. Therefore, the administrative jurisdiction where the objection remedy rules apply can be said to have its own appeal review, even though they are partial. There is no doubt that the reason for introducing such a regulation is to ensure a faster jurisdiction and decision-taking process. It should be noted that the appeal review for the disputes to be subjected to trial procedures for central and common exams is stated to be regulated in the same way in Article 20/B of the AJPL.

As in the urgent trial procedures, it is stipulated in administrative jurisdiction that the decisions to be taken for suspension of execution in the cases where the trial procedures on central and common examinations cannot be appealed. It would not be wrong to say that this regulation also aims to accelerate trial procedures. In a case filed in the Supreme Court claiming that the abolishment of the remedy of appeal against the decisions taken on the requests for suspension of execution in the cases subjected to the urgent trial procedures restricts the right to legal remedies by abolishing the suspension of execution, the Supreme Court did not deem the related regulation unconstitutional. However, the fact that the decisions on the suspension of execution cannot be appealed is incompatible with the state of law. The procedures to be carried out to accelerate the judicial activities by the law-maker should not be to remove privileged and important remedies of the state of law. In other words, it should be to make them more functional and rapid rather than restricting the control of illegalities.

In Article 20/B of the AJPL it is regulated that the suspension of execution and the annulment decisions in the cases filed on the central and common examinations organized by the Ministry of Education and the Student Selection and Placement Center, proceedings for these examinations and the examination results apply to result in favor of the people taking these exams." According to this regulation, in case of the cancellation of the examination in a case filed against an examination specified in the provision, the people who

take the exam should be regarded that they pass the exam. The cancellation of an exam question, wrong evaluation of the exam results and in similar cases, the proceedings that would be in favor of the person who takes the exam should be established by the administration. This is because provision of legal security and protection of legitimate expectations with vested rights are the main duties of the legal administration. The purpose of the related regulation can be said to ensure this main duty of the administration.

The amendments in the administrative jurisdiction procedures through the Laws No.6545 and 6552 made the administrative jurisdiction procedures more complicated instead of simplifying them. In addition, as the necessary infrastructure cannot be ensured, it does not seem possible to implement the provisions of the Law No.6545 that have turned regional administrative courts into intermediate appellate courts, introduced the remedy of intermediate appellate and regulated the legal remedies in administrative jurisdiction again in general soon. Instead, we believe it would be more helpful to introduce legal provisions which are also urgent for administrative jurisdiction but could be applicable when they become effective. For example, many remedies used in administrative procedures are not regulated based on the requirements and characteristics of the administrative jurisdiction procedures in the Administrative Jurisdiction Procedures Law, which is the main law that regulates the administrative jurisdiction procedures; instead, a reference is made to the provisions of the Code of Civil Procedures in Article 31 of the Administrative Jurisdiction Procedures Law, yet even this reference is incomplete. Article 31 of the Administrative Jurisdiction Procedures Law in which a reference is made the provisions of the Code of Civil Procedures has been regulated so randomly and carelessly that many remedies of the procedural law have been left incomplete in this Article or it has been made more complicated by including some matters regulated in the Administrative Jurisdiction Procedures Law in this Article. Therefore, Article 31 of the AJPL should be abolished and the procedural rules that comply with the characteristics of the administrative jurisdiction procedures should be regulated in detail in the Administrative Jurisdiction Procedures Law.

Finally, Article 28 of the AJPL that regulates the results of the administrative jurisdiction decisions has been amended by the Law No.6552; however, the execution of such amendments has been first suspended and then abolished by the Supreme Court. The administration has to take the necessary actions within thirty days as of the notification of the court decision on the annulment or suspension of execution to the administration in accordance with Article 28

of the AJPL. In accordance with this provision, the administration has to take an action on the matter in dispute immediately, the thirty-day period mentioned in the related provision is the final period that the administration has to follow in case of an extension of the final decision to be taken by the administration due to Force Majeure or an unexpected situation. Namely, it is essential for the administrative jurisdiction decisions to be implemented immediately and without any delay in terms of time. Therefore, the administration has to take actions without waiting for this thirty-day period stated in this provision. In this case, giving a two-year period to implement the judicial decisions to the administration is inexplicable in any terms including legal security and right to legal remedies as in the amendments in Article 28 of the AJPL. As a result of accepting the request for suspension of execution by the courts or inherent consequence of the action for nullity in the cases filed by public officers against appointment proceedings is that the concerned person returns his/her duty. As in the regulation annulled by the Supreme Court, the decisions that do not allow for the public officers to return their previous duties simply means that the judicial decisions are not explicitly implemented and this is clearly against the principle of state of law regulated in Article 2 of the Constitution. In accordance with the amendment made in Article 28 of the AJPL which has been abolished by the Supreme Court, it is stipulated that non-performance of the case decisions on the proceedings stated in this rule cannot be subjected to a criminal proceeding and investigation. The public prosecutor carry out any proceedings and fulfill his duties on this provision that eliminates the obligation to implement court decisions, to allow for the impunity of an act that involves a crime, even if he finds out a case giving the impression that a crime has been committed since the related court decisions have not been implemented. The Supreme Court abolished this unnecessary regulation which is not compatible with being a state of law.

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THE ROLE OF DEFENSE COUNSEL IN TURKISH CRIMINAL PROCEDURE CODE IN GENERAL

Genel Olarak Türk Ceza Muhakemesi Sürecinde Müdafiin Rolü

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ABSTRACT

Defense counsel, who assists the suspect and the accused in his defense during investigation and prosecution, is a subject fulfilling a highly crucial public duty during both of these phases. From this aspect, defense counsel is the tool and guarantee for the right to fair trial, right to legal remedies as well as the right and freedom of right to defense under the light of the equality of arms principle. Just as right to fair trial is strengthened particularly via obligatory defense counseling under the Turkish Criminal Procedure Code, a more efficient struggle against unlawful evidences is possible. Within this framework, particularly in accordance with the Criminal Procedure Code and the Attorneyship Code, defense counsel has some rights and authorities as well as some duties and liabilities.

Keywords: Criminal Investigation and Prosecution, Suspect, Accused, Right to Fair Trial, Defense, Defense Counsel, Lawyer, Equality of Arms Principle.

ÖZET

Ceza soruşturması ve kovuşturmasında şüpheli ve sanığın savunmasına yardımcı olan müdafi, bu süreçlerde çok önemli bir kamusal görevi yerine getiren bir süjedir. Bu yönüyle müdafi, silahların eşitliği ilkesi ışığında adil yargılanma hakkının, hak arama ve savunma hak ve hürriyetinin de vasıtası ve güvencesidir. Türk Ceza Muhakemesinde özellikle zorunlu müdafilik yolu ile adil yargılanma hakkı güçlendirildiği gibi, hukuka aykırı delillerle de daha etkin mücadele edilebilmektedir. Bu çerçevede müdafii, özellikle Ceza Muhakemesi Kanunu ve Avukatlık Kanunu uyarınca hem bazı hak ve yetkilere sahiptir, hem de bazı ödev ve yükümlülükleri bulunmaktadır.

Anahtar Kelimeler: Ceza Soruşturması ve Kovuşturması, Şüpheli, Sanık, Adil Yargılanma Hakkı, Savunma, Müdafi, Avukat, Silahların Eşitliği Ilkesi.

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INTRODUCTION

As known, in its broad meaning to include investigation and prosecution

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phases, criminal procedure process is a collective and dialectical one with the participation of various actors. During this process which develops on claim, defense and judgment in general terms, there are various actors such as prosecutor's office, criminal court of peace, law enforcement authorities, suspect or accused[1], lawyer (legal representative and defense counsel), judge (court), witness, expert, etc. During this process running under the light of various principles of criminal procedure[2], every single actor has some rights and duties in accordance with the relevant regulations, therefore, they are influential in the process.

Defense counsel has a significant position and function during this process. In criminal procedure, there is an individual charged with a crime, who does not hold the same "power" as the state *vis-à-vis* the state holding a public power and authority. In this regard, holding some certain rights and authorities, the defense counsel ensures the equality of arms on one hand, while being the tool and guarantee of right to legal remedies, right to defense and right to fair trial by offering legal assistance to the suspect or the accused. This position and function of the defense counsel contributes significantly to the realization of justice and internalization of a state governed by the rule of law.

Right to fair trial has two dimensions. Accordingly, while securing right to fair trial is a duty of the state, it is the right of the individuals. Defense counsel enables both the state's fulfillment of its duty and the exercise of this right [by the individuals]. In this aspect, one might say that the defense counsel strengthens, and even ensures, the legality and legitimacy of a judgment by functionalizing the exercise of right to defense in criminal investigation and proceedings. Defense counsel that is significant both in terms of the state and the accused ensures a correct judgment, which makes criminal justice properly run[3]. As the decision (judgment) is made up of the evaluations, in the form of opinions, of prosecution and defense, prosecution and defense are just like the two sides of the decision medal, and therefore, there should be a balance between these two. That is the reason why defense is vested/

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1 (TURKISH) CRIMINAL PROCEDURE CODE (CPC) ARTICLE 2, (1) In the application of this Code the following concepts mean,...a) **Suspect**: The individual, who is under suspicion of having committed a crime, at the investigation phase b) **Accused**: The individual, who is under suspicion of having committed a crime, after the prosecution phase has started, and until the final judgment.

2 These can be listed as equality principle, principle of use of doubt in favor of the accused, publicity principle, mandatory prosecution principle, no judgment without a full trial, search of substantive truth principle, principle of directness, transparency principle, trial within reasonable time, equality of arms principle, fair trial right and principle.

3 YENİSEY, Feridun and Ayşe NUHOĞLU, *Ceza Muhakemesi Hukuku*, 3rd ed., Ankara 2015, pp. 181-182.

recognized as a right in constitutions and international agreements[4].

According to the prevailing opinion in doctrine, the defense counsel is the assistant to the suspect or the accused rather than being his representative, and this assistance is a defense assistance, which is offered not only in favor of the suspect and the accused, but also for the public good[5]. We agree with this opinion. As a matter of fact, the distinction between the representative and the defense counsel is also based on this reason. This is also verified by the statement "the suspect or the accused may benefit from advice of […] defense counsels" under Article 149/1 of CPC as well as the statement that regulates "right to appoint a defense counsel and he may utilize his legal assistance" under Article 147 of CPC.

In this short study, information on the role of the defense counsel under the Turkish Criminal Procedure Code will be rendered in general terms without going into too much detail and debate.

I- RIGHT TO DEFENSE IN GENERAL TERMS

As known, criminal procedure starts with a suspicion and claim and develops over those. From this aspect, defense is an activity that is performed in favor of the suspect or the accused in reaction to the charges brought against him and that is aimed at protecting him both *de jure* and *de facto.* Defense may be in a way to reveal that the incriminated person has not committed that crime or committed act is not against law or no punishment can be inflicted for legal reasons or less punishment can be inflicted due to this act[6].

Regulated under various conventions and international instruments Turkey is a party to, right to defense is guaranteed under Article 36 of the Constitution [of the Republic of Turkey]. Pursuant to this article, "Everyone has the right of litigation either as plaintiff or defendant and the right to fair trial before the courts through legitimate means and procedures" (Const. Art.36). Without

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4 KUNTER, Nurullah, *Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku*, 9th ed., İstanbul 1989, p. 244.

5 ÖZBEK, Veli Özer, Mehmet Nihat KANBUR, Koray DOĞAN, Pınar BACAKSIZ and İlker TEPE, *Ceza Muhakemesi Hukuku*, 7th ed., Ankara 2015, p. 247; YURTCAN, Erdener, *Ceza Yargılaması Hukuku*, 9th ed., İstanbul 2002, p. 305; ÜNVER, Yener and Hakan HAKERİ, *Ceza Muhakemesi Hukuku*, vol.1, 6th ed., Ankara 2012, p. 273; ÖZTÜRK, Bahri and Mustafa Ruhan ERDEM, *Uygulamalı Ceza Muhakemesi Hukuku*, 12th ed., Ankara 2008, p. 343.; TOROSLU, Nevzat and Metin FEYZİOĞLU, *Ceza Muhakemesi Hukuku,* 5th ed., Ankara 2006, p. 136. KOCAOĞLU defines defense counsel as a subject in criminal proceedings that has characteristic features, whose fundamental duty is to make an effort to settle all disputes in the criminal proceedings justly and fairly before any juridical organ by fully implementing the legal rules(See KOCAOĞLU, *Müdafi*, 2nd ed., Ankara, 2012, p. 82).

6 BIÇAK, Vahit, *Suç Muhakemesi Hukuku*, Ankara, 2010, p. 132.

going into details, we need to note that there are many rules available that fill in and strengthen the principles relating to crimes and penalties regulated under Article 38 of the Constitution as well as right to defense (right of litigation) and right to fair trial as its indispensable part regulated under Article 36 of the Constitution. However, considering its importance, it should be highlighted that findings obtained through illegal (unlawful) methods shall not be considered as evidence and the judgment shall not be based on these findings (Const. Art.38/6; CPC, Art. 206/2, 217/2, 289/1-i). The restriction of the right to defense, not reminding of the rights related to defense, not giving the last word to the accused are considered absolute violations of the law and constitute an absolute reason for reversal in accordance with the Turkish Criminal Procedure Code (CPC, Art.289/1-h).

There are two fundamental phases, investigation and prosecution[7], in Turkish criminal procedure. Accordingly, the investigation phase starts gaining knowledge of suspicion of a committed crime and lasts until the indictment has been admitted/approved by the court and then the prosecution phase begins. In this respect, the person under suspicion of having committed a crime is called as the suspect in the investigation phase whereas the person is called as the accused in the prosecution phase. The distinction between these two are concerning the phases of criminal procedure while the suspect and the accused have equal rights as a rule. The suspect and the accused have various rights during the investigation and prosecution phases. The first of these is right to fair trial (Const. Art.36/1, ECHR 6/1). Right to fair trial can be defined as the case to be heard by an independent and impartial court established by law within the framework of equality of arms principle within reasonable time and in an open session (public hearing)[8]. The second fundamental right is right to defense. This involves rights such as right to information about the charges brought against him, right to silence, right to a defense counsel, right not to be compelled to make self-incriminating statements or submit evidence disfavoring himself, right to access to an interpreter whenever required, right to access to file, right to adequate time and opportunity to prepare his defense, right to ask for collection of evidence, right to pose questions to witnesses, right to respond to the claims, right to contested reasoning, right to be tried in his presence, right to resort legal

[7] (TURKISH) CRIMINAL PROCEDURE CODE (CPC) ARTICLE 2, (1) In the application of this Code the following concepts mean, e) **Investigation**: The phase that comprises transactions, starting with gaining knowledge of suspicion of a committed crime by competent authorities as indicated by the Code, and continuing until the indictment has been approved, f**) Prosecution**: The phase beginning with the decision on the admissibility of the indictment and ending with the final judgment.

[8] BIÇAK, op.cit, 134.

remedies, right to be presumed as innocent until proven guilty by a final judgment.

II- POSITION OF DEFENSE COUNSEL WITHIN THE SCOPE OF RIGHT TO DEFENSE

1- In General Terms

Lawyer is coined differently according to the position of the person in the process of the criminal proceedings and this very distinction is based on the Criminal Procedure Code, or CPC, *per se*. Accordingly, the lawyer, who defends the suspect or the accused during the criminal proceedings, is coined as "defense counsel" (CPC, Art. 2/1-c) while the lawyer, who represents the intervening party, the victim, or the person, who is liable for pecuniary compensation, is called as " representative" (CPC, Art. 2/1-d)[9]. In this respect, defense counsel primarily fulfills public defense as a defense lawyer[10].

According to some authors, defense is a "public duty", while the defense counsel is an independent "justice organ"[11]. The defense counsel will help the accused not to remain weak in legal matters before the counsel for prosecution, the members of whom have studied law, and will defend the accused better than the accused himself with a calm manner as he is experienced in criminal proceedings and as no charges have been brought against him [the defense counsel][12]. The defense counsel acts as a subject of collective defense and provides a balance in this way between the prosecution and the defense as he is a jurist himself[13].

The defense counsel shall be a lawyer as a rule[14]. Conditions for admission to attorneyship profession have been laid down under Article 3 and the following articles of the [Turkish] Attorneyship Code.

The position of the defense counsel has been regulated primarily under the

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9 (TURKISH) CRIMINAL PROCEDURE CODE (CPC) ARTICLE 2, (1) In the application of this Code the following concepts mean, ...c**) Defense counsel**: The lawyer, who defends the suspect or the accused during the criminal proceedings d) **Representative**: The lawyer who represents the intervening party, the victim, or the person who is liable for pecuniary compensation.

10 SOYASLAN, Doğan, *Ceza Muhakemesi Hukuku*, 4th ed., Ankara 2010, p. 187.

11 YENİSEY / NUHOĞLU, op. cit. 183-184; CENTEL, Nur, *Ceza Muhakemesi Hukukunda Müdafii*, Istanbul 1984, pp. 48-…).

12 CENTEL, Nur and Hamide ZAFER, *Ceza Muhakemesi Hukuku*, 12th ed., Istanbul, 2015, pp.176-177.

13 ŞAHİN, Cumhur, *Ceza Muhakemesi Hukuku I*, Ankara 2007, p. 188.

14 However, if there are no more than three lawyers at a place, advocates may fulfill defense duty there.

Attorneship Code. According to this, the lawyer [attorney] freely represents the independent defense which is one of the constituents of the judiciary (Attorneyship Code, or AC, md 1/2). The purpose of attorneyship is to ensure with juridical bodies at every level, arbitrators, public and private entities, boards and agencies, the arrangement of legal relations, the just and fair settlement of all kinds of legal issues and disputes, and the full implementation of legal rules. The lawyer places his/her legal knowledge and expertise in the service of justice and at the disposal of individuals for this purpose (AC Art.2/1-2). As attorneyship is a public service (AC, Art. 1/1), juridical bodies, police departments, other public institutions and agencies, notaries public, insurance companies are under the obligation to assist lawyers in carrying out their duties. These entities shall submit to the lawyers the information and documents they require for review (AC, Art. 2/3). The (Turkish) Criminal Code, or CC, also defines lawyer as a "judicial authority" along with the judges and prosecutors in the enforcement of the criminal laws (CC Art. 6/1-d). Moreover, in our opinion, lawyer is a subject who exercises right to legal remedies, as regulated under Article 36 of the Constitution, on behalf of the citizens, increases the functionality of this right by making it concrete and who increases the legality and legitimacy of the criminal proceedings as he secures right to fair trial. Therefore, one might say that lawyer, in this regard, provides a legal relief for public authorities.

As the accused and the suspect may defend himself, he might also ask for legal assistance of a defense counsel. Having a defense counsel does not constitute an obstacle in self-defense. Involvement of the defense counsel in criminal proceedings process serves to providing balance between the prosecution and the defense as well as ensuring the equality of arms. Through this means, a subject having the same educational background and accumulation of knowledge, may appear *vis-à-vis* the prosecution counsel and this strengthens the defense of the accused. Given all above, the defense counsel's taking a role in the process is a significant guarantee to prevent the suspect or the accused to remain weak in front of the prosecutor's office and to secure a balance between the prosecution and the defense counsels[15], and this is *sine qua non* in terms of the right to fair trial.

The suspect or the accused may benefit from advice of one or more defense counsels at any stage during the investigation or prosecution. However, in the investigation phase, during the interview, the maximum number of lawyers allowed to be present shall be three (CPC, Art. 149/1-2).

The right of the lawyer to consult with the suspect or the accused, to be

[15] BIÇAK, op. cit, 137.

present during the interview or interrogation, and to provide legal assistance shall not be prevented, restricted at any stage of the investigation and prosecution phase (CPC, Art. 149/3).

2- Selection of the defense counsel

Involvement of the defense counsel in the proceedings can either be possible through the selection of the defense counsel by the accused, the suspect or their legal representatives (voluntary defense counseling) or through appointment of a defense counsel by the investigation and prosecution authorities (obligatory defense) counseling). Within this framework, the defense counsel does not automatically participate in the proceedings on his own, but his appointment is requested by the suspect or the accused. In this respect, in Turkish law, the major defense counseling in utilization of defense counseling is selected/chosen defense counseling system. In other words, as a rule, while the suspect or the accused is not obliged to have a defense counsel, he may also choose a defense counsel on his behalf. However, in cases where the suspect or the accused declares that he is not able to choose a defense counsel due to financial reasons, a defense counsel shall be appointed on his behalf, if he requests so. (CPC, Art. 150/1).

As chosen/selected defense counseling is the main rule, in order for the suspect or the accused to request a defense counsel, he has to be notified of the existence of such a right. Therefore, there is an explicit regulation concerning this in the Code [CPC]. According to this, the suspect or the accused shall be notified of his right to appoint a defense counsel, and that he may utilize his legal assistance, and that the defense counsel shall be permitted to be present during the interview or interrogation. If he is not able to retain a defense counsel and he requests a defense counsel, a defense counsel shall be appointed on his behalf by the bar association (CPC, Art. 147/1-c).

In some circumstances, the Code deems the involvement of a defense counsel as an obligation, which is called “obligatory defense counseling”. Obligatory defense counseling is a requirement of the right to fair trial[16]. Obligatory defense counseling applies to the following situations in Turkish law:

a) The first of these is in cases where the suspect or the accused is an individual who is unable to defend himself adequately due to his personal characteristics. If the suspect or the accused who does not have a defense counsel is a child (younger than 18 years old), or an individual, who is disabled to such an extent that he cannot make his own defense, or deaf or mute, then

[16] ÖZBEK et al., op cit., 253.

a defense counsel shall be appointed without his request (CPC Art. 150/2). In doctrine, these are not limited in number, but sampling, therefore, though not indicated under the article, lunatic people, mentally-ill people, blind people and illiterate people should be evaluated within the same scope[17].

b) In the second circumstance, the obligatory defense counseling is set forth according to the gravity of the crime Within this scope, a defense counsel shall be appointed during the investigation or prosecution for crimes that carry a punishment of imprisonment at the lower level of more than five years (CPC, Art.150/3) and the appointment [of a defense counsel] is requested from the bar association.

c) In cases where a motion for an arrest has been submitted in the investigation and prosecution phases, the suspect or the accused must have the legal assistance of a defense counsel (CPC Art. 101/3).

d) In cases where the hearing is conducted for the fugitive, if the fugitive accused has no defense counsel, the court shall ask the Bar Association to appoint a lawyer on his behalf (CPC Art.247/4).

e) In cases where the suspect or the accused would be "stationed" in a public medical center as the mental health of the suspect or the accused is doubted, and if the suspect or the accused has no defense counsel, a defense counsel shall be appointed for him by the bar association upon the request of the judge or the court. (CPC, Art.74/2)

f) If the hearings are conducted in the absence of the accused as he has violated the order of the court, the court shall ask the bar association to appoint a defense counsel (CPC, Art. 204/1).

g) In cases where the defense counsel is banned from duty in accordance with Article 151 of the CPC, the presidency of the relevant bar association shall be notified of this ban immediately for the appointment of a new defense counsel (CPC Art. 151/5).

It should be emphasized that the pre-condition for the appointment of an obligatory defense counsel is that the suspect or the accused shall not have a defense counsel chosen by himself. However, in cases where the suspect or the accused subsequently chooses a defense counsel, the duty of the defense counsel, who was formerly appointed by the bar association, shall be terminated (CPC, Art.156/3); otherwise, it shall last till the end of the proceedings. Within this framework, in cases where the defense counsel (obligatory defense counsel) who has been appointed by the bar association is

[17] BIÇAK, op.cit, 138.

not in attendance during the main trial, or steps out of the main trial without considering the proper time or fails to fulfill his duties, the judge or trial court shall make the necessary interactions for the immediate appointment of another defense counsel. In such an event, the court may interrupt or adjourn the main trial to a later date (CPC, Art. 151/1). If the new defense counsel explains that he has not been given sufficient time to prepare his defense, the main trial must be adjourned (CPC, Art. 151/2). The suspect or the accused is not obliged to accept the defense counsel appointed for him. He has the right to dismiss the appointed defense counsel or ask for the change of the defense counsel.

In obligatory defense counseling, the defense counsel shall be appointed by the bar association, where the investigation or the prosecution is pending, during investigation phase, upon the request of the authority that conducts the interview (law enforcement authority or prosecutor's office) or the judge who conducts the interrogation, during the prosecution phase upon the request of the court (CPC, Art.156/1-2).

In cases where there is more than one suspect or accused, and there is no conflict of interest, their defense may be delegated to the same defense counsel (CPC, Art. 152). Given this, the defense counsel shall not accept the defense counseling commission of more than one suspect or accused in the same case where there is a conflict of interest between them (AC, Art.38/b)

III- RIGHTS AND POWERS OF THE DEFENSE COUNSEL

The defense counsel shall have some certain rights and powers in order to effectively participate in the defense of the suspect or the accused. These are not the "privileges" granted to the lawyer (defense counsel), but these are required by the right to fair trial and equality of arms principle. These can be listed as follows shortly:

The Power of the Defense Counsel for the Discovery and Taking a Copy of the File

This is undoubtedly the most important power the defense counsel is granted on behalf of his client. The defense counsel's offer of the required legal assistance depends on his getting informed on the claims and charges as well as the information and documents thereupon. Therefore, the main rule is the free access of the defense counsel to the file. As a matter of fact, in accordance with the Code, the defense counsel may review the full content of the file in the investigation phase and may take a copy of documents of without paying any fees (CPC, Art.153/1). However, there is an exception to this in terms of the investigation phase. According this exception, limited to

some crimes listed under the article, the power of the defense counsel to review the full content of the file and take a copy of the documents may be restricted, upon motion of the public prosecutor, by decision of the judge, if this hinders the aim of the ongoing investigation (CPC Art. 153/2). However, this restriction does not include the records of the statements provided by the individual or the suspect who was arrested without warrant, as well as the written expert opinions and the records of other judicial proceedings, during which the above-mentioned individuals are entitled to be present (CPC, Art. 153/3). No such restriction is available during the prosecution (trial/proceeding) phase. The defense counsel may review the full content of the file and all secured pieces of evidence as of the date of approval of the indictment by the court; he may take copies of all records and documents without any fee (CPC Art.153/4).

2) Power of Interview and Written Correspondence with the Suspect/Accused

The suspect or the accused shall have the right to an interview with a defense counsel, without the requirement for a power of attorney, at any time and in an environment where the others are not able to hear their conversation (CPC, Art. 154/1). However, in the investigations related to the terrorist crimes/terrorism offenses, right of the suspect to an interview may be restricted up to 24 hours on the decision of the judge, but interrogation is not permitted during this period ([Turkish] Anti-Terror Law, Art. 10/1-b). Furthermore, in the investigations related to the terrorism offenses, in cases where findings or documents verifying that the defense counsel has intervened in the communication of the members of terrorist organization to serve their organizational purposes are obtained, the interview with the defense counsel may take place in the presence of an official upon the request of the prosecutor or on the decision of the judge (Anti-Terror Law, Art. 10/1-b).

Interview of the defense counsel with the accused shall not be recorded (CEPSM, Art.114/5).

Written correspondence between the suspect or the accused and their defense counsel shall not be subject to control (CPC, Art. 154). However, in the investigations related to the terrorism offenses, in cases where findings or documents verifying that the defense counsel has intervened in the communication of the members of terrorist organization to serve their organizational purposes are obtained, the documents given by these individuals to the defense counsel or the documents given by the defense counsel to these individuals may be reviewed by the judge upon the request of the prosecutor and on the decision of the judge. The judge may rule that

the document shall partially or wholly be given/ or not given at all (Anti-Terror Law, Art. 10/1-e).

Written correspondence between the suspect or the accused and their defense counsel shall not be seized as long as such items are at the hands of the defense counsel (CPC, Art.126).

In our opinion, the restrictions imposed on the right of the defense counsel to review and take a copy as well as his right to an interview with the suspect or the accused particularly in terms of terrorism offenses are not true with regard to the right to defense and these restrictions hamper the right to defense.

3) Power to be Present

The defense counsel's provision of the required legal assistance to the suspect or the accused is possible through his presence during various judicial procedures. From this aspect, the defense counsel shall have the right to an interview with the suspect or the accused, to be present during the interview or interrogation, and to provide legal assistance to the suspect or the accused at any stage during investigation and prosecution phases, and these rights of the defense counsel shall not be prevented or restricted (CPC, Art. 149/3).

In cases where the suspect taken into custody is referred to the criminal court of peace with a motion for arrest, a defense counsel shall be present regardless of the request of the suspect (CPC, Art. 91/6, 101/3)

The defense counsel has the power to be present in the investigation phase during the execution of the judicial inspection, while hearing the experts and witnesses, during crime scene visit by the suspect. (CPC, Art. 84, 85).

The lawyer (defense counsel) of the individual may be present during the search and this shall not be prevented (CPC, Art.120/3). In cases where the Justice of the Peace or the prosecutor's office inspect the documents and the papers of the suspect that have been seized during the search of his domicile or belongings, the defense counsel may be present (CPC, Art. 122).

In the prosecution phase, even if the accused is not present, his defense counsel has the power to be present in all sessions of the main hearing (CPC, Art. 197).

In respect to the legal remedies, the defense counsel shall be present during the hearing of appeal on facts and law and hearing of appeal on law only (CPC, Art.299).

There are some certain restrictions concerning the number of defense

counsels to be present. As mentioned above, in the investigation phase, during the interview, the maximum number of lawyers allowed to be present shall be three (CPC, Art. 149/2). However, there is no such restriction concerning the number of defense counsels to be present during the interrogation. In terrorism offenses one defense counsel is allowed to be present during the interrogation of the law enforcement authority whereas three defense counsels are allowed to be present during interrogation of the prosecutor (Anti-Terror Law, Art. 10/c).

4) Power of Declaration

Within the framework of the general structure of the criminal proceedings, the defense counsel may make a declaration at any time in the prosecution phase in the order of the hearing. Pursuant to Article 215 of CPC, after the accomplice, the witness or the expert have been heard and after any document has been read, the accused and his defense counsel shall be asked, besides the other subjects, if they have something to say against these. It should be remark that the expression in the Code is not "may be asked", but "shall be asked" as an imperative rule. Therefore, non-compliance with this imperative rule would mean a restriction on right to defense. Moreover, in our opinion, as a rule, no time restriction and other restrictions shall be brought to the declarations to be made by the defense counsel within this scope.

Likewise, right of the defense counsel to discuss evidence and to make declarations regarding the evidence has been regulated under a provision. Pursuant to Article 216/1 of CPC, just as the permission to discuss the evidence that has been presented shall be granted to the accused and his defense counsel (this is also an imperative provision), the defense counsel has the right to respond to the explanations of the public prosecutor, the intervening party or his representative (CPC, Art. 216/2).

5) Power of Posing Direct Questions

The defense counsel may pose direct questions to the accused, to the intervening party, to the witnesses, to the experts and to the other summoned individuals (such as technical expert giving expert opinion) (CPC, Art. 201/1). In our opinion, as it is allowed to make objections to the directed questions, the defense counsel has the right to object to the questions directed by the public prosecutor, the intervening party and the representative. If there is an objection to the directed question, the decision whether the question may be asked or not is rendered by the president of the court or the judge (CPC, Art. 201/1).

6) Power of Resorting to Supervision

The defense counsel may file motions of legal remedies, provided that this would not contradict the open will of the individual for whom he act as a defense counsel (CPC, Art. 261). The conclusion to be drawn from this provision is that it is the defense counsel's motion for legal remedies that is regarded as principal unless there is a contrary open will of the accused. However, the defense counsel appointed by the bar association may file a petition of legal remedy though this might be contrary to the open will of the accused and if there is a contradiction between the declaration of the defense counsel and that of the accused, the declaration of the defense counsel shall prevail (CPC, Art. 266/3).

It should be noted that the defense counsel fulfills his duty in total independence. This refers to the independence of the defense counsel not only from the prosecution counsel and the court, but also from the bar association, third persons, media, and even from the suspect or the accused though the latter two has the right to dismiss the defense counsel[18].

7- Power of Receiving Notifications

Notifications shall be made to the lawyer if follow-up is done by the lawyer (Notification Law, Art.11/1; CPC, Art. 37). As indicated by the Supreme Court, the notification shall be made to the accused as well as to his defense counsel in cases where the accused has not been in attendance in the hearing though his presence is required[19].

In cases where the accused has not been notified of appointment of an obligatory defense counsel for him, the notification made to the obligatory defense counsel shall not bear any legal results. In this case, the accused shall also be notified of the judgment. Following this notification, if appealed by the accused, this application for appeal shall prevail[20].

IV- DUTIES OF THE DEFENSE COUNSEL

The defense counsel appointed within the scope of the selected or obligatory defense counseling is under the obligation to carry out the defense duty with care, accuracy and integrity in a matter to comply with the sacredness of his profession; to act in compliance with the respectability and trustworthiness required by the profession and to comply with the professional rules set by

18 DONAY, Süheyl, *Ceza Yargılaması Hukuku*, 2nd ed., Istanbul, 2012, p. 309; ÖZBEK et al., op.cit, 248.

19 4th Criminal Circuit, 13.5.1965, 2228/2783.

20 4th Crminal Circuit, 01.06.2009, E.2008/21014, K.2009/10726.

the Union of Turkish Bar Associations (AC, Art.34).

The defense counsel is liable to follow the case they are commissioned with till their completion in accordance with statutory provisions and regardless of the absence of a written contract (AC, Art.171).

The defense counsel is liable to comply with professional privilege (AC, Art.36/1). As an outcome of the obligation of professional privilege, the defense counsel may refrain from taking the witness-stand though the relevant individual (his client) has given consent (CPC, Art.46/1-a). According to the dominant opinion, the defense counsel should refrain from taking the witness-stand.

The defense counsel may be banned from duty or his duty may be terminated in cases where he violates aforementioned duties. Likewise, the bar association may impose disciplinary, and even criminal, sanctions on the lawyer who does not fulfill his duty. Conditions for ban on defense duty have been laid down under the relevant article of the Code (CPC, Art 151).

CONCLUSION

Although right to defense through a defense counsel has not been explicitly set under Article 36 of our Constitution, as in some other constitutions, this article should be regarded as the basis of defense through a defense counsel for it is emphasized [under this very Article] that everyone (therefore, the suspect and the accused) has the right of litigation before the courts through legitimate means and procedures[21]. Moreover, in our opinion, the emphasis on "right to fair trial" mentioned in the article refers to the defense counsel. As it is highlighted under the international agreements, it is not possible to talk about a fair trial without the involvement of the defense counsel in a state governed by the rule of law. Therefore, the defense counsel constitutes the guarantee for the criminal proceedings that is proper to a state governed by the rule of law[22].

The more effective a defense counsel is in a country, the more compliant the criminal proceedings is with the right to fair trial. From this aspect, the defense counsel is not an element that "hinders", "blocks" or "detains/retards" the proceedings, on the contrary, it is a requirement of a state governed by the rule of law to regard the defense counsel as a subject and guarantee that ensures and strengthens equity, legality and legitimacy of the proceedings. Therefore, it would damage the right to fair trial and the principle of a state

[21] CENTEL / ZAFER, op.cit, 177. The authors rightfully accepts defense as a legitimate remedy and the defense counsel as a legitimate tool.

[22] CENTEL / ZAFER, op.cit., 177.

governed by the rule of law, if the rights and powers of the defense counsel is disproportionately confined or restricted except for *force majeure.* A strong defense counsel with broad authority is the guarantee for the right to fair trial, and therefore, for a strong state governed by the rule of law.

It is seen that defense counsel has been widely regulated under the Turkish Criminal Procedure Code in general, although there are some insufficiencies and mistakes in the relevant regulations and some problems in practice. The obligation to have the presence of a defense counsel particularly during interrogation and in some certain condition is not only favorable in order to ensure and strengthen the right to fair trial, but also to the point for combating unlawful evidence and ill treatment. It would be appropriate not to make concessions to this system, which is valuable for a state governed by the rule of law and serves the benefit of the state, and even to strengthen the existing rights and powers of the defense counsel.

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ABBREVIATIONS

AC	Attorneyship Code
Art	Article
CC	(Turkish) Criminal Code
CEPSM	(Turkish) Code on Execution of Punishments and Security Measures
CPC	(Turkish) Criminal Procedure Code
Const	Constitution
ECHR	European Convention on Human Rights
ed.	edition
et al.	and others
op.cit	opus citatum/in the work cited
p.	page
pp	pages

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STANDARD OF PROOF AND APPLICABLE LAW IN CROSS-BORDER DISPUTES IN TURKEY AND GERMANY

Yabancılık Unsuru İçeren Uyuşmazlıklar Açısından Türk ve Alman Hukukunda İspat Ölçüsüne Uygulanacak Hukuk

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ABSTRACT

This paper analyses the term of standard of proof and then focuses on the discussion on applicable law to standard of proof in cross-border disputes, especially with regards to German and Turkish law.

Keywords: Standard of Proof, Applicable Law, Cross-border Disputes, Turkish Law, German Law.

ÖZET

Bu çalışmada ilk olarak ispat ölçüsü kavramı incelenmekte olup, daha sonra yabancılık unsuru içeren uyuşmazlıkların mahkemeler önünde giderilmesi sırasında bu ölçüye uygulanacak hukukun ne olması gerektiği hususu, özellikle Türk ve Alman hukukları açısından ele alınmıştır.

Anahtar Kelimeler: İspat Ölçüsü, Uygulanacak Hukuk, Milletlerarası Uyuşmazlıklar, Türk Hukuku, Alman Hukuku.

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Introduction

Party autonomy is of paramount importance in the sphere of private law. Thanks to it, parties can regulate their relationships as they wish without prejudice to mandatory provisions. If any dispute arises, they can either resolve it by themselves, without intervention of anyone, or bring the case before the courts due to the principle of disposition. This means that "masters of civil procedure" are parties and not the courts in civil proceedings.

Parties are also able to determine the beginning and end of the dispute resolution process. Therefore, the process always requires the application of parties and they are responsible to bring facts and evidences. Whilst it depends

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on them what to bring; the issues of how these facts and evidences would be brought to the court and how judges would deal with them are regulated by procedural rules. For instance, the deadline to bring evidence, and the examination of them by courts are regulated under Civil Procedure Codes.[1]

The judge, who is in charge of resolving the dispute, assesses all the materials that have been brought by the parties. However, the problem here is that, the judge is often unfamiliar to the facts at the beginning, which would actually mean s/he has no idea about the dispute and what the truth is. Parties, thus, will try to convince the judge, and this process is called "proof procedure". If one of the parties is successful in this process, then the fact that is brought by him/her, would be accepted as true and existent, otherwise would be ignored.

It should be noted, nevertheless, that under Turkish Law,[2] there are certain conclusive evidences on which judges have no discretion.[3] In other words, if the fact is proved with a conclusive evidence, then the relevant fact is accepted as truth and can be basis for the judgement. A further, subjective persuasion of the judge is not required. That being the case, the general rule is, like German Law, judges are free while they examine and assess evidences and facts.[4]

Such discretion of judges for the examination of evidence leads to another problem: the need of criterion. To be more precise, in order to accept any fact as existent and to avoid arbitrariness, judges need a criterion. This may be clearly illustrated by the following example: A and B enter into a contract which requires that B must pay 1000 Euros to A. Later, A claims that B does not meet his/her obligations and brings an action against B. B replies and argues that the contract is valid and s/he has made the payment in line with that. It is clear that the aim of the proof procedure here is the payment issue. In other words, it has to be proved that whether B has made that payment or not. Parties should bring their evidences only for this fact. The problem, however, is that when and how the judge would decide on this. For the judge, any fact, which is claimed by one of the parties, can be *true*, *probably true*, *probably not true* and *not true*. In order to express these degrees, the term of "Standard of proof" (*Beweismass-ispat ölçüsü*) is used[5]. It is obvious that

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1 See Turkish Code of Civil Procedure (HMK) Art. 187 et al. and German Code of Civil Procedure (ZPO) Art. 284 et al.

2 In contrast to Turkish Law, there is no conclusive evidence under German Law. Therefore, judges have discretionary power on any kind of evidence. In this regard, see *Hans J Musielak/Max Stadler,* Grundfragen des Beweisrechts, (1984), 63.

3 See HMK Art. 200.

4 See ZPO Art. 286 and HMK Art. 198.

5 **Schack,** IZVR, s. 292; **Hk-ZPO/Saenger,** Art. 286, para. 12; **Musielak/Foerste,** Art. 286,

if the judge thinks that the fact is *not true* or *probably not true*, it would be ignored in cost of the party who bears the burden of proof. Nevertheless, if the judge thinks that the fact, which is brought by one of the parties is *probably true*, either it can be accepted as existent or non-existent. Different legal systems have different approaches to this issue. This paper, therefore, analyzes the term of standard of proof and then focuses on the discussion on the law applicable law to standard of proof in cross-border disputes, especially with regards to German and Turkish Law.

§ I. The Term of Standard of Proof

A. General

The goal of the proof procedure is to establish the truth of alleged facts before the judge appointed for the resolution of the dispute.[6] Parties use evidences to convince judges. According to ZPO Art. 286 and HMK Art. 198, judges have discretion to examine and to assess evidences. This discretion illustrates how judges will search the truth. The question of when and at which grade of persuasion, the fact would be accepted as existent, still needs to be answered.[7]

The judges will decide according to their own convictions and the standard of proof shows the grade of this conviction, i.e. at which point the fact must be accepted as existent.[8] This leads to different theories about the determination of the standard of proof.

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para. 17; **Başözen,** s. 112; **Alangoya/Yıldırım/Deren-Yıldırım,** s. 295; **Linke,** IZPR, s. 138; **Atalay,** Oğuz, Medenî Usûl Hukukunda Menfi Vakıaların İspatı, İzmir 2001, s. 37; **Weber,** Helmut, Der Kausalitaetsbeweis im Zivilprozess, Tübingen 1997, s. 17; **Yıldırım,** Kamil, M, Medenî Usûl Hukukunda Delillerin Değerlendirilmesi, İstanbul 1990, s. 39; **Leipold,** Dieter, Beweismass und Beweislast im Zivilprozess, Berlin 1985, s. 5; **Coester-Waltjen**, Beweisrecht, s. 278; **Maasen,** s. 23.

6 *Hakan Pekcanıtez/Oğuz Atalay/Muhammet Özekes,* Medeni Usul Hukuku, (2013), 643; *Yavuz Alangoya/M. Kamil Yıldırım/Nevhis Deren-Yıldırım, Medeni* Usul Hukuku Esasları, (2009), 295; *Musielak/Stadler,* Grundfragen (n. 2), 63; *Reinhard Greger*, Beweis und Wahrscheinlichkeit, (1978), 15.

7 *Hans Prütting*, Gegenwartsprobleme der Beweislast, (1983), 59-60; *Greger,* Wahrscheinlichkeit (n. 5), 8; *Bernhard H Maasen*, Beweismassprobleme im Schadenersatzprozess, (1975), 23.

8 *Haimo Schack* , Internationales Zivilverfahrensrecht, (2014), 292; *Pekcanıtez/Atalay/Özekes,* CPL (n.5), 677; *Ingo Saenger* , Zivilprozessordnung: Handkommentar, (2009), 717; *Hans J. Musielak/Ulrich Foerste,* Kommentar zur Zivilprozessodrnung, (2009), 939; *Alangoya/Yıldırım/Deren-Yıldırım,* CPL (n. 5), 295; *Hartmut Linke,* Internationales Zivilprozessrecht, (2006), 138; *Oğuz Atalay,* Medenî Usûl Hukukunda Menfi Vakıaların İspatı, (2001), 37; *Helmut Weber*, Der Kausalitaetsbeweis im Zivilprozess, (1997), 17; *Dieter Leipold*, Beweismass und Beweislast im Zivilprozess, (1985), 5; *Kamil M. Yıldırım,* Medenî Usûl Hukukunda Delillerin Değerlendirilmesi, (1990), s. 39; *Dagmar Coester-Waltjen*, Internationales Beweisrecht, (1983), 278; *Maasen,* Beweismassprobleme (n. 6), 23.

B. Theories Regarding the Determination of Standard of Proof

1. Theory of the Subjective Standard of Proof

According to the followers of this theory, proof procedure is the process of the conviction about the existence of claimed facts, and thus, it depends on the personal knowledge of the judges.[9] Therefore, determination of the possibility would not be objective; would rather be made in accordance with subjective and sensual criteria of the judges.[10] This would mean that standard of proof is not an objective truth or objective possibility; rather it is only the persuasion of judges.[11] In this context, therefore, the main concept is "truth/ reality" (*Wahrheit-Gerçeklik*).[12]

This theory is severely criticized. It is argued that they confuse the discretion of judges on examination and assessment of evidence with the standard of proof[13] or they overvalue the discretion of judges on examination and assessment of evidence.[14] Discretion to examine does not necessarily require arbitrariness, and in any case, judges must depend on objective elements while rendering a judgement. They must also pay due regard to *ratio legis* of the legislations and ordinary circumstances.[15] In this context, persuasion is not the only the personal and arbitrary conviction of judges, rather any person at that position would be convinced in such a case.[16] In addition, it is truism that there is no place in civil proceedings for the personal knowledge of judges. This is because judges are bound with the materials that are brought by the parties and it is probable that the judicial result at the end of the proceeding would be totally different from the actual situation.[17]

2. Theory of the Objective Standard of Proof

This theory is emerged against the subjective theory. The followers of this theory contend that subjective, sensual and psychological value judgments of

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9 *Hakan Albayrak,* Medenî Usûl ve İcra İflas Hukukunda Yaklaşık İspat, (2013), 302; *Christian Katzenmeier*, Beweismassreduzierung und probabilistische Proportionalhaftung, ZZP 117 (2004) 187, 192. The term "persönliche Gewissheit" (personal knowledge) used here is also not true, because the knowledge and the doubt contradict with each other.

10 *Greger,* Wahrscheinlichkeit (n. 5), 69; *Maasen,* Beweismassprobleme (n. 6), 23.

11 **Albayrak,** s. 302; **Başözen,** s. 117; **Maasen,** s. 23.*Maasen,* Beweismassprobleme (n. 6), 23.

12 *Greger,* Wahrscheinlichkeit (n. 5), 81.

13 *Maasen,* Beweismassprobleme (n. 6), 30.

14 *Katzenmeier,* ZZP 117 (n. 8) (2004) 187, 192.

15 *Friedrich Stein/Martin Jonas/ Dieter Leipold*, Kommentar zur ZPO, Teilband 1, Zweiter Band, (1987), 166.

16 *Katzenmeier,* ZZP 117 (n. 8) (2004) 187, 192-193; *Gerhard Lüke/Peter Wax/Hanns Prütting,* Münchener Kommentar ZPO, Band 1, (2000), 1785.

17 *Katzenmeier,* ZZP 117 (n. 8) (2004) 187, 193.

judges have to be excluded from the standard of proof in order to preclude arbitrariness, and judges must be bound with stable and objective criteria.[18] Unlike the subjective theory, the "truth/reality" is not used here, since truth corresponds to the mathematical certainty which cannot be obtainable in a law suit. Rather "probability/possibility" (*Wahrscheinlichkeit-Olasılık*) is regarded as the subject of the discretion on examination and assessment of the evidence.[19] Thus, when a certain grade of possibility is reached, independently from the conviction of the judges, the fact is to be accepted as existent. In this respect, German Imperial Court (*Reichsgericht*), in 1885, defined the "truth/reality" as the very high degree of probability,[20] and also defined standard of proof as knowledge or probability at the border of certainty.[21] Nevertheless, in the vast majority of cases, certainty, objective truth or knowledge cannot be achieved. In addition, the judge, who has to be convinced and must decide, is always a human being, and there is no objective tool to measure conviction of her/him. Thus, the subjective part of persuasion cannot be ignored.

3. Theory of Objectified Standard of Proof

This theory combines the pure subjective and objective theories and argues that judges must be convinced also about the probability.[22] The starting point of this view is based on the argument that even though the parties try to convince judges for the reality, any proof procedure would in fact lead to some probability. Hence, persuasion of judges is based on probability.[23] It is claimed that which degree of the *probability* would be accepted as *truth* is determined by the standard of proof.[24] This theory do not entirely deny the subjective part of the examination and assessment of the evidence, it rather aims to eliminate the risks of arbitrary discretion by forcing judges to reach a certain degree of probability. It also rejects the personal knowledge of judges and the use of *ratio legis* of legislations and life experiences as objective elements.[25]

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18 *Maasen,* Beweismassprobleme (n. 6), 32.

19 **Başözen,** s. 119-120; *Katzenmeier,* ZZP 117 (n. 8) (2004) 187, 193; *Greger,* Wahrscheinlichkeit (n. 5), 88; *Maasen,* Beweismassprobleme (n. 6), 32

20 RGZ 15, 338, https://www.jurion.de/de/document/show/0:516859,0/

21 For other relevant court decisions see *Maasen,* Beweismassprobleme (n. 6), 32, fn. 65 and 74.

22 *Greger,* Wahrscheinlichkeit (n. 5), 88; *Hans J. Musielak,* Die Grundlagen des Beweislast im Zivilprozess, (1975), 115. See also. *Musielak/Stadler,* Grundfragen (n. 2), 74.

23 *Katzenmeier,* ZZP 117 (n. 8) (2004) 187, 194; *Greger,* Wahrscheinlichkeit (n. 5), 88; *Musielak,* Beweislast im Zivilprozess (n. 21), 115.

24 *Katzenmeier,* ZZP 117 (n. 8) (2004) 187, 194; *Michael Huber,* Das Beweismass im Zivilprozess, (1983), 121.

25 *Katzenmeier,* ZZP 117 (n. 8) (2004) 187, 195; *Leipold,* Beweismass und Beweislast (n.7), 10-11; *Huber,* Beweismass (n. 23), 102. **Atalay,** s. 41

By doing so, it strikes a balance between subjective and objective theories.

4. Personal View

It seems that there is a subjective aspect of standard of proof, since it is accepted that judges have discretion to examine and assess evidences (ZPO Art. 286, HMK Art. 198). Nonetheless, this subjectivity should not mean arbitrariness. That is to say, a decision cannot be made without normative and reasonable grounds. It has to be shown with objective elements on why judges accepted that fact as existent or non-existent. It should be noted, however, that it would not be possible either for all cases to be decided with pure objective elements by virtue of the fact that "conviction" itself includes subjectivity.[26] In certain cases, the degree of persuasion of people might be somewhat similar. In dubious cases, on the other hand, it continues to be subjective. This subjectivity, however, should not lead to an arbitrary decision without controllable criteria.[27] Therefore, judges must take the general meaning and *ratio legis* of the legislation and general life experiences into consideration.

In conclusion, the theory of objectified standard of proof seems convincing. Here the terminology, either *truth* or *probability* would not affect the result and has no importance in practice because of the fact that the judgment of the court would not show the material truth, rather only the judicial truth.[28] In addition, it appears that the truth is only another expression (mathematically 1/1) of the probability.[29]

C. Degree of the Probability/Truth in order to accept any Fact as Existent

1. General

In the previous chapter the determination of the standard of proof, either subjective or objective persuasion of judges, and the terms *truth* and *probability* are examined. Another problem is that at which degree of the probability judges must be accepted as convinced. In other words, at which degree of the probability, subjectively conviction or objectively persuasion of

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26 *Greger,* Wahrscheinlichkeit (n. 5), 16; *Maasen,* Beweismassprobleme (n. 6), 29.

27 *Winfried Mummenhoff*, Zum Beweismass im Berufskrankheitenrecht, ZZP 100 (1987) 129, 129.

28 Some authors argue that the subject of the persuasion is *truth* or *probability*, while some others claim that it is not about probability, rather subjective reality of the judge. However, the prevailing view is that it is truth, but truth itself is the high level of probability. *Lüke/ Wax/Prütting,* MüKo ZPO (n. 15), 1785-1786.

29 *Olof Ekelöf,* Beweiswürdigung, Beweislast und Beweis des ersten Anscheins", ZZP 75 (1962) 289, 290.

the judge would be enough for them to accept related facts as existent. There claimed to be three different criteria for this in Civil law and Common law countries.

2. Beyond Reasonable Doubt (*Vollbeweis-Tam İspat*)

According to this criterion, judges must be completely persuaded in order to accept any fact as existent. Some authors define it as "a probability which close all doubts", "a reality where there is any reasonable doubt", or "probability on the border of certainty".[30] The prevailing definition of beyond reasonable doubt is expressed by the German Imperial Court (*Reichsgericht)* for the first time in its *Anastasia* Judgment:[31] the knowledge that is required by practical life, which will not remove all doubts but at least silence them to a certain degree.[32] Through this definition it is argued that both subjective and objective theories can be combined together. With the personal knowledge of the judge, subjectivity will be taken into consideration as the scale would always be within him/her. Such knowledge, however, would be considered objective, when it is used by an ideal judge or when the judge uses such knowledge, as obliged by the law, to the extent that is required by the needs of practical life.[33]

3. Preponderance of Evidence (*Die überwiegende Wahrscheinlichkeit-Yaklaşık İspat*)

The main point of this view is as follows: since the truth is only of limited value (Grenzwert) during the examination and assessment of evidences, a degree of probability should always be allowed for.[34] According to this standard, all doubts do not need to be eliminated. If the judge thinks that the possibility of the existence of facts is higher than the possibility of the non-existence, s/he must accept it as proved and existent, regardless of certain amount of doubt.[35] Scholars supporting this standard contend that in this way, the risk of rending wrong decisions would be distributed between parties

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30 *Heinz Thomas/Hans Putzo*, Zivilprozessordnung, (2009), 477; *Lüke/Wax/Prütting,* MüKo ZPO (n. 15), 1787; *Stein/Jonas/Leipold,* Kommentar zur ZPO (n. 14), 166; *Musielak/Stadler,* Grundfragen (n. 2), 74; *Klaus Buciek,* D., Beweislast und Anscheinsbeweis im internationalen Recht, (1984), 280.

31 BGH Urt. 17.2.1970, III ZR 139/67, NJW 1970, V. I, 946.

32 *Saenger,* ZPO (n. 7), 717; *Musielak/Foerste,* Kommentar zur ZPO (n.7), 940; *Lüke/Wax/Prütting,* MüKo ZPO (n. 15), 1785; *Leo Rosenberg/Karl H Schwab/Peter Gottwald,* Zivilprozessrecht, (1993), 659; *Stein/Jonas/Leipold,* Kommentar zur ZPO (n. 14), 166; *Musielak/Stadler,* Grundfragen (n. 2), 146.

33 *Musielak/Stadler,* Grundfragen (n. 2), 74.

34 *Gerhard Walker,* Freie Beweiswürdigung, (1979), 173.

35 *Leipold,* Beweismass und Beweislast (n. 7), 7.

equally.[36] They also claim that since certain knowledge cannot be reached, higher possibility is the most appropriate solution.[37] In addition, it is asserted that incidentally correct decisions based on the burden of proof would be avoided.[38] Lastly, by making it concrete with higher possibility, parties can be more satisfied than the pure conviction.[39]

4. Flexible Standard of Proof (*Die flexible Beweismass-Esnek İspat Ölçüsü*)

This degree of standard is mainly claimed in German law. According to the proponents of this view, it is not necessary and appropriate to define the standard before the dispute and proceedings. Proof depends on the scale, which is always within the judges, even if it is attempted to be objectified. Thus, it is not appropriate to define a stable and abstract rule for the standard of proof.[40] It is argued that it would be more practical if the standard of proof determined by taking the characteristics and alleged facts of the case in question, as well as the difficulty of proof and the requirements of substantive laws into consideration.[41] Therefore, supporters of this view leave to discretion of the judge to decide on the necessary standard of proof, which would be preponderance of evidence or full proof. In any case, however, the judge has to consider that the existence of the facts is more probable than their non-existence.[42]

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36 It is also argued that the burden of proof is related to sharing the risk of doubt and standard of proof will determine that distribution. *Richard Motsch,* Vom rechtsgenügenden Beweis, (1983), 38 f.

37 *Gerhard Kegel,* Der Individualanscheinsbeweis und die Verteilung der Beweislast nach überwider Wahrscheinlichkeit, in: Festgabe für Heinrich Kronstein, Karlsruhe (1967) 321, 335.

38 *Leipold,* Beweismass und Beweislast (n. 7), 125; *Huber,* Beweismass (n. 23), 86-87; *Maasen,* Beweismassprobleme (n. 6), 55.

39 *Huber,* Beweismass (n. 23), 84.

40 *Oliver Rommé,* Der Anscheinsbeweis im Gefüge von Beweiswürdigung, Beweismass und Beweislast, (1988), 90-91.

41 *Peter Gottwald,* Das flexible Beweismass im englischen und deutschen Zivilprozess, in: FS für Dieter Henrich zum 70. Geburtstag, (2000), 173; *Rosenberg/Schwab/Gottwald,* Zivilprozessrecht (n. 31), 660; *Hans J. Musielak,* Gegenwartsprobleme der Beweislast, ZZP 100 (1987) 385, 408; *Rommé,* Der Anscheinsbeweis (n. 39), 90; *Prütting* accepts that for some exceptional cases, the flexible standard of proof will be applied. *Lüke/Wax/Prütting,* MüKo ZPO (n. 15), 1787.

42 The new theory developed and applied in some countries called “loss of a chance”. It is contended that, in order to avoid these “all or nothing” rule, especially for tort cases, the probability of the causation should be taken into account, which will provide a more efficient solution. For example see: *Hans B. Schäfer/Klaus Ott,* Lehrbuch der ökonomischen Analyse des Zivilrechts, (2012) 296 f.; *Zaven T. Saroyan,* The Current injustice of the Loss of Chance Doctrine: An Argument for a New Approach to Damages, Cumb. Law Rev. 33 (2002) 15 f., 17; *David A. Fischer* , Tort Recovery for Loss of a Chance, Wake Forest Law Rev. 36 (2001) 605 f.

5. Personal View

It is not explicitly regulated in German or Turkish Codes which degree of possibility is enough for acceptance of any fact as existent. Notwithstanding this, in some articles,[43] it is explicitly expressed that preponderance of evidence is enough for the sake of those issues, and thus, the standard is reduced. Hence, it seems that the rule must be beyond reasonable doubt (*Vollbeweis-Tam İspat*). Otherwise, the legislator would not provide the exceptional rules explicitly. Additionally, due to the rule of law, both claimants and defendants seek for a right decision, not a *probably right* one.[44] Finally, even if it is not possible to reach an absolute truth due to the human's nature,[45] the principle must be as possible as close to that aim. When there is a special rule for the matter in question, that preponderance of evidence would be enough and the judge will be bound with it. In other cases, s/he must expect the degree of the possibility in which all doubts are silent. In this context, even if preponderance of evidence or flexible standard of proof can be argued as *lege feranda,* it will be against the normative rules of both German and Turkish Codes.[46] Besides, the flexible standard of proof cannot be accepted, since it may lead to arbitrariness and prevent legal certainty and predictability.

§ II. Applicable Law to the Standard of Proof Issues

A. General

It is well-known that vigilantism is forbidden in modern law systems. Therefore, if parties cannot agree to resolve their disputes, they must apply to one of the ways which are allowed by the codes. In this sense, the most common method of dispute resolution is litigation. In litigation, judges will, in principle, settle the disputes by applying the substantive and procedural rules, which are in force in that state. However, as a result of globalization and the growth of commercial relations between states, the mere application of the law of the forum -*lex fori*- would not be sufficient. Hence, in the vast majority of the cases, if the dispute has a relation with more than one country, the rules of conflict of laws, which are also part of substantive law, will decide on which

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43 For example, ZPO Art. 294, HMK Art. 334, 390.

44 In constrast, *Kegel* claims that if preponderance of evidence is accepted, the judgment will be more probably correct and in any case this would be better and more just than making a decision according to burden of proof. *Kegel,* Die Verteilung der Beweislast (n. 36), 335. However, rendering a decision according to burden of proof does not mean arbitrariness, rather there is a substantive ground. Thus the argument of "more just" does not appear to be plausible.

45 *Walker,* Freie Beweiswürdigung (n. 33), 175.

46 *Ekelöf,* ZZP (n. 28) 75 (1962) 289, 291; *Gotthold Bohne,* Mit einer an Sicherheit grenzenden Wahrscheinlichkeit, NJW (1953) 1377, 1377.

law is to be applied.[47] On the other hand, for procedural issues, it is almost universally accepted that the law of the forum -*lex fori*- will be applied with only few exceptions.[48] This means that in order to apply the rules of the forum state directly, the issue has to be qualified as procedural through a process of qualification.[49] In this regard, it is generally accepted that the issue of standard of proof belongs to procedural law,[50] as the rules of standard of proof will not be applied outside proceedings and they regulate the proceedings and aim at reaching the most appropriate results in the end. Therefore, the qualification problem for the standard of proof will not be discussed here. Nevertheless, it is essential to put forward that nowadays applying the principle of *lex fori* for procedural issues is a matter of contention and it is claimed that the principle is not absolute. For each procedural rule, it has to be strictly investigated. In the following parts, thus, the issue of applicable law for the standard of proof will be discussed considering private international law justice. In the

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47 *Willibald Posch,* Bürgerliches Recht: Internationales Privatrecht, V. VII, (2010), 11; *Harm, P. Westermann,* Bürgerliches Gesetzbuch, V. II, (2000), 5134; *Leo Raape/Fritz Sturm,* Internationales Privatrecht, (1977), 404; *Götz v. Craushaar,* Die internationalrechtliche Anwendbarkeit deutscher Prozessnormen, (1961), 20; *Hessel E. Yntema,* "The Historic Bases of Private International Law", Am. J. Comp. L. 2 (1953) 297, 300.

48 *Richard* **Zöller***,* Zivilprozessordnung: ZPO Kommentar, (2012), 40; *Hartmut Linke/Wolfgang Hau,* Internationales Zivilverfahrensrecht, (2011) 24; *Schack,* IZVR (n. 7), 14; *Anne K. Arnold,* Lex Fori als versteckte Anknüpfung, (2009), 47; *Reinhold Geimer,* Internationales Zivilprozessrecht, (2009), 165; *Jan Kropholler,* Internationales Privatrecht, (2006), 595; *Christian v. Bar/Peter Mankowski,* Internationales Privatrecht, V. I, (2003), 399; *Friedrich Stein/Martin Jonas/Wolfgang Brehm* Kommentar zur ZPO**,** V.I, (2003), 16; *Westermann,* BGB (n. 46) 5140; *Hermann Rixen,* Die Anwendung ausländischen Verfahrensrechts im deutschen Zivilprozess, (1999), 3; *Peter Böhm,* Die Rechtschutzformen im Spannungsfeld von lex fori und lex causae, in: FS für Hans W. Fasching zum 65. Geburtstag, (1988) 107, 107; *Dieter Leipold,* Lex Fori, Souveränität, Discovery:Grundlagen des Internationalen Zivilprozessrechts, (1988), 25; *Rolf A. Schütze,* Deutsches Internationales Zivilprozessrecht, (1985), 14. *Coester-Waltjen,* Internationales Beweisrecht (n. 7), 83; *Manfred Radtke,* Der Grundsatz Der Lex Fori und Die Anwendbarkeit Ausländischen Verfahrensrechts, (1982), 3; *Wolfgang Grunsky,* Lex Fori und Verfahrensrecht, ZZP 89 (1976) 241, 241; *Peter E. Nygh,* Conflict of Laws in Australia, (1971), 279; *Andreas Heldrich,* Internationale Zuständigkeit und anwendbares Recht, (1969), 14; *v. Craushaar,* Die internationalrechtliche Anwendbarkeit, 20; *Erwin Riezler,* Internationales Zivilprozessrecht und Prozessuales Fremdenrecht, (1949), 91; *Arthur Nussbaum,* Deutsches Internationales Privatrechts, (1932), 384; *Gustav Walker,* Streitfragen aus dem Internationalen Zivilprozessrechte, (1897), 22; Aysel Çelikel/ Bahadır Erdem, Milletlerarası Özel Hukuk [Private International Law] (2012) 452; Vahit Doğan, Milletlerarası Özel Hukuk [Private International Law] (2013) 48; Cemal Şanlı/Emre Esen/Inci Ataman-Figanmeşe, Milletlerarası Özel Hukuk [Private International Law] (2014) 422 f.; Ergin Nomer, Milletlerarası Usul Hukuku [International Procedural Law] (2009) 26 f.

49 Doğan (n 48) 170; Şanlı/Esen/Figanmeşe (n 48) 63; *Thomas Rauscher,* Internationales Privatrecht mit internationalem Zivilverfahrensrecht, (2012), 109; Çelikel/Erdem (n 48) 77 f.; *Abbo Junker,* Internationales Privatrecht, (1998), 133; *Raape/Sturm,* IPR (n. 46), 277.

50 *Prütting,* Gegenwartsprobleme (n. 6), 66.

first place, the problem will be put forward, and then it will be analyzed which law should be applied.

B. Definition of the Problem

As mentioned above, there are three possible degrees of standard: beyond reasonable doubt, preponderance of evidence and flexible standard of proof. Under Turkish and German Law, it is generally accepted[51] that the general rule of standard of proof is beyond reasonable doubt, which means that not all doubts should be removed but at least they must be silent, as judges content themselves with the requirements of practical life. Nonetheless, this is not valid in all legal systems. In Common law systems, the preponderance of evidence (*die überwiegende Wahrscheinlichkeit-yaklaşık ispat*) accepted in civil cases as the standard of proof.[52] Likewise, Scandinavian states accept "ö*verviktsprincip*" while French Law accept "*intime conviction*" (*intime Überzeugung*).[53] Thus, when the dispute has a relation with these different legal systems, applicable law on standard of proof will affect the content of judgment of the courts. For example, if the American law will be applied to standard of proof, a German or a Turkish judge will decide according to preponderance of evidence and accept related fact as existent although it is only probable, and all doubts are not silent. However, when s/he applies German or Turkish Law, then the same fact will be accepted as non-existent, and final decision will be different. In this respect, the law applicable to standard of proof is of paramount importance.

3. Views about the Problem

For cross-border disputes, which law should be applied to standard of proof, especially when the applicable law is a foreign law, is often problematic. *Coester-Waltjen* argues[54] that the norms of the standard of proof exist in order to shorten the process of investigation of the truth. Even if, at first glance, it appears to be a procedural issue, the main aim of the proceeding is to detect substantial relationship, and thus the aim of the procedural law is

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51 In German law, for the first time by *Kegel,* and then by *Maasen, Musielak, Burns*, and *Motsch,* it is accepted that main rule for standard of proof must also be the rule for preponderance of evidence. Nevertheless, the majority of authors disagree with this view. *Pekcanıtez/ Atalay/Özekes,* CPL (n. 5), 680; *Inge Scherer,* Das Beweismass bei der Glaubhaftmachung, (1996); *Kegel,* Die Verteilung der Beweislast (n. 36), 333 f.; *Maasen,* Beweismassprobleme (n. 6), 153 f.; *Rudolf Burns,* Beweiswert, ZZP 91 (1978) 64, 66; *Musielak,* Beweislast im Zivilprozess, (n.21), 110 f.

52 *Moritz Brinkmann,* Das Beweismass im Zivilprozess aus rechtsvergleichender Sicht, (2005), 27; *Gottwald,* Das flexible Beweismass (n.40), 168; *Maasen,* Beweismassprobleme (n. 6), 43-44.

53 *Buciek,* Beweislast und Anscheinbeweis (n. 29), 281.

54 *Coester-Waltjen,* Internationales Beweisrecht (n. 7), 277-280.

the realization of the substantive laws. Likewise, all exceptions for the general rule of standard of proof are based on the substantive law in both in Civil law and Common law states. The whole controversy on this rule stems from substantive law. In addition, the application of foreign law itself would not harm the international harmony of the judgments, rather judgements may be easily enforced as *ordre public* objection is eliminated in this way. Thus, the applicable law on the standard of proof should be *lex causae*.

Buciek also claims that[55] in order to decide the applicable law, it must be firstly shown that the application of foreign standard of proof will not be more impractical than foreign substantive law. Thus, it will not be against the principle of judicial economy. The standard of proof, hence, will inevitably affect the content of the judgment.[56] Additionally, in order to secure private international law justice, the expectations of parties have to be considered. Therefore, independent from the qualification of the standard of proof, there is a need of unique connection factors in conflict of laws' cases. In this regard, in order to provide predictability, the correct answer for the question of applicable law on standard of proof is *lex causae*.

In contrast, *Schack* claims that[57] degree of the probability can neither be exactly measured nor valued, which results in a danger of equitability. Therefore, it may lead to problems with regards to the identification of the liable party. Indeed, allowing preponderance of evidence in international cases in Germany may lead to disorder in terms of investigation of foreign laws and facts, and this will cause a perception on the parties that the judge cannot detect the foreign law exactly. In addition to this, since the materials that are brought by defendants will not be explicit like the ones brought by the claimant, such a situation would be inappropriate for defendants. Thus, the application of preponderance of evidence would be against law and order (*Rechtsfrieden*). Further, decreasing the scale of standard of proof may in turn increase the number of admissible evidences. Therefore, *lex fori* should outweigh. Judges will have a lack of familiarity and experience to detect the foreign standard. In this sense, it would be meaningless to bind the judge with the foreign standard of proof. However, when the law of the forum is

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55 *Buciek,* Beweislast und Anscheinbeweis (n. 29), 282-285. See also *Geimer,* IZPR (n. 47), 814-815.

56 He claims that the rule of the degree of standard of proof is like a rule that determines the responsibility according to substantive law. In other words, if it is low, then the responsibility will be high or vice versa. *Buciek,* Beweislast und Anscheinbeweis (n. 29), 282.

57 *Schack,* IZVR (n. 7), 293-294. See also *Linke,* IZPR (n.7), 138-139; *Riezler,* IZPR (n. 47), 466-467.

applied, the parties may not be bothered with unnecessary obligations and this will serve the interest of the parties and private international law. Hence, proceedings would be more predictable and practical in such a circumstance.

Gottwald also argues that[58] standard of proof cannot be separated from the position and conviction of the judges. Thus, *lex fori* should be applied to these issues. He further claims that different expressions in different norms will not create different results on merits owing to the fact that a psychologically persuasive judgment is the most important thing on these cases for an ordinary person. Hence, different regulations are only the "matter of words".

4. Assessment of the Opinions and Personal View

Rules on standard of proof, as discussed above, indicate the degree of persuasion of judges in order to accept any fact in the proceeding as existent. Since legal systems adopt different approaches, applicable law to standard of proof in cross-border disputes has an important role. In order to determine the applicable law, it seems that the relationship between the discretion of judges to examine and assess evidences and the burden of proof should be analyzed. In addition, the aim of private international law and private international law justice should be taken into account.

According to German Code of Civil Procedure Article 286 and Turkish Code of Civil Procedure Article 198, judges have discretion to examine and assess evidences. This means that only judges are in position to make a decision on the credibility of an evidence. Standard of proof is related with the degree of this discretion. The rules of burden of proof, on the other hand, regulate the *non liquet* situation and allow judges to decide in spite of that. Thus, the rule of burden of proof is not required at this stage[59]. If judges are not persuaded enough according to standard of proof, then s/he must search for the burden of proof and must accept the related fact as non-existent for the cost of the party who has that burden.[60] It is generally accepted that discretion of judges to examine and assess the evidence belongs to law of procedure, and matters relating to the burden of proof belongs to substantive law.[61] Under these

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58 *Gottwald,* Das flexible Beweismass (n. 40), 175. See also *Heinrich Nagel/Peter Gottwald,* Internationales Zivilprozessrecht, (2013), 511-512.

59 **Başözen,** s. 114; **Atalay,** s. 39; **Yıldırım,** s. 72; **Prütting,** s. 59-60.

60 In this respect it is claimed that the burden of proof only distributes the risk of doubtful situation. *Torstein Eckhoff,* Tvilsrisikoen, (1943).

61 *Schack,* IZVR (n. 7), 285; *Nagel/Gottwald,* IZPR (n. 57), 514; *Geimer,* IZPR (n. 47), 816-817; *Coester-Waltjen,* Internationales Beweisrecht (n. 7), 283-284; *Heldrich,* Internationale Zuständigkeit (n. 47), 18; *Riezler,* IZPR (n. 47), 464; *Hubert Niederländer,* Materielles Recht und Verfahrensrecht im internationalen Privatrecht, RabelsZ 20 (1955) 1, 31, 33; *Paul, H. Neuhaus,* Internationales Zivilprozessrecht und internationales Privatrecht, RabelsZ 20

circumstances, the role and function of standard of proof against these two (examination of evidence and burden of proof) may help us to understand which law would be applicable to it. Additionally, the role of standard of proof must be analyzed in relation to private international law justice, which requires meeting legitimate expectations of parties and international harmony of judgments.[62]

There are diverging views on the role and function of standard of proof. One of the views is as follows:[63]

"By determining the standard of proof rules, lacunas in the norms are detected and filled. With the help of standard of proof, thus, the scope of any rule can be widened or narrowed. For example, if the standard of proof is lowered, then the application of the norm, which regulates compensation for tort cases, will be widened with the same ratio. Thus, the problem of standard of proof is also a problem of the right determination of the scope of the norm."

By facilitating the proof of the present facts, therefore, the applicability of the abstract legal rules –either substantive or procedural rules- will be expanded.

Another view explains the function of the standard of proof, independent from the content of the rules, as shortening of investigation of the reality/truth.[64] Furthermore, specification of areas, where the standard of proof is decreased, will also help to determine its function. In Turkish law, especially for interim injunctions, the rule for standard of proof accepted as a preponderance of evidence.[65] In addition, Article 38/IV of the Code of Civil Procedure decreases the standard for the challenge of judges on the grounds of impartiality. Additionally, in order to provide legal assistance, Article 334/I requires only a low level of preponderance of evidence. The rationale behind decreasing the standard of proof for interim injunctions stems from their exceptional nature. To put it simply, judges, in these cases, should render his/her decision in a very short time. This corresponds with the function of standard of proof which aims at shortening the process of truth investigation.[66] In Article 334/I, the aim is to facilitate legal assistance for people in order for

(1955) 201, 238; *Nussbaum,* DIPR (n. 47), 413.

62 *Çelikel/Erdem,* IPR (n. 48), 32-39.

63 *Maasen,* Beweismassprobleme (n. 6), 1; *Rupert Schreiber,* Theorie des Beweiswerts für Beweismittel im Zivilprozess, (1968), 13.

64 *Coester-Waltjen,* Internationales Beweisrecht (n. 7), 276-278.

65 Code of Civil Procedure Art. 390/III, Code of Enforcement and Bankruptcy Art. 257.

66 However, shortening the time of truth investigation is valid here only for temporary decisions, not for permanent and final decisions of the courts.

them be easily part of it.[67] This is in line with another function of standard of proof that expands or narrows the scope of the norms. In case of the challenge of judges, it is allowed to make a decision in spite of a doubt, since impartiality cannot be proved exactly (i.e. beyond all reasonable doubt) due to its nature. Thus, here the aim is similar to that of interim injunctions: to shorten the process of reality/truth investigation. Hence, both of the views discussed above which explain the function of standard of proof, appears to be acceptable for different legal norms.

Following the discussion on the scope and function of standard of proof, the role of private international law justice in determining the law applicable should also be analysed. This requires, in the first place, the examination of the relationship between the legitimate expectations of parties and standard of proof. Parties will prepare their evidence generally before the disputes arise. Therefore, standard of proof will affect them even at this stage. Since it is already illustrated that there is a close relation (widening and narrowing scope of rules) between substantive law and standard of proof, parties will adjust their action according to law that is applicable to the merits. In this sense, the view which supports the application of *lex causae* to standard of proof issues appears to be convincing. This means that if a dispute, for example, arises out of a contract, contract status should also be applied to the standard of proof.

In terms of international harmony of judgments, there is no doubt that standard of proof will inevitably affect the judgments. For instance, when the judge comes to conclusion that "applicant is probably right", the result depends on relevant rule: if the court must decide based on full proof, then, s/he must accept that fact as non-existent; however, if the preponderance of evidence is enough, then that fact would be accepted as existent.[68] Hence, the function of standard of proof (widening and narrowing scope of rules) cannot be disregarded. It would affect the content of judgments in all cases. Therefore, independently from forum, if the law of the state which was also applicable to the merits applied to standard of proof, international harmony of the judgments will be provided.

In any case, the argument of *Schack s*eems unconvincing. He argues that there will be difficulty in the investigation and application of the foreign law. Yet, the same is true for other substantive issues. In other words, even though

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67 In the preamble of the Article this aspect of the rule is emphasized.

68 It does not seem to be just to agree with *Gottwald*, as he argues that it is practically unimportant due to psychological reasons. Das flexible Beweismass, (n. 40) 175. See also *Nagel/Gottwald,* IZPR (n. 57), 512.

detection of standard of proof and possible negative results are not more different than substantive issues, the application of foreign substantive law (*lex causae*) is not opposed in that context. The same argument should also be rejected for practical grounds. For instance, regarding interim injunctions, judges make a decision in a number of cases according to different standard of proof. In this case, they will be more comfortable when applying foreign standard of proof than applying substantive law, as they are more familiar with such concept due to widespread use of interim injunctions in litigation. What is more, it is not possible to agree with the argument supporting the application of *lex fori* on the grounds that *lex causae* would create a risk of increasing number of admissible evidences. Contrariwise, such a result will actually be more appropriate for the legitimate expectations of the parties, since they generally prepare admissible evidences before disputes arise. *Gottwald*'s view which contends that standard of proof depends on the position and persuasion of judges seems plausible. However, it should be accepted that this will not prevent the application of foreign law. This is because different standard of proof will not change the discretion of judges on examination and assessment of evidence. It may only change the result whether related fact is existent or non-existent. Consequently, application of *lex causae* to standard of proof is more appropriate for the purposes of legitimate expectations of parties and international harmony of judgments.

Conclusion

The analysis made in this paper regarding standard of proof, which shows the degree of conviction of judges in order to accept alleged facts as existent for present case, leads to the following conclusions:

1- In case of standard of proof, the truth will be reached through an objectified evaluation of judges on the probability of existence or non-existence of the related fact.

2- The applicable standard of proof in German and Turkish law is full proof which means all doubts must be silent. This is because preponderance of evidence is regulated exceptionally and explicitly in codes. In addition, due to the rule of law, parties may only be satisfied with a literally right decision, not a probably right one. The flexible standard of proof cannot be accepted, since it may lead to arbitrariness and prevent legal certainty and predictability.

3- *Lex causae* should be applied to standard of proof issues both for practical grounds and the sake of private international law justice.

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THE CULTURE OF DISPUTE RESOLUTION IN TURKEY AND THE ISTANBUL ARBITRATION CENTRE

Türkiye'de Uyuşmazlık Çözüm Kültürü ve İstanbul Tahkim Merkezi

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ABSTRACT

Legal culture in a country is not only constituted by legal rules but also the attitudes of legal actors within the adjudication system. Dispute resolution is an area where legal actors play an important role. Therefore, dispute resolution will also be best understood in relation to the legal culture of the country. In this sense legal culture also consists of attitude of national courts towards alternative dispute resolution especially the awards of international arbitral tribunals.

Different forms of institutions established in different states for international arbitration and in the course of time it has been seen that the legal culture of the states have profound importance in the success of those institutions. Also In Turkey, Law numbered 6570 on the Istanbul Arbitration Centre, which has been pointed out as promising venue for international arbitration between East and West states, entered into force as of January 1, 2015. Whilst it has not actually begun to operate, this paper aims to analyse Turkey's legal culture and its potential effects on the success of the centre.

Keywords: Legal Culture, Dispute Resolutions, International Arbitration, Attitude of National Courts, Istanbul Arbitration Centre, Law Numbered 6570.

ÖZET

Bir ülkedeki hukuk kültürü, yürürlükteki hukuk kuralları ile birlikte, yargılama sistemindeki hukukçuların tutum ve davranışlarından da oluşmaktadır. Anlaşmazlıkların çözümünde hukukçuların rolü de dikkate alınırsa, bir ülkedeki uyuşmazlık çözüm sistemi, oranın hukuk kültürü ile en iyi şekilde anlaşılacaktır. Dolayısıyla, hukuk kültürü milli mahkemelerin mahkeme dışı uyuşmazlık çözüm mekanizmalarına ve özellikle uluslararası tahkim mahkemelerinin kararlarına yaklaşımlarını da kapsar.

Pek çok ülkede hali hazırda faaliyet gösteren uluslararası tahkim merkezlerinin başarısında hukuk kültürünün önemi zaman içinde ortaya çıkmıştır. Türkiye'de de 1 Ocak 2015'te yürürlüğe giren 6570 sayılı Kanun ile kurulan İstanbul Tahkim

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Merkezi, doğu ile batı ülkeleri arasında ümit vadeden bir uluslararası tahkim merkezi olarak görülmektedir. Merkez, henüz faaliyete başlamamış olduğundan, bu çalışma Türkiye'de oluşmuş hukuk kültürünü ve bu kültürün İstanbul Tahkim Merkezi üzerindeki muhtemel etkilerini incelemeyi amaçlar.

Anahtar Kelimeler: Hukuk Kültürü, Uyuşmazlık Çözümü, Uluslararası Tahkim, Milli Mahkemelerin Tutumu, İstanbul Tahkim Merkezi, 6570 Sayılı Kanun.

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INTRODUCTION

Understanding legal rules alone is insufficient to explain the outcomes reached in adjudication in any legal system.[1] This is because the same legal rules may be applied differently in different countries. For instance, in both England and Italy a pedestrian has priority on a pedestrian crossing. However, where a pedestrian is relatively safe on a pedestrian crossing in England, the same pedestrian might be knocked down by a motorist in Italy. Thus, it seems clear that legal rules that have the same wording are understood and respected differently, and depend on the social structure and culture of the issuing state. As such, the cultural background of states and the habits of people living there are of paramount importance to understanding the reasoning behind judgments produced in those states.

Lawrence Friedman, who is accepted as the first proponent of the concept of legal culture,[2] contends that law will be best understood as a system composed of various factors.[3] Dispute resolution will also be best understood in relation to the legal culture of the country. Taking this into account, this paper aims to analyse the culture of dispute resolution in Turkey, especially with regards to arbitration and its potential effects on the success of the Istanbul Arbitration Centre. In this respect, the paper will first focus on the concept of culture, particularly legal culture, and provide a brief history of alternative dispute resolution in Turkey. After that, the background of the establishment of the Istanbul Arbitration Centre will be analysed. Finally, in the last chapter the paper will examine the possible effects of Turkey's dispute resolution culture on the achievement of the Istanbul Arbitration Centre.

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2 Susan S Silbey, 'Legal Culture and Cultures of Legality' in John R Hall, Laura Grindstaff, and Ming-Cheng Lo (eds) *Handbook of Cultural Sociology* (Routlege 2010) 471.

3 Lawrence M Friedman, *The Legal System: A Social Science Perspective* (Russell Sage Foundation 1975) 3.

I. CULTURE AND DISPUTE RESOLUTION IN TURKEY

Culture is generally defined as traits, behaviours, values and beliefs of people who live in certain places.[4] In this sense, legal culture may be defined as all of these elements as they relate to legal issues. However, the concept of legal culture is deemed to be vague and open-ended among scholars.[5] It is often described in two ways.[6] The first refers to differences in the characteristics of law embedded in the broader context of social structure and culture that constitutes and indicates the place of law within a society.[7] Furthermore, it comprises 'attitudes, values and opinions held in society with regard to law, the legal system and its various parts'.[8]

Gessner, however, gives a more comprehensive framework about legal culture research by analysing culture in four different fields: legal norms, Supreme Court decisions, institutional actors in law, such as courts and administration, and non-institutional actors such as lawyers, citizens and business enterprises.[9] In his understanding, even though legal rules may shape culture and be shaped by it, it is also important how courts and other adjudication authorities understand and apply these rules.[10] Dispute resolution is also undoubtedly one area where legal actors play an important role.

Therefore, the values and attitudes of all these groups have an impact on the context of dispute resolution.[11] Throughout history, divergent institutionalized forms of dispute resolution have been created by countries which reflect their unique cultural beliefs and norms.[12] In Turkish history, during the Ottoman Empire, iwas found that dispute resolution including arbitration for private law issues as an alternative to court litigation was used by individuals.[13] Arbitration has a long history in Turkey dating back to 1414

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4 VolkmarGessner, 'Global Legal Interaction and Legal Cultures', (1994) 7 Ratio Juris 132; Immanuel Wallerstein, 'Culture as the Ideological Background of the Modern World System' (1990) 7 Theory, Culture & Society 31.

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10 Ginsburg (n 6) 1337.

11 Amanda Stallard, 'Joining the Culture Club: Examining Cultural Context When Implementing International Dispute Resolution' (2002) 17 Ohio St J DispResol 463.

12 ibid 463.

13 MuharremBalcı, *İhtilaflarınÇözümYollarıveTahkim*(Dispute Resolution and Arbitration) (DanışmanYayınları 1999) 86.

when an arbitration clause was incorporated in a contract between Turks and Genoese.[14] Although the codification of arbitration did not happen until the 1850s and a commission for commercial disputes acting as an arbitration centre was not established until the1980s,it is clear that dispute resolution has been part of Turkish legal culture for many years. However, prior to the 1980s dispute resolution in Turkey was considered unsatisfactory.[15] This situation is apparent from the huge difference between the number of court litigations and alternative dispute settlements.[16] Thus, it appears that the culture of dispute resolution in Turkey has undergone certain changes over the years. In the following chapter, background information on the establishment of the Istanbul Arbitration Centre will be given.

II. BACKGROUND TO THE ISTANBUL ARBITRATION CENTRE

As mentioned above, the Istanbul Arbitration Centre was not the first international arbitration centre in Turkish legal history. For commercial disputes between Ottoman traders and foreigners, a commission was established at the beginning of the 1800s. This commission was composed of mostly foreign traders because they had expertise in customary commercial law that was necessary for trade relations in Europe.

There are now also institutional arbitration centres with their own domestic arbitration rules, such as the Union of Chambers and Commodity Exchanges of Turkey "TOBB", the Istanbul Chamber of Commerce "ITO" and Izmir Chamber of Commerce. However, none of these function as an international arbitration institution.[17]

The idea of the establishment of an independent and autonomous institutional international arbitration centre in Turkey goes back to the 1960s. Despite certain efforts by prominent legal scholars at that time within the Union of Chambers, the institution failed to come into existence. Ten years after, the first academic attempt at an institutional arbitration centre emerged from the Research Institute of Banking and Commercial Law. However, apart from a publication, no effective result materialised from that initiative. In any case, arbitration became well-known and popular in the 1990s in Turkey.[18]

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14 Kate Fleet, *European and Islamic Trade in the Early Ottoman State : the Merchants of Genoa and Turkey* (CUP 1999) 172.

15 Pekcanitez Hakan, 'İstanbul Tahkim Merkezi Kanun Taslağı' (Draft Law of Istanbul Arbitration Centre) (2012) 12 Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi 635, 640.

16 ibid 640.

17 ibid 637-38.

18 Rayhan Asat, 'The Culture of International Arbitration of Turkey', *Reopening the Silk Road in the Legal Dialogue Between Turkey and China*, International Law Conference, 12-14 June 2012 Law School of Marmara University, Istanbul-Turkey (Conference Proceeding Book

In 2001, a draft law to establish the Istanbul Arbitration Centre was prepared but unfortunately this attempt was not successful either. Nevertheless, with the Strategy and Action Plan for the Istanbul International Finance Centre adopted on September 29, 2009 by the High Planning Council,[19] the establishment of an independent and autonomous institutional arbitration centre in Istanbul was officially in the pipeline. Then, on November 20, 2014, Law numbered 6570 on the Istanbul Arbitration Centre was adopted and entered into force as of January 1, 2015.[20]

While preparing Law numbered 6570, the working group which was composed of academics and judges examined the structure of numerous successful arbitration institutions including the ICC International Court of Arbitration, the Arbitration Institute of the Stockholm Chamber of Commerce and the London Court of International Arbitration (LCIA).

The German Institution of Arbitration and the Arbitration Court of Chamber of Commerce, and the Agricultural Chamber of the Czech Republic were particularly scrutinised because they were regarded as the prime movers in the area of arbitration in their countries. The role of an arbitration centre in constituting a culture of arbitration is considerable in the determination of model institutions by a working group.

There are a number of considerations for the choice of institution in international arbitration, including neutrality and internationalisation; arbitral rules, law governing the substance of the dispute; free choice of arbitrators; and seat chosen for arbitration.[21]It seems that within the dispute resolution culture of the country, as part of its legal culture, where the institution is located has an effect on all these considerations. Because the Istanbul Arbitration Centre is located in Turkey it would be influenced by this culture. Therefore, in order to understand better the dispute resolution culture of Turkey and its effect on the Istanbul Arbitration Centre, in the following chapter the political and legislative structure of Turkey as it relates to its legal culture, including the culture of dispute resolution, will be examined. In addition to this, the chance of the Istanbul Arbitration Centre as a preferable arbitration venue will be evaluated by analysing the successes and failures of

2013) 133, 135.

19 Official Gazette 27364, 2 October 2009.

20 İstanbul Tahkim Merkezi Kanunu (The Act for Istanbul Arbitration Centre), Official Gazette 29190, 29 November 2014 <http://www.resmigazete.gov.tr/eskiler/2014/11/20141129-1.htm> accessed 15 May 2015.

21 2010 International Arbitration Survey: Choices in International Arbitration by School of International Arbitration at Queen Mary University of London & White & Case <http://www.arbitration.qmul.ac.uk/docs/123290.pdf> 18 accessed 02 June 2015.

different arbitration centres and judgments of the Turkish Court of Cassation (YARGITAY) with regard to arbitration and arbitral awards.

III. CULTURE AND THE ISTANBUL ARBITRATION CENTRE

A. Political Culture and Structure of Turkey and Effect thereof on the Istanbul Arbitration Centre

Due to its geographical location, Turkey is referred to as the closest Western state to the East and the closest Eastern state to the West.[22] On the one hand, legal dialogue is on-going to open the legendary Silk Road again between China and Turkey which indicates Turkey's strong historical and cultural ties with the East. On the other hand, Turkey has been adapting the legal rules of Western states since the 19th century. Therefore, Turkey reflects the features of both West and East. As such, Turkey seems to be of great importance, especially for dispute settlements between Eastern states and Western states.

This geographical advantage of Turkey as a bridge between Asia and Europe could be significant for the success of an international arbitration centre in the same way as an arbitration centre in Stockholm played an important role during the Cold War for disputes between the Western and Eastern blocs. In fact, it still has a prominent role in the resolution of such disputes.[23]

It is not only in Europe where arbitration institutions have increased their standing thanks to their geopolitical advantages and arbitration-friendly legal environment. For instance, Singapore is quite neutral, politically very stable and in general a strong country.[24] It also has low levels of corruption in the government and judiciary.[25] In addition, Dubai International Arbitration Centre (DIAC), which was established in 1994, has become a successful arbitration institution in the Middle East.

The issue of location could be used as an argument for an international arbitration centre in Istanbul. People from both the West and the East may find something from their culture there and thus may choose Istanbul as a promising venue for arbitration. However, geographical location may not

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22 Ziya Akıncı, 'Neden İstanbul Tahkim Merkezi?/Why center for Arbitration in İstanbul?' (2008)10/3 Journal of Yasar University 79, 92.

23 ibid 81-82.

24 Verhoosel Gaetan, TOBB (Turkish Union of Chambers and Commodity Exchanges) İstanbul International Arbitration Centre Conference (not published), Ankara November 2012 23.

25 The World Justice Project (WJP) Rule of Law Index <http://worldjusticeproject.org/sites/default/files/roli_2015_0.pdf> 25 accessed 02 June 2015.

be sufficient on its own to ensure success. Political stability could also be crucial. For instance, the Cairo Regional Centre for International Commercial Arbitration (CRCICA) established in 1979 endeavours to be one of the prominent arbitration centres in the Middle East thanks to its historical and political importance in the Arab region.[26] However, because of the political unrest in the country, the CRCICA may no longer be so attractive.[27] Therefore, Turkey's political stability is crucial for the future of the Istanbul Arbitration Centre.

In addition, respect for the rule of law may also be significant for an arbitration centre to maintain its position. Whilst the concept of rule of law is hard to define, outcomes of the concept such as respect for fundamental rights and access to justice or accountability are often perceived as a way of approaching it.[28] It is evident in the World Justice Project (WJP) Rule of Law Index that this concept has profound importance. Thus, more reliable, accessible and uncorrupted judicial systems are more likely to establish and sustain internationally successful arbitration centres. For instance, the LCIA may be a preferred centre due to the high respect shown to the rule of law in the UK.[29]

Last but not least, neutrality is a must for a successful international arbitration centre. According to a survey conducted by the School of Arbitration at Queen Mary, University of London in 2010, to the question of what drives decisions about arbitration institutions, 66% of respondents answered that they looked for neutrality and expected 'internationalism', and 56% said that they expected strong and widespread reputation.[30]

In terms of user perception, neutrality means that an arbitration institution never favours any particular nationality over another.[31] It has been suggested that in order to maximize the international character of an arbitration centre, board members should be appointed from different backgrounds and specialisms.[32] This also helps the institution to be perceived as neutral with an international character and in the service of international users.[33] This could be the underlying reason behind the success of the Singapore and Stockholm

26 Akıncı, (n.22) 82.
27 ibid 82
28 WJP Rule of Law Index 2015 (n.25) 22.
29 The United Kingdom has a score of 0.78 and in the 12nd place in Global Ranking with respect to the ruleof law. (WJP Rule of Law Index 2015 (n.25) 22).
30 Arbitration Survey 2010 (n.21) 18.
31 John Trenor, TOBB (Turkish Union of Chambers and Commodity Exchanges) İstanbul International Arbitration Centre Conference (not published), Ankara 30 November 2012 33.
32 ibid.
33 ibid 34.

arbitration institutions.[34] Likewise, the Swiss Chambers' Arbitration Institution is preferred thanks to the neutrality of Switzerland.[35]

In addition, reputation is important. The Istanbul Arbitration Centre has already received a lot of international attention which is important when building a reputation.[36] In this regard, the first awards granted under the auspices of the Istanbul Arbitration Centre have great importance to make Istanbul a promising venue for international arbitration. Thus, an international arbitration centre seated in Istanbul should not be under the influence of contemporary political situation of Turkey. Otherwise, the neutrality of the centre could be disputed and the centre may not achieve its desired success. In this respect, the Istanbul Arbitration Centre will have a general assembly that has the duty to form aboard of directors, and approve the applicable arbitration rules and the budget. This raises certain concerns about the independence and impartiality of the centre.[37] The general assembly consists of 25 members, most of whom have little connection with international arbitration,[38] and is indirectly subject to the influence of government.[39]

B. Legislative Structure of Turkey and Effect thereof on the Istanbul Arbitration Centre

Legal environment, which is composed of legislation and court attitudes, has a profound impact on the outcome of a dispute.[40] Moreover, the legal infrastructure, including the national law, track record in enforcing agreements to arbitrate and arbitral awards, neutrality and impartiality of the legal system, was shown to be the top decisive factor in choosing the seat of arbitration

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34 ibid.

35 Akıncı (n.22) 81.

36 Rebecca Lowe, 'CallsforTurkish Arbitration Centreas Region's Influence Grows' (*International Bar Association 27* September 2013) <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=d958d583-882d-4aa9-a378-398915ad959a>accessed 2 June 2015.

37 Leyla Orak Çelikboya, 'İstanbul Arbitration Center'(*Erdem ErdemLawJournal*July 2014) http://www.erdem-erdem.com/en/articles/istanbul-arbitration-center/ accessed 2 June 2015.

38 Akıncı (n.22) 86.

39 According to Article 7 of the Law numbered 6570, 6 members shall be elected by Turkish Union of Chambers and Commodity Exchanges, 4 members shall be elected among registered lawyers by the president of bars, 3 members shall be elected by the council of Higher Education, 2 members shall be elected by Turkish exporters assembly, Ministry of Justice, The Banks Association of Turkey, The Participation Banks Association of Turkey, the Capital Markets Board, the Istanbul Stock Exchange, the Confederation of Turkish Tradesman and Craftsmen, the Banking Regulation and Supervision Agency, Turkish Capital Markets Association and Confederations having the largest numbers of members of employer and employee associations shall each elect one member.

40 Asat, (n.18) 135.

in the survey conducted by the School of International Arbitration at Queen Mary University, London in 2010.[41]

Essentially, in Turkey, apart from court litigation and since the amendment in 1999, international arbitration for disputes with a foreign connection has been guaranteed a judicial remedy within Article 125 of the Constitution. Moreover, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention, 1958) and the European Convention on International Commercial Arbitration (Geneva Convention, 1961) were signed and ratified by Turkey. These are the two main conventions in the area of international arbitration.

In Turkish law, besides international conventions in the field of international arbitration, the International Arbitration Law numbered 4686[42] is also a milestone in international arbitration in Turkey. This code adopted the essential points from the UNCITRAL Model Law and the rules concerning arbitration from the Swiss Federal Statute on Private International Law. Furthermore, the rules governing domestic arbitration, which are in the Law of Civil Procedure numbered 6100, adopted the UNCITRAL Model Law and accord with international arbitration.

The arbitration rules that are applicable to the proceedings before the Istanbul Arbitration Centre are not clear. The law establishing the Istanbul Arbitration Centre numbered 6570 does not include arbitration rules but only provides that the centre has the duty to determine the arbitration rules. According to Article 9 of the Code, a board of directors[43] will draft arbitration rules and, after taking the advisory board's opinion, the general assembly will put it into effect.

The similarity between the Swiss and Turkish Code of Obligations may be one of the decisive factors for Turkish parties in choosing Switzerland as the seat of the arbitration.[44] Thus, determination of arbitration rules by the Istanbul Arbitration Centre has a very important role in the success of the centre. Flexible and efficient modern arbitration rules will contribute much to the prominence of the centre. According to the survey conducted by the School of Arbitration at Queen Mary, University of London in 2010, 62% of respondents thought that formal legal infrastructure was the most decisive factor in choosing a place of arbitration.[45]

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41 Arbitration Survey 2010 (n.21) 18.

42 Official Gazette 24453, 5 July 2001.

43 Board of directors of Istanbul Arbitration Centre has been elected on 30 April 2015.

44 Akıncı, (n.22) 81.

45 Arbitration Survey 2010 (n.21) 18.

Even though the International Arbitration Law numbered 4686 had a catalysing effect on the development of international arbitration in Turkey, the law eventually became unsatisfactory. For example, unless there is agreement to the contrary between the parties, the tribunal has to issue its final award on the merits within a year. If no award is issued within this time, parties have no other option but to apply to the national courts for an extension of the time limit.[46] This has been criticized by scholars on the basis that it could be a significant consideration for parties to submit their disputes to arbitration.[47] Thus, these kinds of problems have to be taken into account in the new arbitral rules of the Istanbul Arbitration Centre.

Another main problem with arbitration in Turkey is the appeals process against arbitral awards. There is no special chamber for arbitral issues in the Turkish Court of Cassation. Every chamber may deal with an arbitral appeal and may make a decision in this regard. This generally leads to contradictory judgments which surely decrease predictability. The fact remains that the International Arbitration Act numbered 4686 and Code of Civil Procedure exclude the appeal of the arbitration award and provide only an annulment mechanism for arbitral awards under strict conditions.[48] Even if it is now not possible to apply directly for appeal of arbitral awards, which should be also regarded as positive development in terms of legal culture[49], there is still a way for annulment of them, and decision of the court of first instance about annulment of awards can be checked by Court of Cassation. for both national and international arbitration cases. This issue also has to be solved whilst drafting the rules of the Istanbul Arbitration Centre. We are also hopeful that Court of Cassation may solve this problem next year accordingly with its internal decision[50].

The third and most important problem is, as briefly mentioned above, that there are a number of reported cases granted by the Turkish Court of Cassation which are not consistent with international arbitration practice.[51] For instance, in 1994 in a decision of joint chambers of the Turkish Court of Cassation,[52] which has a binding effect as law, it was stated that in case the

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46 Turkish International Arbitration Law Numbered 4686 Art. 10/B.

47 Akıncı Ziya, *Milletlerarası Tahkim* (International Arbitration) (Vedat 2013) 39.

48 Turkish International Arbitration Law Numbered 4686 Art. 14.

49 It is also positive development fort he success of Istanbul Arbitration Centre, since it is established after all these legal amendments.

50 According Now there is a discussion to make one, unique arbitral chamber. to Code of Court of Cassation, presidency of Court shall decide allocation of cases between chambers.

51 Akıncı (n.22) 90.

52 Court of Cassation Assembly of Civil Chambers Unified Decision File No 1993/4 Decision No 1994/1, 28 January 1994.

law applicable to the arbitration is Turkish law, the Supreme Court is entitled to review the merits of the award.[53]

The issue of public policy interventions is a really important one in Turkey. The frequent use of public policy exceptions should also be dealt with under legal culture because this attitude reflects the legal policy of the courts against international arbitration awards. If the enforcement of arbitration awards could be frequently refused on the grounds of public policy, this would be a big obstacle to the business of the Istanbul Arbitration Centre.[54] In this respect, arbitration-friendly court attitudes are essential for an internationally-recognized arbitration centre. When courts adopt an inconsistent view and a narrow approach to the public policy exception is not established, there must be great concern for the success of the Istanbul Arbitration Centre because this will adversely affect every applicant. In two ways, Turkish courts may deal with arbitral awards in respect of public policy: to make a decision for the annulment of arbitral awards and to decide about recognition and enforcement of them. In this respect, Article 3 of the New York Convention also requires limited intervention from national courts with regard to arbitration. Thus, the excessive use of public policy exception by Turkish courts should be reduced in order to have an arbitration-friendly and neutral legal environment in Turkey.

One of the most controversial cases in Turkey was about a concession agreement between a GSM operator and the Turkish Information Technologies and Communication Authority (TITCA).[55] Arbitrators decided that the discounts provided to distributors on wholesales should be excluded from the base of the shares, and TITCA applied to set aside this decision due to a public policy infringement. According to the Article 15 of the International Arbitration Code, the award may be set aside *ex officio* by the court examining the case if (i) the subject matter of the dispute is not eligible to settle through arbitration under Turkish law, or (ii) the award is in conflict with public policy.

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53 This practice is undoubtedly against the prohibition of *Revision au fond* which is a general principle of private international law that means 'reviewing the merits' (Musa Aygül, 'Tanıma ve Tenfiz Davalarında Usul Hukuku Problemleri (Procedural Law Issues in Recognition and Enforcement Cases)' (2011) 2 International Law Bulletin 83, 103). In the context of arbitration, the prohibition of *Revision au fond* precludes courts from reviewing the merits of the award (ÖzgeTosun,'Révision au Fond in Turkish Arbitration Practice' (2015) 33 ASA Bulletin 58).

54 Mazza Francesca, TOBB (Turkish Union of Chambers and Commodity Exchanges) İstanbul International Arbitration Centre Conference (not published), Ankara 30 November 2012 43.

55 Court of Cassation Civil Chamber (13) File No 2012/8426 Decision No 2012/10349, 17 April 2012.

The Turkish Court of Cassation held that even though the shares stipulated in the concession agreement did not constitute a tax *per se,* they were an important and continuous source of income for the State, and the reduction in such an income would clearly violate the economic balance and public policy. However, decisions like this are contrary to the nature of arbitration. If it is always accepted that payment loss of the State is against Turkish public policy, every arbitral judgment against the State could be annulled. Therefore, nobody would wish to use an arbitral court in Turkey.

However, there are some positive judgments by the Court of Cassation. In April 2014 it held that preliminary injunctions could be provided even before the finalization of an enforceable decision.[56] In 2013 the Court of Cassation stated that distancing itself from domestic practice did not necessarily mean a violation of public policy.[57] Also, in 2012, the Court of Cassation held that *"it is worth emphasizing that, even if it is necessary to analyze the merits of a case, in order to determine whether the award can be enforced, this examination must be limited to the determination of whether or not the award is against public policy, this may not be an examination of the merits of the case*".[58]

In this regard, Turkey and Turkish courts previously did not have reputations. Kerr[59] analyse some of the old judgments of the Turkish Court of Cassation[60] in which recognition of an ICC arbitral award had been rejected due to public policy, and he stated sarcastically that it was a "remarkable conclusion". Even after the ratification of the New York Convention by Turkey, international society took quite a critical view of Turkey by claiming that the Turkish courts were not very interested in adhering to legal rules.[61] It is evident from the recent examples that there are some changes which indicate that with the recent codifications the legal environment in Turkey has started to become arbitration-friendly and we should be hopeful for success, but there is still room for improvement, especially with regard to the attitude of courts.

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56 Court of Cassation Civil Chamber (6) File No 2014/3906 Decision No 2014/4941, 14 April 2014.

57 Court of Cassation Civil Chamber (11) File No 2012/16024 Decision No 2013/24728, 16 July 2013.

58 Court of Cassation General Assembly File No 2011/13-568 Decision No 2012/47, 08 February 2012.

59 Michael Kerr, 'Concord and Conflict in International Arbitration' (1997) 13 Arb Int 2/121, 139, 140.

60 Court of Cassation Civil Chamber (15) File No 1976/1617 Decision No 1976/1052, 10 March 1976.

61 Nuray Ekşi, 'Yargıtay Kararları Işığında ICC Hakem KararlarınınTürkiye'de Tanınması ve Tenfizi (Recognition and Enforcement of ICC Arbitral Awards in Turkey under the Judgments of the Court of Cassation) (2009), 67/1 Ankara Bar Review 62.

CONCLUSION

Legal culture in a country is not only constituted by legal rules but also the attitudes of legal actors within the adjudication system. Since dispute resolution is also an area that legal actors play an important role in, it is also a part of legal culture. This may have an effect on the international arbitration centre located in that country. Therefore, it is undoubtedly true that the Istanbul Arbitration Centre as located in Turkey would be influenced by Turkey's legal culture. Even though it has undergone certain changes throughout the years, dispute resolution has a prominent role in Turkish history and culture. It is also true that Turkey stands as a bridge between the East and West. These may be virtues for Istanbul to become a promising venue for arbitration. Nevertheless, these are not enough to secure the centre over the long-term. There are a number of points that need to be considered to make the Istanbul Arbitration Centre an attractive international arbitration institution for parties. First and foremost, the political stability of Turkey is an important consideration for the users of arbitration. Hence, in order for the Istanbul Arbitration Centre to achieve the desired success, political stability should be sustained. Moreover, the respect attributed to the rule of law in a country also has an effect on the success of an international arbitration centre. Thus, Turkey should try to improve its poor reputation with respect to the rule of law[62] in order to make the Istanbul Arbitration Centre attractive for the users of arbitration. Last but not least, neutrality and reputation should be ensured in the centre. In terms of neutrality, one aspect is that governmental institutions should not intervene in the arbitration process. Such practice is compatible with the nature of arbitration. With regard to reputation, the quality of the first decisions rendered under the auspices of the centre would make a significant contribution to the reputation of the centre. Apart from these considerations, the legal framework of a country is also important for confidence in the international arbitration centre located in that country. Whilst there are certain criticisms with respect to effective legal rules on arbitration in Turkey, it is still arguable that Turkey has a promising legal framework. The rules of the Istanbul Arbitration Centre should be drafted to complete this framework since the rules of an international arbitration centre are also an essential element in the growth of the centre. The correct approach of the Court of Cassation in arbitration cases is also crucial for the future of the Istanbul Arbitration Centre. It is clear that the stance of the Court has not been pro-arbitration at certain times. Therefore, this could also be changed to offer parties an arbitration-friendly environment and thus promote the success of the centre. It is hoped that all these materialise in the future and Istanbul can take advantage of its long-established culture, history and geopolitical situation.

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[62] According to the World Justice Project Rule of Law Index 2015 Turkey is in the 80th place among 102 states. (WJP Rule of Law Index 2015 (n.25) 22).

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2015 World Justice Project Ruleof Law Index <http://worldjusticeproject.org/sites/default/files/roli_2015_0.pdf>

THE PRINCIPLE OF 'UNIVERSAL JURISDICTION' IN INTERNATIONAL CRIMINAL LAW

Uluslararası Ceza Hukukunda Evrensel Yargılama İlkesi

Dr. Mehmet Zülfü ÖNER*

ABSTRACT

The term of 'universal jurisdiction' has been one of the central issues in international criminal law. This principle is defined as 'a legal principle allowing or requiring a state to bring criminal proceedings in respect of certain crimes irrespective of the location of the crime and the nationality of the perpetrator or the victim'. After the Second World War the idea gained ground through the establishment of tribunals and the adoption of new conventions containing explicit or implicit clauses on universal jurisdiction. Despite its inherent difficulties, the principle of universal jurisdiction remains widely accepted by states owing to the specific nature of international crimes. In 2002, the International Criminal Court (ICC) came into existence, marking the end of over fifty years of elaborations to create a permanent global court to prosecute particularly heinous crimes of international significance. The crimes within the jurisdiction of the ICC are listed in the Statue of Article 5 thereof: the crime of genocide; crimes against humanity; war crimes; the crime of aggression. The establishment of the ICC has further fuelled the debate and the principle of universal jurisdiction has become a highly controversial topic.

This article aims to analyse the principle of universal jurisdiction in international criminal law. In this article, first of all, the term 'universal jurisdiction' will be examined in international context. Secondly, the article will analyse the historical background of this principle and provisions of the Rome Statute of the International Criminal Court. Finally, it will discuss the obstacles to the exercise of this principle. The paper will conclude with a brief conclusion.

Keywords: Universal Jurisdiction, International Law, International Crimes, International Criminal Court.

ÖZET

Evrensel yargılama ilkesi, uluslararası ceza hukukundaki önemli kavramlardan birisidir. Bu ilke, belirli bazı suçlar için bir ülkeye mağdur veya failin milliyeti ya da suçun işlendiği yer ile ilgili bir sınırlandırma olmaksızın yargılama yapma ve ceza verebilme yetkisi olarak tanımlanmaktadır. İkinci Dünya Savaşı'ndan sonra bazı suçların yargılanması için kurulan uluslararası mahkemeler ve imzalanan uluslararası

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sözleşmeler bu ilkenin uygulanma alanını genişletmiştir.Bu ilke, bazı zorluklarına ragmen, bir kısım uluslararası suçların doğasından kaynaklanan nedenlerle devletler tarafından büyük ölçüde kabul edilmektedir. 2002 yılında kurulan Uluslararası Ceza Mahkemesi (International Criminal Court), önemli olduğu kabul edilen bazı suçların uluslararası düzeyde soruşturulması için sürekli bir mahkeme kurulması konusunda gösterilen çabaları bir sonuca ulaştırmıştır. Mahkeme'yi kuran Statünün 5. maddesine göre soykırım, insanlığa karşı suçlar, savaş suçları ve saldırı suçu Mahkemenin yargılama yetkisine dahil edilmiştir. Bu Mahkeme'nin kurulması, evrensel yargılama yetkisi üzerindeki tartışmaları yoğunlaştırmış ve ilkeyi daha da tartışmalı bir kavram haline getirmiştir.

Bu çalışma, uluslararası ceza hukuku alanında evrensel yargılama ilkesini incelemeyi amaçlamaktadır. Çalışmada, ilk olarak ilkenin uluslararası bağlamdaki yerine değinilecektir. Daha sonra ilkenin tarihsel gelişimi açıklanacak ve Uluslararası Ceza Mahkemesini kuran Roma Statüsünün bu ilkeye ilişkin hükümlerine yer verilecektir. Son olarak, bu ilkenin uygulanmasına ilişkin bazı engeller tartışma konusu yapılacak ve sonuç bölümü ile çalışma tamamlanacaktır.

Anahtar Kelimeler: Evrensel Yargılama İlkesi, Uluslararası Hukuk, Uluslararası Suçlar, Uluslararası Ceza Mahkemesi.

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INTRODUCTION

The burgeoning scope and increasing magnitude of international crime and human right problems around the world pose a problem that requires an international response[1]. Treaties, conventions, and United Nations resolutions have given rise to monitoring mechanisms, commissions, ad hoc tribunals, and even permanent courts, such as the regional human rights courts, European Court of Human Rights (ECHR), the International Court of Justice and the International Criminal Court (ICC) all of which contribute to the further development of this field[2].

Over the past 500 years the global community has sought numerous ways to address the most serious crimes[3]. Attempts of nations to cooperate in

1 See Cassese Antonio, ''International Criminal Law'', Ed. Evans Malcom D., International Law, Oxford University Press, 2006, p.723.; Gianaris William N., ''The New World Order and the Need for an International Criminal Court'', Fordham International Law Journal, Vol. 16, Issue 1, 1992, p.88.

2 See Shaw Malcom N., International Law, Oxford University Press, Cambridge University Press, 2008, p.66.

3 Jamison Sandra L., "A Permanent International Criminal Court: A Proposal that Overcomes Past Objections", Denver Journal of International Law & Policy, Vol. 23, Issue 2, 1995, p. 419.

law enforcement and to combat international crimes date back to the 19th century[4]. The beginning decades of the 20th century saw greater attempts by nations to combat transnational crimes through multilateral treaties[5]. The idea of establishing an international criminal court could be said to have begun in 1899 with the First Hague Convention for the Pacific Settlement of International Disputes[6]. After, states entered into numerous treaties in the post-World War II era that stressed greater international cooperation in law enforcement, particularly in the areas of international crimes[7].

After World War II, the newly created United Nations appointed the Special Committee of the General Assembly to draft a statute for the formation of an international criminal court. The committee prepared a draft statute in 1951 and a revised draft statute in 1953. Draft statutes were produced in the 1950s, but the conditions and Cold War made any significant progress impossible. A variety of factors led to the establishment of international criminal tribunals in the early 1990s, such as the former Yugoslavia and Rwanda[8]. The establishment the International Criminal Tribunal for the former Yugoslavia (ICTY)[9] and the International Criminal Tribunal for Rwanda (ICTY)[10] provided a further spur to the establishment of an international criminal court which, unlike the ad hoc tribunals, would have global jurisdiction and be able to potentially to respond to violations occurring anywhere. These ad hoc tribunals later served as the impetus for the efforts to create a permanent international criminal court. Finally, in 1994, a draft statute for an international criminal court was

4 Barnett Laura, The International Criminal Court: History and Role, Library of Parliament, Canada, 2008, p.2.; Jamison, p.421.; Cakmak Cenap ''Historical Background: Evolution of the International Criminal Law, Individual Criminal Accountability and the Idea of A Permanent International Court'', 2006, available at: http://www.du.edu/korbel/hrhw/workingpapers/2006/39-cakmak-2006.pdf., 08.11.2015.

5 Gianaris, p.92.

6 Bassiouni M. Cherif and Blakesley Christopher L., ''The Need for an International Criminal Court in the New International World Order'', Vanderbilt Journal of Transnational Law, Vol. 25, Number 2, 1992, p.152.

7 See Shelley Louise, ''The Globalization of Crime'', International Crime and Justice, Ed. Mangai Natarajan, Cambridge University Press, 2011, p.4.; Noll Alfons, ''International Treaties and the Control of Drug Use and Abuse'', Britsh Journal of Addiction, Vol.79, 1984, p.18.; Geraghty Anne H., ''Universal Jurisdiction and Drug Trafficking: A Tool for Fighting One of the World's Most Pervasive Problems'', Florida Journal of International Law, Volume16, 2004, pp.371-403.

8 See Cassese, p.724.

9 See for status http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf, 18.10.2015.

10 See for status http://www.unictr.org/Portals/0/English/Legal/Statute/2010.pdf, 18.10.2015.

submitted to the General Assembly; and in 1996, the Preparatory Committee on the Establishment of an International Criminal Court was founded. On 17 July 1998, the Rome Statute of the International Criminal Court[11] was adopted. The ICC began functioning on 1 July 2002, the date that the Rome Statute entered into force[12]. The idea of a permanent international criminal court and the adoption of the Rome Statute setting up the ICC has been a historical step in the fight against impunity for the most serious crimes[13].

The ICC has a limited jurisdiction, which has been carefully defined under the statute[14]. The Court has jurisdiction in accordance with this Statute with respect to the crime of genocide, crimes against humanity, war crimes and the crime of aggression. The ICC has jurisdiction over core crimes committed on the territory of State Parties or by the nationals of the State Party abroad, which means that the Court accepts territorial jurisdiction and active nationality principles for exercise of jurisdiction over the nationals of State Parties. Additionally, the Court may exercise its jurisdiction over individuals who are nationals of non-Party States in three circumstances. First, the ICC may prosecute nationals of non-parties in situations referred to the ICC Prosecutor by the UN Security Council. Secondly, non-party nationals are subject to ICC jurisdiction when they have committed a crime on the territory of a state that is a party to the ICC Statute or has otherwise accepted the jurisdiction of the Court with respect to that crime. Thirdly, jurisdiction may be exercised over the nationals of a non-party where the non-party has consented to the exercise of jurisdiction with respect to a particular crime[15].

One of the most general forms of jurisdiction is that of a nation state over its own territory, which is called by such diverse names as "national jurisdiction,"

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11 See http://www.unhcr.org/refworld/docid/3deb4b9c0.html, 18.10.2015.

12 See Natarajan Mangai and Kukaj Antigona, ''The International Criminal Court'', International Crime and Justice, Ed. Mangai Natarajan, Cambridge University Press 2011, p.357.

13 See Hall Christopher Keith, "The First Proposal for A Permanent International Criminal Court," International Review of the Red Cross, Issue 322, 1998, p.57-74.; Mullins Christopher W., Kauzlarich David and Rothe Dawn, "The International Criminal Court and the Control of State Crime: Prospects and Problems", Critical Criminology, Vol. 12, Issue 3, 2004, p. 289.

14 The ICC was created, in order to have jurisdiction over only ''the most serious crimes of concern to the international community as a whole' (Statute, Preamble, para 4), which according to Article 5(1) of the Statute are: genocide, crimes against humanity, war crimes and the crime of aggression.

15 See Akande Dapo, ''The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits'', Journal of International Criminal Justice Vo.1, 2003, p.618.

"state jurisdiction," "domestic jurisdiction," or just "sovereignty"[16]. The "universal jurisdiction" refers to jurisdiction established over a crime without reference to the place of perpetration, the nationality of the suspect or the victim or any other recognized linking point between the crime and the prosecuting State. The purpose of universal jurisdiction is linked to the idea that international crimes affect the international legal order as a whole[17]. In this context, for the last years the notion of universal jurisdiction is probably one of the most controversial issues in international law.

I. The Term of Universal Jurisdiction

The term '*jurisdiction*' has various meanings, but here it refers to a state's legitimate assertion of authority to affect legal interests. Like every concept, jurisdiction may have different meanings. The word comes from Latin roots: "jus" or "juris" means "law" and "dicere" means "to say" or "to read"[18]. Therefore, "jurisdiction" can be understood to mean; "to say the law" and, as a derivative; "the power to say the law"[19]. A state's 'jurisdiction', in the present context, refers to its authority under international law to regulate the conduct of persons, natural and legal, and to regulate property in accordance with its municipal law[20]. More simply, jurisdiction to prescribe refers to a state's authority to criminalize given conduct, jurisdiction to enforce the authority, inter alia, to arrest and detain, to prosecute, try and sentence, and to punish persons for the commission of acts so criminalized. Jurisdiction can be civil or criminal[21], and only criminal jurisdiction[22] will be discussed here.

When a crime is committed, a state must be able to exercise some kind of jurisdiction in order to be able to take judicial action. The principle of universal jurisdiction[23] provides for jurisdiction of a State over certain crimes without

16 Colangelo Anthony J., ''The New Universal Jurisdiction: In Absentia Signaling Over Clearly Defined Crimes'', Georgetown Journal of International Law, Vol.36, 2005, p.538.

17 See Cryer Robert, Friman Hakan, Robinson Darryl, Wilmshurst Elizabeth, An Introduction to International Criminal Law and Procedure, Cambridge University Press, 2010, p.50.

18 See http://www.etymonline.com/index.php?term=jurisdiction, 18.10.2015.

19 Rahim Tashakkul Hasanov, ''The Problem of Universal Jurisdiction in Curbing International Crimes'', Acta Universitatis Danubius Juridica, Issue: 1, 2011, p.111.

20 O'Keefe Roger, ''Universal Jurisdiction, Clarifying the Basic Concept'', Journal of International Criminal Justice, Vol.2, 2004, pp.735-760.

21 Jurisdiction in criminal matters may be considered either as substantial or procedural law. Customary international law was covering sea piracy, slavery, and child and woman trade under universal jurisdiction. See Rahim Tashakkul, p.111

22 Shaw, p.652.

23 See Broomhall Bruce, ''Towards the Development of an Effective System of Universal Jurisdiction for Crimes under International Law'', New England Law Review, Vol. 35,

requiring any of the normally required linkages, such as commission on its territory, nationality of either perpetrator or victim, or the threat towards its national security[24]. Universal jurisdiction is the technique used to prevent impunity for international crimes and it is one of the methods to deter and prevent international crimes by increasing the like hood of prosecution and punishment of its perpetrators.

There is generally no agreed doctrinal definition of universal jurisdiction. However, this does not preclude any definition, which embodies the essence of the concept as the ability to exercise jurisdiction irrespective of territoriality or nationality[25]. Universal jurisdiction is the right of a state to 'define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern' regardless of whether the prosecuting state can establish a connection with the perpetrator, victim, or location of the offense[26]. Universal jurisdiction empowers any state to exercise jurisdiction to prosecute a suspect wherever he is found, regardless of the location of his crime(s), his nationality, or any other contacts with the prosecuting state[27]. But the rationale[28] behind it is broader: 'it is based on the notion that certain

Issue 2, 2001, pp.399-420.; Xavier Philippe, 'The Principles of Universal Jurisdiction and Complementarity: How do the Two Principles Intermesh?', International Review of the Red Cross, Vol.88, Number 862, June 2006, pp.375-398.; Reydams Luc, Universal Jurisdiction International and Municipal Legal Perspectives, Oxford Monographs in International Law, 2004.; Reydams Luc, ''The Rise and Fall of Universal Jurisdiction'', Routledge Handbook of International Criminal Law, Edited by William A. Schabas, Nadia Bernaz, Routledge, 2011, pp.337-354.

24 See, Krings Britta Lisa, ''The Principles of 'Complementarity' and Universal Jurisdiction in International Criminal Law: Antagonists or Perfect Match?'', Goettingen Journal of International Law Vol.4, Number 3, 2012, p.742.

25 Rahim Hesenov, ''Universal Jurisdiction for International Crimes - A Case Study'', European Journal on Criminal Policy and Research, Vol.19, 2013, pp. 275-283.

26 See Geraghty Anne H., ''Universal Jurisdiction and Drug Trafficking: A Tool for Fighting One of the World's Most Pervasive Problems'', Florida Journal of International Law, Volume16, 2004, pp.371-403.

27 Geraghty, 2004, p.372.

28 Some suggested that there are two traditional theoretical rationales for universal jurisdiction. The first rationale is pragmatic because it provides a basis for jurisdiction when jurisdiction is hard to find. Under this theory, universal jurisdiction responds to the danger that no state will be able to establish jurisdiction by traditional means. The second rationale for universal jurisdiction is humanitarian. If a crime is considered heinous or detrimental to the world community, then any member of the world community has a right to prosecute that crime to ensure that perpetrators do not go unpunished. See Jordan Jon B., ''Universal Jurisdiction in a Dangerous World: A Weapon for All Nations Against International Crime'', Michigan State University DCL Journal of International Law, Vol.9, Issue 1, 2000, p.31.; Bassiouni M. Cherif, Universal Jurisdiction for International Crimes: Historical Perspectives

crimes are so harmful to international interests that states are entitled-and even obliged-to bring proceedings against the perpetrator, regardless of the location of the crime and the nationality of the perpetrator or the victim'[29].

The term universal jurisdiction has been used to describe a variety of concepts that are, to some extent, analytically separate. On the one hand, universal jurisdiction can be a matter of customary international law[30]. This type of jurisdiction is generally permissive in character[31]. On the other hand, international treaties, agreements and conventions have also provided universal jurisdiction over a number of offences, such as hijacking and torture. In contrast to the permissive nature of universal jurisdiction under customary international law[32], these treaties, agreements and conventions often contain an obligation to *prosecute* or *extradite*[33] the offender. This obligation, often referred to as the principle of *aut dedere aut judicare*[34], is closely associated with and, indeed, often considered a form of universal jurisdiction. The universality principle is closely related to the maxim *aut dedere aut judicare*. The principle *aut dedere aut judicare* by definition entails the duty of the state concerned to extradite or to prosecute the accused, while universal jurisdiction may refer only to the right of the state to prosecute the accused[35].

and Contemporary Practice'', Virginia Journal of International Law Association, Fall 2001, p.81.

29 See Xavier, p.377.

30 See Shaw, p.66.

31 See Donovan Donald Francis, Roberts Anthea, ''The Emerging Recognition of Universal Civil Jurisdiction'', American Journal of International Law, Vol. 100, 2006, p.143.

32 Customary law is less clear than law established by convention, but it has the advantage of applying to all States. See Broomhall, p.403.

33 Extradition is the formal process whereby a fugitive offender is surrendered to the State in which an offence was allegedly committed in order to stand trial or serve a sentence of imprisonment. See Bantekas and Nash, p.293; The practice of extradition enables one state to hand over to another state suspected or convicted criminals who have fled to the territory of the former. It is based upon bilateral treaty law and does not exist as an obligation upon states in customary law. See Shaw, p.686.

34 "Aut dedere aut judicare" means that States where the suspect is have the choice between extraditing and judging him. See Hesenov, p.276.; Lafontaine Fannie, ''Universal Jurisdiction - the Realistic Utopia'', Journal of International Criminal Justice, Vol.10, 2012, p.1300.; Most of the UN treaties provide for "aut dedere aut judicare" obligations, such as: the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963), the Hague Convention for Unlawful Seizure of Aircraft (1970), the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents 1973, the Convention against the Taking of Hostages 1979, the International Convention for the Suppression of Terrorist Bombing 1997.

35 See Bottini Gabriel, "Universal Jurisdiction after the Creation of the International Criminal Court." New York University Journal of International Law & Politics, Vol. 36, 2004, p.516.

As indicated above, universal jurisdiction provides every state with jurisdiction over a limited category of offenses generally recognized as of universal concern, regardless of where the offense occurred, the nationality of the perpetrator, or the nationality of the victim. While other bases of jurisdiction require connections between the prosecuting state and the offense, the perpetrator, or the victim, the universality principle assumes that every state has a sufficient interest in exercising jurisdiction to combat egregious offenses that states universally have condemned[36].

It is also important to maintain distinctions amongst universal jurisdiction, *jus cogens* norms[37]and obligations *erga omnes*[38]. The three concepts are based on the idea that members of the international community share common goals and fundamental values that shape an international *ordre public*. While some argue that an international crime established by *jus cogens* norms is subject to universal jurisdiction, some claim that these two theories are completely separate[39].

It should be noted that state practice determines whether the universality principle is extended to apply to crimes covered by *jus cogens* norms and/or *erga omnes* obligations[40]. Some commentators argue with respect to some or all core crimes that such jurisdiction is mandatory at customary law, often adducing arguments of *jus cogens* and obligations *erga omnes* in support[41]. From this perspective, universal jurisdiction flows directly from the fact that the core crimes of international criminal law rest on norms of *jus cogens* that give rise to obligations *erga omnes*.

Finally, some argue that universal jurisdiction and international jurisdiction are different and both types of jurisdiction are often confused. Universal

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36 Scharf Michael P., ''Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States'', New England Law Review, Vol.35, 2001, p.367.

37 These norms are norms which are accepted and recognized by the international community. Jus cogens, the literal meaning of which is "compelling law," is the technical term given to those norms of general international law that are argued as hierarchically superior. See Hossain Kamrul, ''The Concept of Jus Cogens and the Obligation under the U.N. Charter'', Santa Clara Journal of International Law, Vol.3, İssue 1, 2005, p.73.

38 An obligation erga omnes is defined as an obligation towards the international community as a whole. See Vos Jan Anne, The Function of Public International Law, 2013, p.249.

39 Bottini, p.518.; Because universal jurisdiction provides a mechanism for enhancing accountability for the most serious violations of international law, commentators often link the principle with jus cogens norms and erga omnes obligations, though many express divergent views on their relationship. See Donovan and Roberts p.145.

40 See Bottini, p.519.

41 Broomhall, p.403.

jurisdiction is national jurisdiction over international crimes, whereas international jurisdiction is jurisdiction over international crimes as exercised by international tribunals[42].

II. Universal Jurisdiction in International Law

There are a number of established bases or principles in customary law that describe jurisdiction and five general doctrines authorizing the exercise of jurisdiction under international law: the nationality principle, the territoriality (or territorial) principle, the protective principle, the passive personality principle, and the universality principle[43]. In short, the nationality principle grants states jurisdiction over their own nationals, the territoriality principle gives states jurisdiction over actions committed inside of their boundaries, it also allows states to reach conduct occurring outside of their borders if that conduct has substantial effects within their territory. The protective principle grants states jurisdiction over offenses directed against the security of the state, the passive personality principle authorizes states to exercise extraterritorial jurisdiction over acts against their nationals. Finally, the universality principle gives states the power to punish certain offenses recognized by the community of nations as of universal concern[44].

Known as 'principle of territoriality'[45], providing for jurisdiction of the State on whose territory the crime was committed. This principle is invoked when the act over which a state wishes to assert jurisdiction takes place or has an effect on the territory of that state. It includes jurisdiction over acts that have direct effects on a State's territory as well as those committed on board crafts flying its flag. Under this principle, States have the right to exercise jurisdiction over all events on their territory, and this includes ships and aeroplanes which are registered in those countries. Thus, a State has jurisdiction over a crime when the crime originates abroad or is completed elsewhere, so long as at

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42 Like the ICTY and the ICTR, the ICC is not equipped to handle all charges of international crimes. See Ryngaert Cedric, ''Universal Jurisdiction in an ICC Era'', European Journal of Crime, Criminal Law and Criminal Justice, Vol. 14, 2006, pp.46-80.

43 See Boggess D. Brian,''Exporting United States Drug Law: An Example of the International Legal Ramifications of the "War On Drugs"'', Brigham Young University Law, 1992, pp.165-190.; Tate James A., ''Eliminating the Nexus Obstacle to the Prosecution of International Drug Traffickers on the High Seas'', University of Cincinnati Law Review, Vol.77, 2008, p.271.

44 See Bennettt Allyson, ''That Sinking Feeling: Stateless Ships, Universal Jurisdiction, and the Drug Trafficking Vessel Interdiction Act'', The Yale Journal of International Law, Vol. 37, 2012, pp.433-461.

45 See Cryer Robert et al., 2010, p.46.; Shaw, p.652.

least one of the elements of the offence occurs in its territory[46].

'Principle of personality', either active (nationality of the perpetrator) or passive (nationality of the victim) nationality are relevant to establish jurisdiction[47]. States are entitled under international law to legislate with respect to the conduct of their nationals abroad. The nationality or active personality principle is invoked where the perpetrator of the offense is a national of the state, and the passive personality principle is invoked when the victim of the offense is a national of the state[48]. Passive personality jurisdiction is jurisdiction exercised by a State over crimes committed against its nationals whilst they are abroad. Under this principle, a state may claim jurisdiction to try an individual for offences committed abroad which have affected or will affect nationals of the state[49]. A state may prosecute perpetrators for crimes committed against its nationals by virtue of this principle. Unlike nationality jurisdiction, which extends jurisdiction to offenses against the laws of the forum state committed by its nationals abroad, the passive personality principle extends jurisdiction to offenses committed against the forum state's nationals abroad[50].

The 'protective principle', enabling a State to exercise its jurisdiction over foreigners, acting in foreign territory but threatening the national security[51]. This principle is invoked where the offense "harms the state's interests"[52]. A State is entitled to assert protective jurisdiction over extraterritorial activities that threaten State security, such as the selling of a State's secrets, spying

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46 Whether a State's exercise of extraterritorial jurisdiction is legitimate is governed by the so called 'Lotus Principle' articulated by the Permanent International Court of Justice (PCIJ) in 1927. The context in which this principle was articulated was a dispute between France and Turkey about whether Turkey had jurisdiction to try a French sailor for negligence on the high seas. When the French vessel anchored at a Turkish port, Turkey took custody over and prosecuted the French watch officer for criminal manslaughter. The PCIJ rejected France's argument, ruling that the burden was on France to demonstrate that Turkey's exercise of jurisdiction violated some prohibitive rule of international law. In the setting of international criminal law, the contemporary logic of the Lotus Principle is supported by the nature of State sovereignty and the embryonic status of international law relative to domestic law. See Scharf, p.366.; Shaw, p.655.; Garson, p.3.

47 Cryer Robert et al., 2010, p.47.

48 Colangelo, p.539.

49 Shaw, p.664.

50 Kontorovich Eugene, ''The Inefficiency of Universal Jurisdiction'', University of Illinois Law Review Vol. 1, 2008, p.394.

51 See Shaw, p.666.

52 Colangelo, p.539.

or the counterfeiting of its currency or official seal[53]. Some argue that the existence and scope of the protective principle is uncertain and controversial, because under loose notions of harm and causation it could encompass a wide variety of extraterritorial conduct, far broader than even territorial-effects jurisdiction, and ultimately shading into universal jurisdiction for offenses not thought to be international crimes[54].

Finally, the most controversial principle of jurisdiction is the 'universality principle'[55]. This principle holds that international law considers certain acts to be so egregious that the nature of the crime itself engenders jurisdiction by any state irrespective of territorial or national links[56]. The principle of universality recognises that certain crimes are of such an atrocious and dangerous nature that all states have a responsibility or a legitimate interest to take action[57]. The idea of universal principle is basically that no State should shield alleged perpetrators of certain crimes from criminal responsibility[58] but should either prosecute under their own jurisdiction or extradite to another place of jurisdiction[59]. Serious crimes under international law that are potentially subject to universal jurisdiction include genocide, slavery, torture, crimes against humanity and war crimes[60].

Universal jurisdiction can be exercised over international crimes, but not all international crimes are subject to universal jurisdiction[61]. Of those that are, some are subject to universal jurisdiction as a matter of 'customary law', and others as a result of 'treaty, convention or international agreement'[62].

There are two ways in determining whether a particular crime is subject to universal jurisdiction. Firstly, a crime can become subject to universal

53 Cryer Robert et al., 2010, p.50.
54 Kontorovich, p.394.
55 Shaw, p.668.
56 Colangelo, p.539.
57 Kraytman Yanna Shy, "Universal Jurisdiction-Historical Roots and Modern Implications," Brussels Journal of International Studies, Vol. 2, 2005, p.95.
58 For state criminalty see Bantekas and Nash, p.15.; Shaw, p.778.
59 Krings, 2012, p.744.
60 Colangelo, p.540.
61 Lowe explains that there are really two types of universal jurisdiction, one for truly heinous crimes such as genocide, war crimes, and crimes against humanity, and the other for serious crimes that would go unpunished if states were limited to more traditional claims of jurisdiction, like piracy. See Lowe Vaughan, "Jurisdiction" in International Law, Ed. Malcolm D. Evans, Oxford University Press, 2003.
62 Kobrick Eric S., ''The Ex Post Facto Prohibition and the Exercise of Universal Jurisdiction over International Crimes'', Columbia Law Review, Vol. 87, No. 7, 1987, pp. 1515-1538.

jurisdiction through the development of customary international law, as evidenced by domestic legislation, international agreements, and the commentary of international law scholars[63]. The fact that universal jurisdiction can be exercised over an international crime as a matter of customary law, means that the vast majority of nations must have followed the practice of allowing nations capturing the perpetrators of such crimes to exercise jurisdiction over them. For example, traditionally, piracy was prosecutable by virtue of universal jurisdiction under customary international law given the fact that no State would have jurisdiction because these acts would be committed on the high seas. Several international conventions regarding the law of the sea have now codified this rule.

Secondly, countries may establish universal jurisdiction over an offense by treaty. Treaties are formal agreements between states, while customary law is derived from state practice and international legal norms. Both depend on state consent, which is a manifestation of the principle of sovereignty. The 1969 Vienna Convention on the Law of Treaties defines a treaty as ''an international agreement concluded between states in written form and governed by international law''[64]. Such treaties contain a requirement that state parties 'extradite or prosecute' offenders. State parties are required to assert jurisdiction over the parties whether or not they have any link with the suspect or with the crime[65]. There are several international crimes over which universal jurisdiction can be exercised only as a matter of international agreement[66].

From a comparative law perspective, states implement the principle of universality in either a narrow or an extensive manner. The narrow concept enables a person accused of international crimes to be prosecuted only if he or she is available for trial, whereas the broader concept includes the possibility of initiating proceedings in the absence of the person sought or

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63 Henderson Convay W., Understanding International Law, 2010, p.58,59.; Bantekas Ilias and Nash Susan, İnternational Criminal Law, Third Edition, 2007, p.3.

64 The 1986 Viennna Convention extend the same definition to agreements between International Government Organizations (IGO) and states or other IGOs. See Henderson, 2010, 65.

65 See Geraghty, 2004, p.381.

66 Kobrick, p.1523.; In addition to the accepted universal jurisdiction to apprehend and try pirates and war criminals, there are a number of treaties which provide for the suppression by the international community of various activities, ranging from the destruction of submarine cables to drug trafficking and slavery. See Shaw, p.673.

accused (trial *in absentia*)[67]. International law sources often refer to the narrow concept, but the decision to refer to the broader concept is quite often a national choice[68]. Regardless of whether universal jurisdiction is defined by treaty or by customary law, it is important to note that rules concerning the application of universal jurisdiction are not necessarily uniform. For instance, presence of the accused is sometimes required for the exercise of universal jurisdiction. Although the regime created by the Geneva Conventions requires the presence of the accused in the territory of the state exercising universal jurisdiction, some states' legislation does not contain such a requirement[69].

III. Historical Development of Universal Jurisdiction

The origins of the universal jurisdiction doctrine can be traced to efforts of the international community in the middle ages to effectively police piracy on the high seas, which posed a very serious threat to international commerce and navigation. This jurisdiction is an old concept that dates back to the 1600s when nations cooperated over opposition to piracy[70]. In the last 30 years, universal jurisdiction has been used to prosecute core international crimes, such as genocide, crimes against humanity, and war crimes[71].

The first widely accepted crime of universal jurisdiction was piracy. In the aftermath of the atrocities of the Second World War, the international community extended universal jurisdiction to war crimes and crimes against humanity. In addition to piracy, war crimes, crimes against humanity, and a growing number of other international offenses, such as torture, genocide, terrorism, and narcotics trafficking, have been made subject to universal jurisdiction through the negotiation of multinational conventions under the auspices of the United Nations and other international bodies. Recent events

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67 Sometimes "universal jurisdiction in absentia" is used to describe the "pure universal jurisdiction" but this term can be confused with "trial in absentia" See, Yee Sienho, ''Universal Jurisdiction: Concept, Logic, and Reality'', Chinese Journal of International Law, 2011, pp.503-530.; Ryngaert, 2006, p.64.; Lafontaine, p.1280.

68 Some states such as Belgium or Spain have made some efforts to give concrete effect to the principle of universal jurisdiction by amending their penal code. See Xavier, p.380.

69 See Bottini, p.522.

70 See Garson Jonathan, ''Handcuffs or Papers: Universal Jurisdiction for Crimes of Jus Cogens or is there another route?'', Journal of International Law & Policy, Vol.5, 2007, available at: https://www.law.upenn.edu/journals/jil/jilp/articles/4-1_Garson_Jonathan.pdf, 18.10.2015.

71 See Langer Maximo, ''Universal Jurisdiction is Not Disappearing, The Shift from 'Global Enforcer' to 'No Safe Haven' Universal Jurisdiction'', Journal of International Criminal Justice, Vol.13, 2015, pp.245-256.

involving the establishment of the International Criminal Court (ICC) have raised the question of whether the State Parties to these conventions can use the authority of these treaties to prosecute the offenders[72].

A. Piracy and Slavery

Historically, the oldest[73] and singularly most accepted application of the universality principle has been the prosecution of piracy on the high seas[74]. Piracy was identified as a problem as early as the 10th century, and all states were affected by piracy they were all eager to prosecute the pirates. States have exercised universal jurisdiction over pirates, regardless of their nationality or where their crimes were committed, for nearly 500 years[75]. The universal nature of the crime of piracy developed out of two basic necessities. One was the necessity to provide for forums to prosecute crimes committed in an area outside the territorial jurisdiction of any state-the high seas. The other necessity was to combat an offense that indiscriminately attacked all states but for which no state could be held responsible[76].

While universal jurisdiction over piracy originally arose under customary law[77], states eventually recognized this jurisdiction under treaty law (1982 United Nations Convention on the Law of the Sea and 1958 Convention on the High Seas). During the seventeenth century, support for the principle of the freedom of the high seas began to undermine the idea that states could be sovereign over entire seas[78]. Universal jurisdiction over hijacking is explicitly provided in Article 4 of 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft. In the modern context, hijacking has been compared to piracy, and the relevant provisions of the 1982 Law of the Sea Convention include aircraft as well as ships on the high seas.

A less modern, but still unfortunately relevant, another example of a

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72 Scharf, p.365.

73 See Randall Kenneth, "Universal Jurisdiction under International Law", Texas Law Review, No. 66, 1988, p.791.; Morris Madeleine H., "Universal Jurisdiction in a Divided World: Conference Remarks", New England Law Review, Vol. 35, 2001, p.339.

74 Shaw, p.615.; Kraytman, 2005, p.97.

75 Kraytman, 2005, p.98.

76 Colangelo, p.580.

77 Randall, p.792.

78 Two major concepts of piracy under international law have emerged. Piracy, under the first view, is a 'crime jure gentium', an offense against the law of nations, over which every state has universal jurisdiction. But according to a second view, piracy is not a crime by the law of nations, the basis of an extraordinary jurisdiction in every state to seize and to prosecute and punish persons. Randall, p.796.

universal jurisdiction crime is 'slavery'[79]. The trading of slaves has been deemed an offense subject to every state's jurisdiction. The universal nature of slavery is historically closely associated with the universal nature of piracy, as both offenses traditionally involved use of the high seas. The international prohibition on the slave trade came first because the slave trade between nations took place on the high seas and could be regulated by international law, whereas slavery fell primarily within a state's domestic sphere. By the end of the 19th century there was general international consensus that slave trade was illegal and its prohibition could arguably be elevated to a peremptory norm. There are still no treaties specifically providing for universal jurisdiction in the suppression of slavery, but the prohibition on engaging in the practice has reached the status of *jus cogens*. Currently, states can recognize universal jurisdiction over slave trading by referring to the 1982 United Nations Convention on the Law of the Sea, the conventions aimed at abolishing slavery and protecting individual liberty, and customary law[80].

Various interpretations of the human rights law regarding slavery have led to the general assumption that international law allows universal jurisdiction for its the prosecution. The recognition of universal jurisdiction over slavery and slave trading can be traced to the Geneva Convention on the High Seas, the United Nations Convention on the Law of the Sea, the 1926 Convention to Suppress the Slave Trade and Slavery[81] and its Protocol in 1953 and Supplementary Convention in 1956[82]. In the modern context, however, it is the international trafficking that has been addressed more slowly and inadequately[83].

Slavery is categorized as a crime against humanity by the ICC Statue. According to Article 7 of the ICC Statute, enslavement "means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children''[84].

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79 Shaw, p.616.

80 Randall, p.798.

81 With respect to slavery, the Slavery Convention of 1926 imposes on States the obligations to prevent and suppress the slave trade, and to adopt appropriate measures with a view to preventing and suppressing the embarkation, disembarkation, and transport of slaves in their territorial waters and upon all vessels flying their respective flags.

82 Hesenov, p.276.

83 See Kraytman, 2005, pp.99-102.

84 Colangelo, p.584.

B. The Modern Evolution of Universal Jurisdiction

Historically, universal jurisdiction was exercised over serious crimes, such as piracy, that were difficult to prosecute using traditional bases of jurisdiction because they occurred beyond state borders, such as on the high seas. In modern times, universal jurisdiction has been founded on the sheer heinousness of certain crimes, such as genocide and torture, which are universally condemned and which every state has an interest in repressing even in the absence of traditional connecting factors[85].

In the aftermath of the post-Second World War trials universal jurisdiction enjoyed a significant level of evolutionary codification and development[86]. Until the post-second world war trials, piracy and slave-trading were the only crimes subject to universal jurisdiction. However, the concept was soon expanded, in keeping with the growth of the international legal order[87], to accommodate two new classes of crime: war crimes and crimes against humanity. Since the Second World War, universal jurisdiction has expanded to cover certain terrorist activities and human rights violations[88].

Following the Second World War, universal jurisdiction reached several offenses other than piracy and slave trading. This expansion of the universality principle began in the post-war trials of individuals who had committed various wartime offenses, including war crimes and crimes against humanity[89]. German war criminals were tried at Nuremberg by the International Military Tribunal (IMT), which was created and administered jointly by the United States, Great Britain, France, and the Soviet Union. Some scholars argue that the monumental turning point in the evolution of universal jurisdiction was the establishment of the IMT and other Nuremberg trials held immediately after the Second World War[90].

Crimes against humanity obtained status in customary international law

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85 See Donovan and Roberts p.143.

86 This was confirmed by a number of cases, starting with the Eichmann case in 1961, the Demanjuk case in 1985, and more recently the Pinochet case in 1999 and the Butare Four case in 2001, emphasizing that universal jurisdiction could lead to the trial of perpetrators of international crimes. SeeXavier, p.378.

87 The international legal order has a fundamental interest in upholding the integrity and credibility of the international legal system by prosecuting those who violate its basic injunctions. See Scharf, p.363, 369.

88 Broomhall, p.403.

89 See Scharf, p.369.

90 Randall, p.801.; Morris, p.341.

with the UN affirmation of the Nuremberg Principles. An important example and one of the milestones in the prosecution of crimes against humanity is the famous Eichmann trial in Jerusalem in 1962, based on the principle of universality[91]. Israel kidnapped Adolph Eichmann in Argentina and prosecuted him in Jerusalem in 1961[92]. Applying universal jurisdiction to prosecute Eichmann for crimes against humanity, the Supreme Court of Israel relied both upon the precedents created by the post-war trials and on an analogy to piracy[93].

In discussing this modern evolution, we could see current multinational conventions that typically obligate parties to prosecute or extradite those who commit offenses prohibited by the treaties[94], irrespective of any direct connection between the prosecuting state and the offense. These treaties generally concern war crimes, hijacking, terrorism, apartheid, and torture. This development stems from the world community's collective concern with an increased array of offenses and the absence of an international criminal court in which to redress such all wrongs[95].

Some post-war treaties concern offenses that invoked universal jurisdiction under customary practice. These treaties prominently include the four Geneva Conventions of 1949. Despite the dubious initial foundations universal jurisdiction for war crimes obtained during the Nuremberg trials, even with the UN affirmation of the principles, it received a firmer boost in the subsequent Geneva Conventions of 1949. Since their drafting, the Geneva Conventions have become the cornerstone of the laws of war, international criminal law, and humanitarian law.

The Geneva Conventions of 1949 introduced a new concept, that of "grave breaches". Their provisions have been so universally endorsed that judges all over the world, including those of the International Court of Justice (ICJ),

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91 Kraytman, 2005, p.112.; Morris, p.346.

92 Under Israel's Nazis and Nazi Collaborators (Punishment) Act, Eichmann was charged with crimes against the Jewish people, crimes against humanity, and war crimes. Following diplomatic and UN Security Council debate over the kidnapping, Israel tried Eichmann. The District Court of Jerusalem convicted Eichmann and sentenced him to death, and the Supreme Court of Israel affirmed. See Randall, p.811.

93 Morris, p.346.

94 Some have argued that the provisions of treaties are not really grounds for "universal jurisdiction" because they apply only to the parties of the relevant conventions. See Kraytman, p.117.

95 Randall, p.816.

have agreed they constitute customary international law[96]. The *aut dedere aut judicare* clauses have led many to assume that universal jurisdiction is provided by the Conventions[97]. Hence, every party has legislative, adjudicatory, and enforcement jurisdiction over grave breaches of the Geneva Conventions, even if it has no connection to, and is not engaged in, the *armed conflict*[98] or occupation during which the offense occurs[99].

The principle of universal jurisdiction of national courts is reflected in Article 6 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide[100]. Thus, according to that legal provision, persons charged with genocide shall be tried by a competent tribunal of the State in the territory of which the act was committed, or the principle of *aut judicare aut dedere* shall be applied. The Genocide Convention, however, does not obligate the parties to prosecute all offenders in their custody, nor does it explicitly address the right to prosecute such offenders. Hence, Article 6 obligates the parties to exercise domestic jurisdiction pursuant to the territoriality principle and also refers to prosecution by an international body[101]. Some argue that Article 6 of the Convention seems to limit the obligation to prosecute to the state with territorial jurisdiction over the offense, or whatever international tribunal has been given jurisdiction over by the relevant states[102].

Geneva Conventions, adopted less than a year after the Genocide Convention, were able to retain the universal jurisdiction that was struck from the earlier convention. Geneva Conventions oblige States Parties to enact legislation in order to provide effective penal sanctions both for persons

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96 See Kraytman, 2005, p.110.

97 Whereas some authors opine that that the Geneva Conventions do not provide for universal jurisdiction whatsoever and only provide for jurisdiction between belligerent states, others go so far as to interpret that the obligation to search for perpetrators of war crimes. See Kraytman, 2005, p.111.

98 The concept of 'armed conflict' is not defined in the Conventions or Protocols, although it has been noted that 'any difference arising between states and leading to the intervention of members of the armed forces is an armed conflict' and 'an armed conflict exists whenever there is a resort to armed force'. See Shaw, p.1190.

99 Randall, p.818.

100 Bantekas and Nash, p.6.

101 Because the territoriality principle is the only basis of domestic jurisdiction mentioned in Article 6, some debate has ensued over whether genocide is subject to the parties' universal jurisdiction. Some have argued that territoriality is the exclusive jurisdictional basis. Others, however, have argued that Article 6 only enumerates one possible basis of domestic jurisdiction, and that genocide remains a crime giving rise to a universal jurisdiction under customary international law. See Randall, p.835.

102 Kontorovich, p.408.

committing, or ordering to be committed, any of the grave breaches defined in the Geneva Conventions. The application of extraterritorial jurisdiction to internal conflicts remains controversial even half a century later, as evidenced the significantly lower acceptance of the additional Geneva Protocols of 1977.

The adoption of the Genocide and the Geneva Conventions inaugurated a period of intense multilateral treaty negotiation, especially in the field of human rights instruments but also pertaining to numerous aspects of international criminal law enforcement. Several of these conventions included references that could be interpreted as providing universal jurisdiction or else endorse the principle of *aut dedere aut judicare*[103].

Apart from the Geneva Conventions, several treaties address domestic jurisdiction over newer offenses not previously subjected to the universality principle under customary practice. These offenses include the hijacking and sabotage of aircraft; the particular terrorist acts of hostage taking and crimes against internationally protected persons; and the specific human rights violations of apartheid and torture. These treaties are: The Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation of 1971, The International Convention Against the Taking of Hostages of 1979, The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents of 1973, The Convention on the Suppression and Punishment of Apartheid of 1973, The Convention To Prevent and Punish Acts of Terrorism Against Persons of International Significance of 1971, The Convention on the Physical Protection of Nuclear Material of 1980, The Omnibus Diplomatic Security and Antiterrorism Act of1986, The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984[104]. A common thread in all the conventions relates to the universality principle. The hijacking, terrorism, and torture conventions all contain the following provision, with insignificant variation: 'The State Party in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offense was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution,

[103] Kraytman, 2005, p.116.

[104] The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment obliges States to take the necessary measures in order to establish jurisdiction over torture when committed on a State's territory, on a ship or aircraft registered in that State, or when the offender, or the victim is a national of a State Party.

through proceedings in accordance with the laws of that State'[105].

The 1970 Convention for the Suppression of Unlawful Seizure of Aircraft is considered a major turning point because it not only placed on states the obligation of prosecute or extradite a suspect if they had existing legislation in place to claim jurisdiction for such a prosecution but obligated states to take measures to establish legislation creating such jurisdiction. The 1973 International Convention for the Suppression and Punishment of the Crime of Apartheid contained provisions that would extend universal jurisdiction even to nationals of non-party states, but it was only intended to ever apply to Rhodesia, Namibia, and South Africa, states that would not ratify the convention anyway at the time it was drafted. This Convention not only placed on states the obligation of prosecute or extradite a suspect if they had existing legislation in place to claim jurisdiction for such a prosecution, but obligated states to take measures to establish legislation creating such jurisdiction.

Finally, it should be noted that the adoption of the hijacking, terrorism, apartheid, and torture conventions represents the legitimization of any state's right to prosecute those who commit the proscribed offenses. While parties are obligated to prosecute or extradite such offenders, non-parties have also the right to prosecute those offenders[106].

C. The International Criminal Court and Universal Jurisdiction

Despite various attempts over the century, no general international convention on criminal jurisdiction has come into being. Instead states have opted to address criminal jurisdiction internationally on a crime by crime basis, as witnessed by the numerous conventions on crimes mentioned above.

It was not until after Second World War that universal jurisdiction was explicitly recognized for the core crimes of international criminal law[107]. The pre-World War II conventions contained this principle, which laid down three clear conditions for the exercise of universal jurisdiction. First, all

[105] See Randall, p.819.

[106] The view that non-parties have the right to prosecute for hijacking, hostage taking, crimes against internationally protected persons, apartheid, and torture also may draw support from sources other than the international adoption of the multilateral conventions. See Randall, p.827.; In recent years, domestic courts of Denmark and Germany have relied on the universality principle in trying Croatian and Bosnian Serb nationals for war crimes and crimes against humanity committed in Bosnia in 1992, and courts in Belgium have cited the universality principle as a basis for issuing arrest warrants against persons involved in the atrocities in Rwanda in 1994. See Scharf, p.372.

[107] Broomhall, p.407.

these conventions require that the domestic law of the asserting state must recognise the offence in question. Secondly, the conventions stipulated that the asserting state must have received and declined an extradition request[108] from the state on whose territory the offence was committed before it could exercise jurisdiction. Thirdly, the alleged crime must affect states on an equal basis[109]. In contrast, the formula adopted by the post-World War II conventions merely obligates state parties to take necessary measures towards the domestic implementation of the relevant treaties.

The establishment by the Security Council of *ad hoc* tribunals to try those responsible for crimes committed in the Former Yugoslavia and Rwanda led to a number of national prosecutions related to these situations[110]. The establishment of the International Criminal Court has furthered fuelled the debate, as it is the first international court whose jurisdiction is not limited to a particular conflict as the rest of the ad hoc tribunals are. It is the first such treaty to house jurisdiction over the most notable *jus cogens* crimes under one roof[111].

Perhaps the most intractable controversy during and after the ICC treaty negotiations concerned the jurisdiction of the court. The jurisdictional scheme ultimately adopted in the treaty rejected universal jurisdiction, providing instead that the ICC could exercise jurisdiction when either the defendant was a national of a state party to the treaty or the crime was alleged to have been committed on the territory of a state party. Although the ICC treaty did not provide for the ICC to exercise universal jurisdiction, proponents of the treaty's jurisdictional scheme relied heavily upon the "law and principles" of universal jurisdiction in supporting the ICC treaty's jurisdictional regime[112].

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108 Firstly, extradition may be refused if the offence for which extradition is requested is regarded by the requested state as an offence of a political nature. A second ground for refusal is concerned with non-discrimination, where the requested state has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic, origin, political opinions, sex, status or other prohibited motives. Thirdly, extradition cannot run afoul of the *non-refoulement* principle, so that it can be refused if the person whose extradition is requested would be subjected in the requesting state to torture or cruel, inhuman or degrading treatment or punishment. Finally extradition may be refused if the suspect would not receive a fair trial. See Lafontaine, p.1294, 1295.

109 Abass Ademola, ''The International Criminal Court and Universal Jurisdiction'', International Criminal Law Review, Vol.6, 2006, pp.349-385.

110 See Broomhall, p.407.

111 Kraytman, 2005, p.109.

112 Proponents of ICC jurisdiction over non-party nationals argued that, since each state party

The crimes within the jurisdiction of the Court are listed in Article 5 thereof: a) the crime of genocide; b) crimes against humanity; c) war crimes; d) the crime of aggression. When it was discussed in Rome, the question of jurisdiction was an extremely controversial one. It is the matter upon which the conference broke consensus. The final result, the Rome Statute, which passed by 120 votes to seven against (with 21 abstentions), provides for jurisdiction over war crimes, crimes against humanity and genocide in two primary situations in Article 12. According to Article 12, the Court may exercise jurisdiction on a state party on whose territory a crime has been committed and over a state of which the person accused of a crime is a national. In either case, the consent of the concerned state is required before the Court can exercise jurisdiction. According to Article 11 of the Statute (jurisdiction *ratione temporis*), the Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute[113].

Outside the territorial basis, the ICC may exercise jurisdiction over nationals of non-parties only in two other circumstances: First, where the Security Council refers a situation involving nationals of non-parties to the ICC Prosecutor; second, where a particular non-party state has otherwise accepted the ICC jurisdiction with regard to particular crimes including those committed by its nationals. Thus, the important issue is raised regarding the applicability of universal jurisdiction to the core crimes of the ICC Statute. Article 13(b) of the Statute also provides for jurisdiction in one case irrespective of whether a territorial or nationality State has ratified the Statute, in 'a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations'. Therefore, outside of situations referred by the Security Council, the ICC only has jurisdiction over offences committed when a State that has nationality or territorial jurisdiction over the offence is a State party to the Rome Statute[114].

The Preamble of the ICC Statute states that the Parties thereto recognise that the most serious crimes of concern to the international community as a

to the treaty had universal jurisdiction over genocide, war crimes, and crimes against humanity as a matter of customary international law, those states were free to exercise that jurisdiction jointly in an international court. See Morris, p.350.

113 Rahim Tashakkul, p.115.

114 See Bekou Olympia and Cryer Robert, ''The International Criminal Court and Universal Jurisdiction: A Close Encounter?'', International and Comparative Law Quarterly, Vol.56, Issue 01, January 2007, pp.49-68.

whole must not go unpunished, because they endanger the protected legal values of the international community by threatening the peace, security, and the well-being of the world. Thus, the ICC has been established and has jurisdiction not over all crimes but only the most serious crimes of concern to the international community.

There were proposals at Rome to give the ICC a more general form of universal jurisdiction. During the Preparatory Committee discussions the German delegation promoted the universal jurisdiction of the International Criminal Court, based on the premise that the crimes were punishable by virtue of the principle of universality[115]. At the Rome Diplomatic Conference, there were four proposals regarding the Court's jurisdiction. The German delegation continued to campaign for universal jurisdiction, irrespective of States having to separately give their consent regarding the core crimes. Germany had proposed, with respect to the scope of the jurisdiction *ratione materiae* of the ICC, that: ''Under international law, all states may exercise universal criminal jurisdiction concerning acts of genocide, crimes against humanity and war crimes, regardless of the nationality of the offender, the nationality of the victims and the place where the crime was committed''. Although the German Proposal found a strong support, it met with stiff resistance from principally the United States, India, Mexico, Indonesia and Japan[116]. The principal objection of the US to the conferral of universal jurisdiction on the ICC is that such jurisdiction would violate the principle contained in Article 34 of the Vienna Convention on the Law of Treaties concerning the right of third states[117].The US argued that the treaty's provisions for ICC jurisdiction over non-party nationals were unlawful because they constituted an attempt to bind non-parties to the treaty's terms[118].

Secondly, the Republic of South Korea proposed that the Court have automatic jurisdiction based on the principles of territoriality, nationality,

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115 The broadest proposal was introduced at Rome by the German delegation. This would have granted the ICC 'pure' universal jurisdiction, ie jurisdiction over any offence committed anywhere, irrespective of whether the suspect was present in the territory of a State party to the Statute. See Bekou and Cryer, p.51.

116 Abass, p.372.; There are a number of other powerful States, including China and India, share the concern of the US about the possibility of the ICC exercising jurisdiction over them as non-parties. See Bekou and Cryer, p.54.

117 See Bekou and Cryer, p.53.; Article 34 of the Vienna Convention on the Law of Treaties provides that "[a] treaty does not create either obligations or rights for a third State without its consent".

118 Morris, p.350.

passive personality, and the jurisdiction of the custodial State. Thirdly, the United Kingdom had proposed the Court have jurisdiction only when both the custodial and territorial States had consented to the exercise of jurisdiction by the ICC. Finally, the United States maintained that the Statute would require minimally the consent of the State of nationality of the accused, and alternatively both the consent of the State of nationality and the consent of the territorial State, in order to prosecute[119].

Article 25(4) of the ICC Statute attempts to prevent potential clash between the ICC jurisdiction to prosecute non-parties' nationals, on the basis of delegated criminal jurisdiction by member states, and the right of non-member states not to be subjected to the provisions of a treaty they are not party to. The article states that ''no provision of this Statute relating to criminal responsibility shall affect the responsibility of States under international law.'' Some argue that the effectiveness of this provision to prevent a clash is suspect. The ICC Statute does not govern state responsibility, and neither are its provisions concerned with allocating primary rules of responsibility amongst states. Moreover, there can be no obligation without responsibility and a breach of obligations necessarily implies a shirking of responsibility[120].

The outcome at Rome has been heavily criticized[121]. The debate as to whether the ICC can exercise jurisdiction is likely to dominate international law discourse for a long time to come. The contest is not so much as between the advocates of the ICC and its opponents as it is between those who want a Court that is unlimited in its jurisdiction and those who want an international criminal court that will function harmoniously with pre-existing frameworks of fundamental principles of international law[122].

IV. Crimes in the Jurisdiction of the International Criminal Court

On 17 July 1998 the Rome Statute of the ICC was adopted by the United Nations Diplomatic Conference in Rome. The Rome Statute establishes a

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119 See Strapatsas Nicolaos, ''Universal Jurisdiction and the International Criminal Court'', Manitoba Law Journal, Vol. 29, No:1, pp.1-32.

120 Abass, p.377.

121 See Bekou and Cryer, p.51.; Over the past few years, international criminal justice, as administered by Western states and the International Criminal Court (ICC), has increasingly come under attack from African states. See Wilt Harmen van der, ''Universal Jurisdiction under Attack an Assessment of African Misgivings towards International Criminal Justice as Administered by Western States'', Journal of International Criminal Justice, Vol.9, 2011, pp.1043-1066.

122 See Abass, p.385.

permanent court, the ICC, with jurisdiction over international crimes such as genocide, war crimes, crimes against humanity and aggression. By qualifying these certain crimes as being subject to universal jurisdiction the international community signals that they are so appalling that they represent a threat to the international legal order[123]. On the other hand, the Court's jurisdiction is strictly circumscribed: the Court only has jurisdiction on the basis of the territoriality principle (in case the crimes have occurred in the territory of a state party, or on board a vessel or an aircraft registered in a state party) and on the basis of the nationality principle (in case the crimes have been committed by a national of a state party)[124].

The work of the International Law Commission offers a convenient starting point for the identification of the crimes that are subject to universal jurisdiction under international law. In its 1996 Draft Code of Crimes against the Peace and Security of Mankind, the International Law Commission (ILC) suggested that genocide, crimes against humanity, crimes against United Nations and associated personnel, and war crimes are subject to universal jurisdiction[125].

A. Genocide

Perhaps the most palpable crime of universal jurisdiction in international law given the history of the past century is genocide[126]. Genocide may be roughly defined as committing certain acts against a national, ethnic, racial, or religious group with the intent to destroy that group[127]. The legal concept of genocide is narrowly circumscribed, the term 'genocide' being reserved in law for a particular subset of atrocities which are committed with the intent to destroy groups, even if colloquially the word is used for any large-scale killings[128]. A variety of acts directed against the target group constitute genocide, including killing, causing serious mental or bodily harm, deliberately inflicting living conditions calculated to bring about the group's destruction,

123 Kamminga Menno T., ''Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses'', Human Rights Quarterly, Vol. 23, No. 4, 2001, pp.940-974.

124 See Ryngaert Cedric ''The International Criminal Court and Universal Jurisdiction: A Fraught Relationship?'', New Criminal Law Review: An International and Interdisciplinary Journal, Vol.12, No.4, 2009, p.500.

125 Kamminga, p.944.

126 Genocide has been described as the 'ultimate crime'. See Bantekas and Nash, p.139.

127 Colangelo, p.584.

128 See Cryer and et al., p.203.

preventing births within the group, and transferring children of the group to another group[129].

Genocide has been regarded as an international crime since the Second World War and the Genocide Convention of 1948[130]. The prohibition of genocide as a matter of *jus cogens* has been confirmed by the International Court of Justice (ICJ), as has the non-contractual character of the 1948 Genocide Convention[131]. Article 6 of the 1948 Genocide Convention[132] provides that perpetrators of genocide must be tried by the territorial state or by an international criminal tribunal: ''Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the state in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction''. Although the Convention does not specifically provide for the exercise of universal jurisdiction by domestic courts it is widely agreed that the offense of genocide is subject to universal jurisdiction as a principle of customary international law[133].

Although Article 6 of the 1948 Genocide Convention refers to the possibility of an international court being available to try cases of genocide, it was not until the establishment of the ad hoc Tribunals in 1993 and 1994 that this became a reality[134].

The ICC Statute adopted the definition of genocide found in the Genocide Convention. Article 6 of the Statue describes: For the purpose of this Statute, ''genocide'' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d)

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129 Colangelo, p.584.

130 Shaw, p.430.

131 Bantekas and Nash, p.139.

132 Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 Dec. 1948, entered into force 12 Jan. 1951.

133 Bottini, p.538.; Kamminga, p.945.; Morris, p.347.; Shaw, p.430.

134 Cryer and et al., p.205. The first conviction for genocide by an international court was recorded on 2 September 1998 by the ICTR, of Jean-Paul Akayesu, a Rwandan mayor. Two days after that, Jean Kambanda, the former Prime Minister of Rwanda was sentenced to life imprisonment after pleading guilty to genocide, conspiracy, incitement and complicity in genocide, as well as crimes against humanity. See Bottini, p.524.

Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

B. Crimes against Humanity

The concept of crimes against humanity has long lacked an authoritative definition. It was not until the Nuremburg Trials that crimes against humanity entered positive international criminal law[135]. This crime obtained status in customary international law with the UN affirmation of the Nuremberg Principles[136]. Article 6(c) of the Nurembourg Charter[137] defines crimes against humanity as: "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated".

Crimes against humanity differ from other war crimes from the fact that their perpetrators are engaging in particular unlawful acts with the knowledge and approval that such acts are committed on a widespread scale or based on a policy against a specific civilian population[138]. Many of the same acts may constitute both war crimes and crimes against humanity, but what is distinctive about the latter is that they do not need to take place during an armed conflict[139].

Like genocide, no international convention provides for the application of the universality principle to crimes against humanity. Certain crimes that are included in the definition of crimes against humanity in the ICC Statute are subject to jurisdiction under specific regimes, namely: apartheid; enforced disappearance of persons; and torture[140].

Article 7 of the ICC Statute broadly defines as crimes against humanity a number of practices, including murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution, enforced disappearance, and apartheid 'when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge

135 See Bantekas and Nash, p.125.
136 See Kraytman, 2005, p.111.
137 See Shaw, p.436.
138 Bantekas and Nash, p.133.; Shaw, p.437.
139 Shaw, p.438.
140 See Bottini, p.539.

of the attack'[141]. From this Article it is evident that there are three principal requirements which must be met in order for an attack to constitute a crime against humanity: (i) The attack must be directed against any civilian population.(ii) The attack must be widespread or systematic.(iii) The perpetrator must have knowledge of the broader context in which the attack occurs. The general threshold for crimes against humanity is set out in Article 7(1), comprising any act contained in an exhaustive list of offences when committed 'as part of a widespread or systematic attack' against any civilian population[142]. Thus, under the ICC regime, crimes against humanity must be committed "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack". The definition 'widespread or systematic attack' allows the ICC to exercise its jurisdiction over a broader range of scenarios than a conjunctive test would have allowed[143].

The definition of this offence under Article 7 is different in a number of respects from that found in the statutes of the ICTY and ICTR. Unlike the ICTY and ICTR Statute, Article 7 of the ICC Statute does not require a nexus to an armed conflict, or a discriminatory intent. This definition and characterisation as a crime against humanity is consistent with Article I of the 1973 Convention on the Prevention and Suppression of Apartheid, as well as Article 1(b) of the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity[144].

The prohibition of torture as a war crime and crime against humanity codified in Articles 7(f) and 8(2)(a)(ii) respectively of the Statute of the ICC. The prohibition of torture forms a core component of both international human rights and humanitarian law. Treaty law prohibitions include Article 7 of the International Covenant on Civil and Political Rights (ICCPR), common Article 3 to the four Geneva Conventions, and the UN Convention against Torture. Article 147 of the Fourth Geneva Convention classifies torture as a grave breach of the Geneva Conventions[145]. Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[146]

141 Kamminga, p.946.

142 Bantekas and Nash, p.134.

143 See Bottini, p.525.

144 Bantekas and Nash, p.135.

145 Torture in times of armed conflict is specifically prohibited by the 1949 Geneva Conventions and the two Additional Protocols of 1977. See Bantekas and Nash, p.164.

146 Article 5(2) of this Convention contemplates universal criminal jurisdiction over torture by requiring states to prosecute suspected torturers found within their territory or to extradite them for the purpose of prosecution by the state where the offense was committed or the

states that 'the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity[147]. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. It is apparent from this Article that the human rights law definition of torture comprises four main pillars: (i) The relative intensity of pain or suffering inflicted must be severe. (ii) The act must be intentional. (iii) The act must be perpetrated for a specific purpose. (iv) A public official must be involved in the process (act or instigation, consent or acquiescence).

Crimes against humanity is a category of international crime that has an unusual history and poses unique challenges to those jurisdictions attempting to assert universal jurisdiction over the crime. Originally associated with wars of aggression, this requirement was dispensed with in later codifications of the concept. While there are certainly clearly defined crimes against humanity, the definitional problem of potentially expanding this class of international crime is expansive and vague[148].

C. War Crimes

Laws and customs regulating warfare may be traced back to ancient times. War crimes law deals with the criminal responsibility of individuals for serious violations of international humanitarian law[149]. Although national laws have long provided for prosecution of war crimes[150], international codification and consensus since the Second World War have confirmed war crimes as international criminal acts, thus permitting states to define and punish those

state of nationality of the offender or the victim. See Donovan and Roberts p.148.

147 The definition of torture in Article 1 of the 1984 UN Torture Convention requires that the offence was perpetrated at the instigation, consent, or acquiescence of a public official. See Bantekas and Nash, p.165.

148 Colangelo, p.587.; Similarly, the definition of torture under customary international law remains ambiguous. See Bantekas and Nash, p.162.

149 War crimes are essentially serious violations of the rules of customary and treaty law concerning international humanitarian law. See Shaw, p.433.

150 See Cryer and et al., p.273.

extraterritorial crimes wherever, and by whomever, they are committed[151].

Since their drafting, the Geneva Conventions have become the cornerstone of the laws of war, international criminal law, and humanitarian law[152]. The scope of the words 'war crimes' is not entirely clear and they were deliberately omitted in the Geneva Conventions[153]. On the other hand, several national decisions can be found in the aftermath of World War II that account for the application of universal jurisdiction to war crimes[154]. State practice and the writings of publicists support the proposition that the universality principle is applicable under customary law, not only to grave breaches of the Geneva Conventions, but also to all war crimes committed in an international armed conflict[155].

The lengthiest provision defining offences within the jurisdiction of the International Criminal Court is Article 8 of the Statute, entitled 'war crimes'[156]. A considerably longer list of war crimes is contained in Article 8 of the Statute of the ICC. The purpose of that provision is merely to designate the war crimes which are within the jurisdiction of the ICC. The Statute of the ICC carefully identifies the serious violations applicable in internal armed conflicts with regard to which the Court has jurisdiction. Article 8, regarding war crimes, is by and large satisfactory and considered a progressive development of international law in several respects. The ICC has jurisdiction over war crimes committed both in international armed conflicts and in conflicts "not of an international character"[157].

The list of covered war crimes is based on several instruments found in the field of international humanitarian law. This codification of the law of war, for purposes of the ICC Statute, resulted in a very broad definition of war crimes that empowers the ICC to address all of the most serious offences committed in armed conflicts[158].

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151 Joyner Christopher C., ''Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability'', Law and Contemporary Problems, Vol.59, 1996, pp. 153-172.

152 Kraytman, 2005, p.110.

153 The Geneva Conventions recognise two types of violations, in accordance with the gravity of the condemned act, namely, 'grave breaches' and other prohibited acts not falling within the definition of grave breaches. See Bantekas and Nash, p.113.

154 Bantekas and Nash, p.115.; Bottini, p.531.

155 Bottini, p.533.

156 See Schabas William A., An Introduction to the International Criminal Court, Cambridge University Press, 2004, p.51.

157 See Bottini, p.526.

158 Bottini, p.526.

Some argue that war crimes may be divided into two categories. The first category consists of grave breaches of the four Geneva Conventions of 1949, for example, offenses committed during international armed conflict. The second category of war crimes consists of serious violations of Common Article 3 of the Geneva Conventions and other serious violations of the laws and customs applicable in armed conflicts not of an international character[159].

In customary law, a major distinction between war crimes and the other categories, crimes against humanity and genocide, is that the latter two have jurisdictional thresholds while the former does not. Crimes against humanity must be 'widespread' or 'systematic', and genocide requires a very high level of specific intent. War crimes, on the other hand, can in principle cover even isolated acts committed by individual soldiers acting without direction or guidance from higher up[160].

D. Crime of Aggression

Since after the Second World War, the crime of aggression is -along with genocide, crimes against humanity and war crimes- a "core crime" under international law[161]. Despite the many difficulties surrounding the establishment of a definition, the crime of aggression was widely recognised among scholars[162]. In essence, a crime of aggression is committed when a political or military leader of a State causes that State to illegally use force against another State, provided that the use of force constitutes by its character, gravity, and scale a manifest violation of the United Nations Charter[163].

Aggression is widely regarded as a crime under customary international law, although at present there is no universally agreed definition and no international court or tribunal which can try offenders. It is formally within the jurisdiction of the ICC but the Court cannot exercise its jurisdiction unless and until the parties to the ICC Statute have agreed both a definition of the crime and the conditions under which the Court may exercise its jurisdiction[164].The

159 See Kamminga, p.947.
160 Schabas, p.55.
161 See Sayapin Sergey, The Crime of Aggression in International Criminal Law, Published by T.M.C. Asser Press, 2014, p.5.
162 See Boas Anouk T., ''The Definition of the Crime of Aggression and its Relevance for Contemporary Armed Conflict'', International Crimes Database, 2013, p.5, available at: http://www.internationalcrimesdatabase.org/upload/documents/20131030T045349-ICD%20Brief%201%20-%20Boas.pdf, 08.11.2015.
163 See http://crimeofaggression.info/documents/1/handbook.pdf, 08.11.2015.
164 Cryer and et al., p.312.

delegations arrived at this compromise toward the end of the Rome diplomatic conference because they could not reach agreement on the definition of the crime of aggression or on the manner in which the ICC was to adjudicate this crime. Consequently, Article 5(2) of the Rome Statute indicates that the Court shall exercise jurisdiction with respect to the crime of aggression under three conditions. First, a provision must be adopted that defines this crime and sets out the conditions under which the Court may exercise its jurisdiction. Second, this provision must be adopted through an amendment to the Statute at the first review conference, which is scheduled to take place in 2010. Third, this provision must be consistent with the relevant provisions of the UN Charter[165].

After the adoption of the Rome Statute, the Preparatory Commission for the ICC was given the mandate of preparing certain key documents, such as the rules of procedure and evidence, the elements of crimes, the relationship agreement between the Court and the United Nations, and 'proposals for a provision on aggression' to be submitted to the Assembly of States Parties of the ICC. By its final session in 2002, the Preparatory Commission had succeeded in adopting most of these documents[166].

Seven years after the entry into force of the Rome Statute, a review conference was held in accordance with article 123 to consider amendments, including a definition of the crime of aggression[167]. This review conference was held in Kampala, Uganda from 31 May to 11 June 2010[168]. After twelve years of negotiations, in 2010 the States Parties reached a breakthrough in defining the crime of aggression through consensus. The aggression amendments are expected to go into force in January 2017. While the aggression amendments

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165 See Strapatsas Nicolaos, ''Aggression'', Routledge Handbook of International Criminal Law, Edited by William A. Schabas and Nadia Bernaz, 2011, p. 159.

166 Strapatsas, p. 159.

167 The Working Group held a number of meetings in 2004-2008 and submitted its final report to the Assembly of States Parties on 13 February 2009. The final report contained the following wording of the draft Article 8 bis of the Rome Statute ("Crime of aggression"): ''1. For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity, and scale, constitutes a manifest violation of the Charter of the United Nations. See Sayapin, p.59.

168 See Trahan Jennifer, ''The Rome Statute's Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference'', International Criminal Law Review, Vol.11, 2011, pp.49-104.; Davis Cale, Forder Susan, Little Tegan and Cvek Dali, ''The Crime of Aggression and the International Criminal Court'', The National Legal Eagle, Vol. 17, 2011, Issue 1, pp.11-13.; Sayapin, p.60.

will only go into force after 1 January 2017, the Kampala definition is already regarded to be a significant development in international criminal law[169].

V. Obstacles to the Exercise of Universal Jurisdiction

The exercise of universal jurisdiction in respect of gross human rights offenses raises a series of legal and practical problems that have hardly begun to be considered. Some of these difficulties may arise in any trial of crimes under international law. They include problems such as those relating to statutes of limitations, command responsibility, superior orders, and gender issues. Some difficulties are, however, typical for the trial of crimes on the basis of universal jurisdiction. They include sovereignty, the lack of adequate implementing legislation, lack of specialized machinery, immunities, amnesties, evidentiary problems, and ineffective international supervision[170].

A. Sovereignty

Sovereign equality is easily subjected to political abuse including discrimination as manifested in selective prosecution, thus destabilizing international relations[171]. In that respect, the exercise of universal jurisdiction may infringe the principle of sovereignty[172].

In practice, universal jurisdiction appears inconsistent with the notion of sovereign equality among states. One problem of universal jurisdiction lies in the contradiction between the universality of its mission and the particularity of the political interests of the sovereign nation states[173].

The main role of a sovereign state is to provide security and protection for its own people. Generally, sovereignty encompasses two distinct yet interrelated meanings. First, sovereignty in its internal, domestic sense

169 See Boas, p.2.

170 See Kamminga, p.951.

171 Yee, p.510.; Universal jurisdiction entails pitfalls in the interstate relations realm. The situations in which genocide, war crimes, or crimes against humanity may be alleged are generally largescale conflicts in which governments are involved. Because official acts will often be at issue in prosecutions under universal jurisdiction, such trials often will constitute, in effect, the judgment of one state's policies and perhaps, officials, in the courts of another state. See Morris, p.354.

172 Sovereignty is the fundamental concept around which international law is presently organized. See Grossman Claudio and Bradlow Daniel D., ''Are We Being Propelled Towards a People-Centered Transnational Legal Order?'', American University International Law Review, Vol.9, No.1, 1993, pp.1-25.; The English word sovereignty is derived from the French term 'souverain'. See McKeon, p.539.

173 Hesenov, p.276.

provides for a state's power and authority 'over all persons, things, and territory within its reach'. Second, sovereignty in an external and international context concerns a state's right and ability to independently manage its own affairs, without outside interference or intervention[174]. Sovereignty in the external or international context continues to be strong, however, no state, has been able to shield its affairs completely from external influence.

Although sovereignty continues to be a controlling force affecting international relations, the powers, immunities and privileges it carries have been subject to increased limitations. These limitations often result from the need to balance the recognized rights of sovereign nations against the greater need for international justice[175]. First of all, improved levels of technology and communication have ostensibly shrunk the world. As a result, people are increasingly linked into broader communities and new international concerns require many nations to act in concert. Secondly, limiting sovereignty and receiving increased attention in recent years is the increased international concern for human rights[176]. Additionally, various international agreements have propelled the importance of individual rights to the forefront of international law.

World War II demonstrated the dangers inherent in an international legal order based upon absolute sovereignty. The lessons learned from viewing sovereignty in this manner provided the impetus for the international community to take action to prevent these atrocities from recurring. Such a response has continued in light of events such as the atrocities committed during the wars in the former Yugoslavia and Rwanda. Two ad hoc tribunals have been created under United Nations auspices to prosecute those responsible for grave human rights violations[177].

With regard to sovereignty, some[178] argue that universal jurisdiction is generally exercised by powerful countries over acts that occurred in developing countries and that were committed by persons from such countries. According

174 McKeon, p.539.

175 McKeon, p.541.

176 For example, the atrocities committed in Rwanda and the former Yugoslavia prompted intervention by the United Nations to stop the gross human rights violations occurring there. See McKeon, p.542.

177 McKeon, p.545.

178 Bottini, p.555.; States may exercise universal jurisdiction as a means of gaining advantage over states with whom they are in conflict by prosecuting nationals of those opponent states for conduct unrelated to the conflict between the two states. See Morris, p.355.

to this view, this practice necessarily involves the risk of imposing the West's values on the developing world. Furthermore, universal jurisdiction gives powerful nations a means of politically influencing less powerful ones. Indeed, thus far, weak countries with little to no political leverage have not exercised universal jurisdiction over powerful people from powerful countries through their courts. Regarding the ICC, it would be unrealistic to deny that when important interests are at stake, states, especially powerful ones, will be able to hinder the work of the ICC and constrain its effectiveness[179].

B. Due Process, Lack of Legislation and Specialized Institutions

One form of due process failing would occur if states exercise universal jurisdiction to conduct prosecutions for acts that do not clearly constitute an international crime under established international law. Indeed, not all states share a common view of the content of international law. Some states, for example, take the view that using cluster bombs or damaging water supplies is a war crime, a view that the some states do not share[180]. For example, in the United States torture alone is subject to universal jurisdiction; genocide, other crimes against humanity and war crimes are not[181].

The lack of judicial independence in many countries presents an additional, threshold problem. Non-independence of the judiciary renders remote the prospect of impartiality and due process, particularly in politically charged cases, which prosecutions under universal jurisdiction tend to be[182].

States are of course free to choose the manner in which they wish to give effect to their international obligations. This enables them to select the method of implementation that is most likely to be effective in their domestic context. On the other hand, implementing legislation in the field of international humanitarian law have so far not been successful and very few states have adequate implementing legislation enabling the exercise of universal jurisdiction in respect of gross human rights offenses. The absence of treaty provisions on the exercise of universal jurisdiction regarding crimes against humanity and crimes committed in non-international armed conflict explains why only few states have legal provisions allowing them to exercise universal jurisdiction with regard to these offenses[183]. As a result, only a

179 Bottini, p.560.
180 Morris, p.352.
181 Many countries are in a similar position. See Broomhall, p.411.
182 Morris, p.353.
183 See Kamminga, p.953.

few dozen states appear to have provided their courts with the specific competence to try certain gross human rights offenses under the principle of universal jurisdiction.

One issue in this context is that a number of states have limited their implementing legislation providing for the exercise of universal jurisdiction, *ratione loci* and *ratione temporis*, to offenses committed in certain places and during certain periods only[184]. Many states have also limited the competence of their courts to try defendants on the basis of universal jurisdiction *ratione personae* to persons that happen to be found within their jurisdiction. Another concern is that investigating and prosecuting crimes on the basis of universal jurisdiction requires special skills and specialized units[185].

Some[186] argue that the ratification of the ICC Statute ought to provide all states with a suitable occasion to review their legislation and ensure that their courts are able to exercise universal jurisdiction in respect of all offenses contained in the Statute. Canada, for example, the first country to pass legislation implementing the Rome Statute, established the jurisdiction of its national courts over genocide, crimes against humanity and war crimes as defined by customary or conventional international law, declaring the definitions of the Rome Statute to constitute custom as of at least July 17, 1998.

C. Immunities

One of the most important barriers to successful universal jurisdiction prosecutions is the presence of immunity doctrines in many national legal systems. Traditionally, State officials have been afforded immunity for acts committed in their official capacity[187]. Immunity from criminal jurisdiction and individual criminal responsibility are separate concepts[188]. Criminal responsibility is a question of substantive law and immunities cannot

184 One example of such selectivity is the law enacted in the United Kingdom in 1991, called the War Crimes Act, under which criminal proceedings may only be brought against UK citizens or residents who committed certain war crimes in Germany or German-occupied territory during the Second World War. See Kamminga, p.953.

185 Kamminga, p.954.

186 See Broomhall, p.409.

187 Diplomats, heads of State and government, along with many of their senior officials, held wide immunity from both criminal prosecution and civil lawsuits, at home and abroad; their protections subsiding only once they had left office.

188 Shaw, p.697.

exonerate the person to whom it applies from all criminal responsibility[189]. With respect to some international crimes, there is no doubt that immunity cannot exonerate the person to whom it applies from all criminal responsibility.

The question of whether individuals can be held accountable for violations of international law, regardless of their rank or political position, has been debated since the Nuremberg trials[190]. Immunity has been eliminated since the Nuremberg Charter and the judgments of the International Military Tribunal at Nuremberg. Also, the Statute of International Tribunal for the Former Yugoslavia, in Article 7, the International Criminal Tribunal for Rwanda Statute, in Article 6 and the International Criminal Court Statute have foreseen that immunity shall in no case exempt a person from criminal responsibility, nor shall it constitute a ground for reduction of sentence[191].

The Statute of the ICC, in Article 27, has the following provision: ''1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.''

When read on its own, Article 27 suggests that state officials may never rely on the immunity provided by international law to avoid the jurisdiction of the ICC. However, the effect of Article 27 is limited by Article 98(1), which provides that: ''The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with

189 See Aghenitei Mihaela and Flamanzeanu Ion, ''Limits on the Exercise of Universal Jurisdiction Especially about Other States Representatives' Immunities'', Contemporary Readings in Law and Social Justice, Vol.4, 2012, pp. 219-224.

190 McKeon Patricia A., ''An International Criminal Court: Balancing the Principle of Sovereignty Against the Demands for International Justice'', Journal of Civil Rights and Economic Development, Vol. 12, Issue 2, Spring 1997, p.537.; Shaw, p.697.

191 The International Court of Justice states that immunities with regard to Heads of State, Heads of Governments and Ministers of Foreign Affairs are absolute as long as they are in office. In its Judgment in the Arrest Warrant of 10 April 2000, the Court states that any exception to the immunity and the inviolability of the leaders in practice does not exist in customary international law, when they are suspected of having committed war crimes or crimes against the humanity. See Aghenitei and Flamanzeanu, p.220.

its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity''. Article 98(1) is particularly important for states that are not party to the ICC Statute because it prevents parties to the Statute from arresting and surrendering officials or diplomats of non-parties to the ICC, where those officials or diplomats have immunity in international law[192].

D. Amnesties

Another significant barrier to universal jurisdiction prosecutions is the effect of amnesties upon prosecution for international crime. The validity of amnesties and other pardons[193] in international law with respect to international crimes is a contentious issue. Despite the increased codification of international crimes, no international convention explicitly prohibits amnesty laws[194].

Amnesties for certain international crimes in general will often be inconsistent with the *jus cogens* nature of certain international crimes. It has been argued that awarding amnesties to perpetrators of gross human rights offenses is in itself prohibited under international law[195]. For example, the Human Rights Committee has in one of its general comments taken the view that amnesties in respect of acts of torture are "generally incompatible with the duty of States to investigate such acts". Similarly, the UN General Assembly has declared that perpetrators of enforced disappearances shall not benefit from amnesties[196].

The Rome Statute of the ICC does not contain a provision on amnesty. On the other hand, in the terms of Article 17 of the ICC Statute such amnesties could be an indication of "unwillingness or inability of the State genuinely to prosecute"[197]; they would therefore not prevent the ICC from declaring a case

192 Akande, p.640.

193 An amnesty is distinct from 'a pardon', which refers to an official act that exempts a convicted criminal or criminals from serving his, her or their sentences.

194 For a detailed analysis, please refer to Office of the United Nations High Commissioner for Human Rights, Rule of Law Tools for Post-Conflict States: Amnesties, 2009, United Nation Publications, available at: http://www.ohchr.org/Documents/Publications/Amnesties_en.pdf, 10.11.2015.

195 See Kamminga, p.956.

196 U.N. Declaration on the Protection of all Persons from Enforced Disappearance, art. 18. See Kamminga, p.957.

197 See Lafontaine, p.1291.

admissible[198]. Based upon Article 17, the ICC will arguably have discretion to find that, in specific cases, amnesties have been consistent with the desire to do justice, a circumstance that would render the case inadmissible[199].

But there may be exceptional cases in which amnesties and pardons are consistent with international law depending upon, inter alia, the extent to which the main perpetrators have been convicted or the most serious crimes excluded from amnesty, whether reparation has been provided to the victims, and whether the process was a truly democratic one that was subject to some sort of international monitoring[200].

E. Evidentiary and Other Problems

One of the greatest difficulties in bringing proceedings on the basis of universal jurisdiction may be of a practical nature. The authorities of the territorial state can be expected to be reluctant to render assistance, even when they are obliged to do so, for the reason that they may bear co-responsibility for the offenses. Indeed, in some cases, they may strongly object and actively try to frustrate investigations. Even with the backing of the Security Council, the ICTY and the ICTR have found it difficult to obtain the necessary co-operation from the authorities of the territorial states.

The exercise of universal jurisdiction raises special evidentiary challenges because the majority of the evidence necessary to make out a case may lie in the control of another jurisdiction[201]. Even where documents can be obtained, courts outside the jurisdiction of the crime may sometimes find it difficult to assess their authenticity. Another problem is that witnesses often have to be traced in distant states. State officials may make difficult or impossible visits to sites or access to witnesses and documents indispensable to proving the alleged crime[202]. Even when they can be found they may be reluctant to testify for fear of reprisals against themselves or their families[203]. Furthermore, numerous documents will need to be translated. Investigations on the basis of universal jurisdiction therefore tend to be considerably more expensive and time-consuming than investigations based on the territoriality principle[204].

198 Kamminga, p.957.
199 Bottini, p.554.
200 Bottini, p.553.
201 See Broomhall, p.412.
202 See Broomhall, p.412.
203 An inability to acquire adequate evidence can effectively block proceedings. See Broomhall, p.416.
204 See Kamminga, p.959.

One concern raised by the exercise of universal jurisdiction relates to the violation of due process guarantees. The due process problem is exacerbated by the fact that there is little agreement among states or commentators as to which crimes are subject to universal jurisdiction under international law. Indeed, there are sometimes great differences among members of the international community in the definitions of crimes, the determination and extent of the penalties, and the applicable procedure[205].

The primary shortcoming with respect to extradition relating to crimes under international law is the lack of comprehensive and express treaty obligations[206]. In recognition of these problems, the UN Declaration on the Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity[207]specifically provides that states shall co-operate with each other in the collection of information and evidence which would help to bring to trial persons indicted for war crimes and crimes against humanity. Additionally, some of the treaties providing for the exercise of universal jurisdiction similarly oblige the parties to render each other mutual legal assistance[208] in the investigation and prosecution of these crimes[209].Some important provisions may be found in the Statute of the ICC. They include assistance with the identification and locating the whereabouts of persons or the location of items, the taking of evidence, the serving of documents, the examination of places or sites, the execution of searches and seizures, the provision of records and documents, and the protection of victims and witnesses[210]. Apart from relying on mutual legal assistance, there are several measures that states may take unilaterally to facilitate the investigation and prosecution of gross human rights offenses committed abroad. In particular, methods of gathering evidence abroad and of reducing reliance on direct oral testimony may be usefully considered[211].

It should be stated that from the point of view of the defendant, the exercise of universal jurisdiction may present some special difficulties.

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205 See Bottini, p.551.

206 See Broomhall, p.414.

207 Declaration was adopted 3 Dec. 1973.

208 International judicial and police co-operation in criminal matters through formal mutual legal assistance arrangements is a fairly recent phenomenon. See Bantekas and Nash, p.357.

209 See Kamminga, p.959.

210 Article 83.

211 See Kamminga, p.960.

For example, the decision to initiate proceedings on the basis of universal jurisdiction may be objected to[212]. States exercising jurisdiction on this basis may be accused of jurisdictional imperialism because universal jurisdiction is likely to be exercised in powerful states with regard to crimes committed in less powerful states. Indeed, the large majority of universal jurisdiction cases would appear to support this accusation and these have been conducted in OECD states with respect to crimes committed outside these states[213].

Conclusion

Universal jurisdiction over international crimes is a very recent development and remains a subject of dispute for both in theory and practice. This principle has evolved and expanded to cover human rights violations over the past 500 years and since the Second World War in particular. This expansion derives from the growing world consensus condemning such crimes and the concern of the world's legal system rather than the sole province of individual states. Indeed, humanitarian law has reached a stage where most States agree that it is in the interest of the entire international community to try individuals suspected of having committed grave violations of human rights. Some argue that from the perspective of human rights, the expanding use of universal jurisdiction by national courts is an important component of the fledging system of international justice.

Obviously, the burgeoning scope and increasing magnitude of international crime and human right problems around the world pose a problem that requires an international response. Proponents of universal jurisdiction in international level argue that it is not always possible to prosecute crimes in the countries in which they were committed. They claim that without an international criminal court for dealing with individual responsibility as an enforcement mechanism, acts of genocide, war crimes and egregious other violations of human rights often go unpunished.

The Rome Statute was adopted in 1998 and the International Criminal Court began functioning in 2002. The arrival of the ICC has contributed to the prosecution of international crimes at the international level. The ICC

[212] When one state institutes proceedings under universal jurisdiction against the national of another state, the defendant's state of nationality may claim (and probably would claim, where its official acts or policies are implicated) that the prosecution is politically motivated and baseless. See Morris, p.356.

[213] Report of the Secretary-General to the Security Council on the Protection of Civilian in Armed Conflict, U.N. Doc. S/1999/957, 8 Sept. 1999. See Kamminga, p.963.

has limited jurisdiction and exercises jurisdiction over a limited class of perpetrators and crimes (crime of genocide, crimes against humanity, war crimes and the crime of aggression) under a particular set of circumstances as defined by the Rome Statute. At present, the Court has no jurisdiction over torture, piracy, terrorism or drug trafficking, crimes which are under a number of treaties and domestic criminal codes subject to universal jurisdiction. Additionally, the Court may exercise its jurisdiction over individuals who are nationals of non-Party States in some circumstances.

The ICC, despite its shortcomings, in conjunction with prosecutions by domestic courts under the territorial and nationality principles constitutes a better alternative for dealing with international criminality than the exercise of universal jurisdiction by states. Some scholars claim that if the Court had universal jurisdiction, it would be able to deal with crimes that are committed in any part of the world, irrespective of whether the territorial state or the state of nationality of the offender has ratified the Statute, or whether the Security Council has referred the situation to the Court. On the other hand, there are a number of arguments against the universal jurisdiction of the ICC. Indeed, the exercise of universal jurisdiction in national or international level raises numerous legal and practical difficulties that cannot be easily overcome. Some of these difficulties may arise in any trial of crimes under international law. Some difficulties are, however, typical for the trial of crimes on the basis of universal jurisdiction, such as sovereignty, the lack of adequate legislation, lack of specialized machinery, immunities, amnesties, and evidentiary problems. Another important concern is lack of adequate international support. In this regard, it should be noted that the ICC is an adolescent institution that must function in an international system and it is essential that some of the most powerful countries in the world, including the United States, become parties of the ICC Statute.

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FUNCTIONAL DEVELOPMENT OF TRADE MARK AND TRADE MARK RIGHTS IN EUROPE

Avrupa'da Marka'nın Fonksiyonel Gelişimi ve Marka Hakları

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ABSTRACT

There has been a rapid change in the nature of trade marks in the last decades. With the discovery of "brand image" by trade mark holders, a modern trade mark has commenced to signify the additional functions which can be identified as the quality guarantee and the investment, advertising or communication functions as well as its essential function of indicating commercial origin. The European case law has recently responded to this change by expanding the exclusive rights given to trade mark under Article 5(1) (a) of the Trade Marks Directive (TMD). However, use of trade mark on products started in European societies as early as the Ancient Times. Trade mark rights have been developing and expanding since the rights for safeguarding the trade mark use first appeared in Europe. To understand better the reasons of today's trade mark rights expansion, we will try to explore the functional development of trade mark and trade mark rights through the European history in this article.

Keywords: Intellectual and Industrial Property, Trade Mark, Trade Mark Rights, the Functions of Trade Mark, Infringement, the European Union Court of Justice, the European Trade Mark Directive.

ÖZET

Son yıllarda ticari markaların özelliklerinde hızlı bir değişim görüldü. Ticari marka sahiplerinin "marka imajını" keşfiyle birlikte, modern ticari markalar markanın temel fonksiyonu olan ürünlerin ticari orijinlerini tanımlama kadar kalite güvencesi ile yatırım, tanıtım veya iletişim fonksiyonları olarak adlandırılabilecek ilave fonksiyonları da temsil etmeye başladılar. Avrupa İçtihat Hukuku bu değişikliklere yakın zamanda Avrupa Ticari Marka Yönergesi Madde 5 (1) (a) da yer alan marka haklarını genişleterek karşılık verdi. Fakat Avrupa toplumlarında ticari markaların kullanılmaya başlanması Antik Çağlar kadar eskiye dayanmaktadır. Marka hakları ise marka kullanımını koruyan hakların Avrupa'da ilk ortaya çıkışından beri sürekli bir gelişme ve genişleme halindedir. Bugünkü ticari marka haklarındaki genişlemenin kapsam ve nedenlerini daha iyi anlayabilmek için, Avrupa tarihi boyunca süregelen markanın fonksiyonel gelişimi ve marka haklarını bu makalede incelemeye çalışacağız.

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1. Introduction

A trade mark is an intellectual property which a person or a firm, who will be using it in the course of trade, may obtain through registration.[1] When a trade mark has been registered by the authorised institutions, the owner of the registered trade mark is given exclusive rights on his or her trade mark within the territory of registration in relation to specific kinds of products. The exclusive rights conferred by a registered trade mark are set out in related legislations.

In the European trade mark law, the exclusive rights granted to trade mark owners are set out in Article 5 of the TMD.[2] It defines what will amount to an infringement whereby the scope of the exclusive rights given to trade mark owners is outlined. Article 5 of the TMD specifies three grounds of infringement, which can be viewed as a core right of exclusivity over the use of trade mark for specific products and its additional rights which strengthen the economic power of trade mark.

The right provided under Article 5(1) (a) of the TMD is a "core right of exclusivity" over the trade mark use.[3] According to that, a trade mark owner can prevent third parties from the use of the mark in the course of trade within the territory of the exclusive rights of the registered trade mark, and bring an infringement action against third parties due to the use of trade mark without consent. The exercise of this exclusive right was limited to situations where the essential function of trade mark is adversely affected. In other words, the core zone of trade mark right provided under Article 5 (1) (a) of TMD was designed to safeguard the essential function of trade mark which is to guarantee to consumers and end users the commercial origin of the

1 It is necessary here to note that passing off is a tort that protects un-registered trade marks. Therefore, the un-registered trade marks are the subject of passing off rather than trade mark law.

2 It is necessary here to note that this article focuses on the European trade mark law and that this is governed by the Trade Mark Directive (DIRECTIVE 2008/95/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 22 October 2008 to approximate the laws of the Member States relating to trade marks).

3 The "core right of exclusivity" description for the exclusive trade mark right provided under article 5 (1) (a) of Trade Mark Directive was used by Griffiths; Griffiths, A., *An Economic Perspective on Trade Mark Law*, Edward Elgar, (2011), Cheltenham

goods and services bearing the trade mark. However, this core zone of trade mark right has been expanded by the recent judgments of the Court of Justice European Union (CJEU)[4] where the additional functions of trade mark have been identified as the quality guarantee and communication, investment or advertising functions and they have been found to merit protection under Article 5 (1) (a) of the TMD.

Although the additional functions of trade mark were recently identified by the CJEU, the function of trade mark has been developed since the trade mark use first appeared in the society. Accordingly, the gradual expansion of the exclusive rights given to trade mark owners started with the emerge of rights to trade mark. In order to understand the evolution of trade mark rights, the functional development of trade mark needs to be analysed in three different historical periods. Industrialisation was on threshold of the changes in the function of trade mark owing to the developments of business organisations.[5] Therefore, the functional development of trade mark is divided into three main periods in this paper. These are "pre-industrial period", "industrial period" and "post-industrial period."

2. Pre-Industrial Period

Bearing a mark on products by their traders or makers started as early as the Ancient times.[6] The first kind of marking known was probably the branding of cattle and other animals.[7] On the wall paintings of ancient Egypt it is possible to see cattle being branded by Egyptian field workers.[8] However, any mark on products cannot necessarily be counted as a trade mark. In order to decide whether a mark used on products is a trade mark or not, the use to which it is put is considered. In other words, when products are sold under a mark which intends to indicate by whom the products are made or sold, the mark becomes a trade mark.[9] A mark which merely indicates possession of an

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4 *L'Oreal v. Bellure* (C-487/07)[2009] E.T.M.R. 987

5 Griffiths, A., *An Economic Perspective on Trade Mark Law*, Edward Elgar, (2011), Cheltenham, 16

6 Sherman, B. and Bently, L., *The Making of Modern Intellectual Property Law: The British Experience, 1760-1911*, Cambridge University Press, (1999), 1st edition, Cambridge,166; Diamond, S.A., ' The historical development of trademarks', The Trademark Reporter, (1975), 65, 265

7 Diamond, S.A., ' The historical development of trademarks', The Trademark Reporter, (1975), 65, 266

8 *Ibid.,* 267

9 Trade Marks Registry; Moorby, R. L.; Ward Dyer, F. J.; Myall, D. G. A., *A Century of Trade Marks: a commentary on the work and history of the Trade Mark Registry, which celebrates*

article is not enough to be deemed as a trade mark. Producers or traders used a trade mark in order to inform their customers or end users as to the exact source of the products.

The majority of the known oldest marks are borne by pottery, the remains of which can be found commonly in the Mediterranean region, in particular around ancient civilisations such as Etruria, Greece and Rome.[10] However, possibly the oldest ones are borne by pottery jars where were found in Transylvania and likely to have been made as long as seven thousand years ago.[11] *Prima facie*, these seven thousand years old marks are unlikely to be equivalent to true trade mark, used to indicate source. Nevertheless, it has been argued that "…the way in which the marks were formed, by combinations of straight lines, remained for many thousands of years (certainly well into the 16th century) characteristic of many marks which were undoubtedly true trade mark."[12]

In Ancient Rome, it was certain that some of the marks on Roman pottery were true trade mark because many known Roman potters' marks can be attributed with assurance to certain identifiable ateliers.[13] Thousands of different Roman potters' marks have been identified as in use during the period of approximately three centuries between 35 B.C. and 265 A.D.[14] Principles of Roman Commercial Law developed the acknowledgement of the origin and the title of potters' marks.[15] A purchaser of products bearing an imitated mark could bring a civil action against the true proprietor of an imitated mark.[16] However, it appears that the highly-developed law system of

its centenary in 1976, H.M.S.O., (1976), London, 1

10 Clifton, R., *Brands and Branding*, The Economist in association with profile books, (2009), 2nd edition, London, 14; Trade Marks Registry; Moorby, R. L.; Ward Dyer, F. J.; Myall, D. G. A., *A Century of Trade Marks: a commentary on the work and history of the Trade Mark Registry, which celebrates its centenary in 1976*, H.M.S.O., (1976), London, 1

11 Trade Marks Registry; Moorby, R. L.; Ward Dyer, F. J.; Myall, D. G. A., *A Century of Trade Marks: a commentary on the work and history of the Trade Mark Registry, which celebrates its centenary in 1976*, H.M.S.O., (1976), London, 1

12 *Ibid*., p.1

13 Clifton, R., *Brands and Branding*, The Economist in association with profile books, (2009), 2nd edition, London, 14

14 Diamond, S.A., ' The historical development of trademarks', The Trademark Reporter, (1975), 65, 271

15 Blackett, T., *Trademarks*, Macmillan Press, (1998), 1st edition, 5; Clifton, R., *Brands and Branding*, The Economist in association with profile books, (2009), 2nd edition, London, 14

16 Trade Marks Registry; Moorby, R. L.; Ward Dyer, F. J.; Myall, D. G. A., *A Century of Trade Marks: a commentary on the work and history of the Trade Mark Registry, which celebrates its centenary in 1976*, H.M.S.O., (1976), London, 1

Romans did not prevent makers of lower quality potteries from imitating the marks used by well-known pottery makers in order to deceive consumers.[17] It is important to note that it is possible to see some of these imitation Roman potteries bearing fake Roman marks which were made in Belgium in the early part of the 1st century and exported to Britain in the British Museum.[18]

Beside the pottery marks, oil lamps, knives, swords and other iron items bearing the names of their makers which belong to Ancient Rome have been found by archaeologists.[19] One of them was a Roman oil lamp mark, Fortis, which appears to have been very successful because specimens bearing that mark come not only from Italy but from almost all of Europe, including France, Germany, Holland, England and Spain.[20] Similarly, some pharmaceutical products bearing the name of their creator were circulated in Ancient Rome.[21] One of them, ointment for the treatment of the eyes bearing the name of the Roman doctor on its container, was evidently an important export item.[22] Some food products such as wine or cheese for export were also marked to indicate the geographic origin of these goods.[23] For instance, the famous Etruscan Luna cheese was marked with a picture of the city; one Roman epigram speaks of "a cheese from Luna. This cheese marked with the likeness of the Etruscan Luna will serve your slaves a thousand times for breakfast."[24]

Roman traders used these marks on their products as a response to the expansion of trade.[25] Trading over great distances substituted for the method

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17 Blackett, T., *Trademarks*, Macmillan Press, (1998), 1st edition, 1; Clifton, R., *Brands and Branding*, The Economist in association with profile books, (2009), 2nd edition, London, 14

18 Trade Marks Registry; Moorby, R. L.; Ward Dyer, F. J.; Myall, D. G. A., *A Century of Trade Marks: a commentary on the work and history of the Trade Mark Registry, which celebrates its centenary in 1976*, H.M.S.O., (1976), London,1

19 Drescher, D.T., 'The transformation and evolution of trademarks—from signals to symbols to myth', The Trademark Reporter, (1992), 82, 310

20 Diamond, S.A., ' The historical development of trademarks', The Trademark Reporter, (1975), 65, 271

21 Drescher, D.T., 'The transformation and evolution of trademarks—from signals to symbols to myth', The Trademark Reporter, (1992), 82, 310

22 Diamond, S.A., ' The historical development of trademarks', The Trademark Reporter, (1975), 65, 272

23 Drescher, D.T., 'The transformation and evolution of trademarks—from signals to symbols to myth', The Trademark Reporter, (1992), 82, 310

24 Rogers, S.E., *Goodwill, Trade-Marks and Unfair Trading,* A.W. Shaw Company, (1914), Chicago

25 Diamond, S.A., ' The historical development of trademarks', The Trademark Reporter, (1975), 65, 272

of doing business directly with an artisan in his shop.[26] This change led to the need for source identification because of demands of customers from distant markets for repeat orders although traders were individuals rather than companies.[27] They wanted to inform their consumers in distant markets as to the exact origin by attaching their unique marks to their products. By doing so, they represented their address to their consumers who might wish to place repeat orders.[28] In relation to trade mark use by Romans, Kohler says that a side of Roman commercial relations, although resting on different principles, were not different from general impulses of today's trade. Roman manufacturers' marks are not unique; they are connected with the same system of marking that is known in modern trade.[29] Therefore, Drescher claims that the application of Roman marks to products traded over great distances represents trademark use in the modern sense. More specifically, these Roman marks became symbols of reputation identified with a single source.[30] The conclusion drew by Diamond from Romans trade mark use was that Roman trade mark performed the same basic functions as today's trade mark.[31]

In my opinion, there are some similarities between the trade mark of ancient times and today's trade mark. First, traders or producers of ancient times used trade mark to convey information as to the origin of products which is similar to origin function of modern trade mark. The difference is that origin function of ancient marks identifies the maker, the physical origin of products while modern trade mark is used to indicate the commercial origin of products. Moreover, the marks used by traders or producers of ancient times on their products were also conveying a message to buyers or end users as to the material quality features of those products. In that sense, the trade

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26 *Ibid*., p.270

27 *Ibid.*, p.270

28 *Ibid*., p.270; Drescher, D.T., 'The transformation and evolution of trademarks—from signals to symbols to myth', The Trademark Reporter, (1992), 82, 310

29 "Joseph Kohler, with his wide range of scholarship, utilized a great deal of the then available archaeological material in his reconstruction of the early history of trademarks and trademark law." DAS RECHT DES MARKENSCHUTZES(1884) cited from Schechter, F.I., *The Historical Foundations of the Law Relating to Trade-Marks,* Colombia University Press*,* (1925),1st edition, New York; Rogers, S.E., *Goodwill, Trade-Marks and Unfair Trading,* A.W. Shaw Company, (1914), Chicago

30 Drescher, D.T., 'The transformation and evolution of trademarks—from signals to symbols to myth', The Trademark Reporter, (1992), 82, 301, 310

31 Diamond, S.A., ' The historical development of trademarks', The Trademark Reporter, (1975), 65, 270

mark of ancient times was used by traders or producers to build up reputation about their productions or trades. This economic aspect of the ancient marks has a similarity with the additional functions of modern trade mark.[32]

With the fall of the Roman Empire, the elaborate and highly sophisticated system of trade gradually collapsed.[33] Western Europe entered the Dark Ages in about 500 A.D.[34] During this period, the use of trade marks almost disappeared.[35] However, with the renaissance of trade in twelfth century and with the rise of town and urban units which had won a degree of autonomy to some extent from feudal authorities medieval industry regulated by guilds, merchant organisations or craftsmen, appeared.[36] During the mediaeval period, roughly between the fourteenth and sixteenth centuries, the use of marks increased again as an outcome of developments in trade.[37]

Different kinds of marks were used in medieval times. It is possible to divide medieval marks into a number of categories such as personal marks, house marks, proprietary marks, and production marks. Production marks were used to indicate the origin of goods in order to trace the origin of sub-standard goods.[38] As said above, medieval industry regulated by guilds, merchant organisations or craftsmen appeared after the twelfth century. These guilds and organizations were firmly controlled by groups of artisans.[39] The members of these guilds and organizations were required to use a production mark.[40]

So, the medieval production marks were compulsory regulatory marks for the member of guilds which aimed to convey clear and unequivocal message to officers of the guild about the identity of makers of goods to which marks

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32 Arıkan, Ö., Trade Mark Rights and Parallel Importation in the European Union, Onikilevha, (2016), 1st Edition, p. 32-33.

33 Clifton, R., *Brands and Branding*, The Economist in association with profile books, (2009), 2nd edition, London, 14

34 Diamond, S.A., ' The historical development of trademarks', The Trademark Reporter, (1975), 65, 272

35 *Ibid*., p.272

36 Drescher, D.T., 'The transformation and evolution of trademarks—from signals to symbols to myth', The Trademark Reporter, (1992), 82, 311

37 Diamond, S.A., ' The historical development of trademarks', The Trademark Reporter, (1975), 65, 272

38 Trade Marks Registry; Moorby, R. L.; Ward Dyer, F. J.; Myall, D. G. A., *A Century of Trade Marks: a commentary on the work and history of the Trade Mark Registry, which celebrates its centenary in 1976*, H.M.S.O., (1976), London, 2

39 Diamond, S.A., ' The historical development of trademarks', The Trademark Reporter, (1975), 65, 277

40 *Ibid.,* p. 277

were attached.[41] This system helped to find the individual master responsible when defective products came from one of those sources. In 1266, England enacted the first bakers' compulsory marking law.[42] Regarding to bakers' compulsory mark, a passage from a book of instructions for coroners and sheriffs, based on ordinances going back to the fourteenth century, states:

"[A] Baker must set his owne proper marke upon every loafe of bread that hee maketh and selleth, to the end that if any bread be faultie in weight, it may bee then knowne in whom the fault is".[43]

Medieval production marks were the indicators of source, like a modern trade mark. However, medieval production marks differs from modern trade marks in certain points. The fundamental difference between these production marks and modern trade mark, as mentioned above, is that production marks are kind of "police marks" derived from the craftsman's liability.[44] Though they indicated the source of products, thereby enabling consumers to distinguish marked products from the same kind of products made by other craftsmen, the reason why production marks were used on goods was to fulfil an obligation rather than to try to use it to convey message as to the origin of products or the material quality features of products in order to gain the loyalty of consumers.[45] Regarding to this, Drescher says that "the medieval mark was a "liability mark" which only later evolved into as "asset mark" as a valuable symbol of individual good will."[46]

Having said this, medieval mark owners' individual liability for defective work warranted that products to which their production mark attached were of a quality consistent with the standards of guilds.[47] In other words, craftsman's production mark served as a warranty of quality to be expected from a particular source.[48] In this sense, the individual liability of craftsmen for the quality standards of their products corresponds to some extent to the commercial responsibility of modern trade mark owners as to the quality of

41 Drescher, D.T., 'The transformation and evolution of trademarks—from signals to symbols to myth', The Trademark Reporter, (1992), 82, 319

42 Diamond, S.A., ' The historical development of trademarks', The Trademark Reporter, (1975), 65, 277

43 *Ibid.,* p. 277

44 Drescher, D.T., 'The transformation and evolution of trademarks—from signals to symbols to myth', The Trademark Reporter, (1992), 82, 319

45 *Ibid.*, p. 320

46 *Ibid.,* p. 319

47 *Ibid.,* p. 320

48 *Ibid*., p. 320

their trademarked products. However, there is not a legal obligation for the owners of modern trade mark to provide their marked products at a certain quality, unlike the medieval products.[49]

Another difference between medieval marks and modern trade mark is pointed out by Drescher, using the example of a medieval mark owner, John Odinsay, who was a master blade smith at the guildhall of London blade smiths.[50] Drescher says that "no matter what type of knife, axe, lance head or other work John Odinsay might produce, that work would bear his raven mark. John Odinsay's mark, then, did not identify the product; it identified him." [51] Medieval production marks used to be equal to the identity of the maker of the products.[52] Although medieval production marks were the indicators of source like a modern trade mark, they identify the maker (the physical origin of products) while modern trade mark indicates the commercial origin of products.

3. Industrial Period

The industrial revolution, which commenced in Britain in the eighteenth century, was a real milestone in the history of trademark and trade mark rights.[53] In this period, modern production methods substituted for the handwork of older times.[54] This led to the increase of production capacity and of production units in size. Along with the development of manufacturing, distribution extended to more distant markets.[55] In fact, the need for the extension of distribution occurred as a result of increase of production.[56] All those changes have given rise to the mass marketing of manufactured goods.[57]

With the industrial revolution, especially in the late the nineteenth and

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49 Arıkan, Ö., Trade Mark Rights and Parallel Importation in the European Union, Onikilevha, (2016), 1st Edition, p. 36-37."

50 Drescher, D.T., 'The transformation and evolution of trademarks—from signals to symbols to myth', The Trademark Reporter, (1992), 82, p. 320.

51 *Ibid*., p. 320

52 Maniatis, S.M., Sandres, A.K., 'A consumer trade mark: protection based on origin and quality', European Intellectual Property Review, (1993), 15(11), 407

53 Blakeney, M., 'Trade marks and the promotion of trade', International Trade Law & Regulation, (1999), 5(6), 140

54 Diamond, S.A., 'The historical development of trademarks', The Trademark Reporter, (1975), 65, 289

55 *Ibid*., p. 289

56 *Ibid.,* p. 281

57 Clifton, R., *Brands and Branding*, The Economist in association with profile books, (2009), 2nd edition, London, 14

early twentieth century, the increased use of trade marks appeared.[58] Some of today's well known trade marks such as Coca-Cola soft drinks, Quaker oats and Shredded Wheat breakfast cereal emerged in this period.[59] Wilkins emphasised on the explosion of trade mark by saying that all the United States companies in the late nineteenth and early twentieth century that became multinational enterprises offered trademarked products and all the successful European multinationals that invested in the United States in this same period sold trademarked products too.[60]

However, the increased use of trade marks in this period caused malicious attempts. Unauthorised use of popular marks on similar products in order to deceive consumers led owner of trade marks to seek protection against the unauthorised uses. "The origin and the nature of the legal right" for the protection of the use of a trade mark was emerged from the species of remedy given for its violation.[61] The hundreds of cases involving trade marks were brought and decided under the head of fraud, deceit, misrepresentation, forgery and so on, all of which were grounds of action either in equity or at common law.[62]

The first reference to trade mark protection in the English courts was thought to be in the case of *Southern v. How* which was decided in the reign of Queen Elizabeth I.[63] Protection of the use of the trade mark was undertaken by the court on the basis of preventing fraud. *Southern v. How* was first reported in *Popham's Reports* in 1656,[64] which stated that:

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58 *Ibid.,* 15; Diamond, S.A., ' The historical development of trademarks', The Trademark Reporter, (1975), 65, 265, p.282

59 Clifton, R., *Brands and Branding*, The Economist in association with profile books, (2009), 2nd edition, London, 15

60 Wilkins, M., 'The neglected intangible asset: the influence of the trade mark on the rise of the modern corporation', Business History, 34, 68

61 Lloyd, E., *The Law of Trade marks with Some of Account of Its History and Development in The Decisions of The Courts of Law and Equity*, (1865), 2nd edition, London available at www.westlaw.com

62 Trade Marks Registry; Moorby, R. L.; Ward Dyer, F. J.; Myall, D. G. A., *A Century of Trade Marks: a commentary on the work and history of the Trade Mark Registry, which celebrates its centenary in 1976*, H.M.S.O., (1976), London, 4

63 Lloyd, E., *The Law of Trade marks with Some of Account of Its History and Development in The Decisions of The Courts of Law and Equity*, (1865), 2nd edition, London; Rogers, S.E., *Goodwill, Trade-Marks and Unfair Trading,* A.W. Shaw Company, (1914), Chicago; Schechter, F.I., *The Historical Foundations of the Law Relating to Trade-Marks,* Colombia University Press*,* (1925),1st edition, New York

64 It is important to note that there are four later reports of *Southern v. How*. Those are; *J. Bridgeman's Reports* (1659), *Croke's Reports* (1659), *volume 2 of Rolle's Reports* which

"22 Eliz. an action upon the case was brought in the Common Pleas by a clothier, that whereas he had gained great reputation for his making of his cloth, by reason whereof he had great utterance to his benefit and profit, and that he used to set his mark to his cloth, whereby it should be known to his cloth, and another clothier perceiving it, used the same mark to his ill-made cloth on purpose to deceive him and it was resolved that the action did well lie". [65]

However, *Southern v How* is disregarded as the earliest basis for trade mark law in English legal history with the discovery of *Sandforth's Case* which provide the historical bridge linking guild regulation of trade marks to the development of trade mark jurisprudence by the common law courts as early as mid-sixteenth century.[66]

Although there was protection in the use of a trade mark in those cases, it had no relation to trademark law. This is because; there was no property recognized by the law in any trade mark or trade name; but there was a sort of qualified right recognized by the law.[67] Regarding the protection of trade mark, Sebastian, who was an English authority on trade marks at the beginning of the 20th century, said that the right to use of trade mark was recognized as early as the reign of Queen Elizabeth [1]; it was rate established in 1833, when a decision was given which indicates a marked departure from the rules governing the ordinary action for deceit.[68]

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contains two conflicting accounts of *Southern v. How.* "… (1) Three of the five reports contain no reference whatsoever to the clothier's case in Elizabeth.(2) Of these three reports only one(*Popham*) definitely states the action to have been by the clothier whose mark had been infringed. Of the two others, one (*Croke*) is equally definite that the action was defrauded purchaser, and other (*2 Rolle 26*), while not perhaps so positive in this regard, likewise believes that the action was by the vendee. (3)*Popham* reports Dodderidge to have remembered that the clothier's action occurred in 22 Elizabeth,*2 Rolle* says 23 Elizabeth, while *Croke's Report* states 33 Elizabeth. (4) Only two of the five reports (*Popham* and *2 Rolle 5*) agree that *Southern v. How* was decided in 15 Jac. I, the other three reports giving other and different dates for the decision."; Schechter, F.I., *The Historical Foundations of the Law Relating to Trade-Marks,* Colombia University Press*,* (1925),1st edition, New York

65 Lloyd, E., *The Law of Trade marks with Some of Account of Its History and Development in The Decisions of The Courts of Law and Equity*, (1865), 2nd edition, London

66 *Sandforth's Case*, Cory's Entries, BL MS. Hargrave 123, fo. 168 (1584); Stolte, K. M., 'How Early Did Anglo-American Trademark Law Begin? An Answer to Schechter's Conundrum', Fordham Intellectual Property, Media and Entertainment Law Journal, (1997), 8(2), 505-547, p. 544

67 Stephen, H.J., *Mr. Serjeant Stephen's New Commentaries on the Laws of England*, Butterworth & Co., (1914), 16th edition, London

68 Sebastian, L.B., *The Law of Trade Mark Registration*, Stevens and Sons Limited, (1922), 2nd

The decision Sebastian applied for his argument was given in the case of *Blufeld v. Payne*, in which it was decided that "the act of the defendant was a fraud against the plaintiff and if it occasioned him no specified damage, it was still to a certain extent an invasion of his right."[69] Nevertheless, the English Courts relied upon the authority of *Southern v How* to establish "the antiquity of their jurisdiction" to prevent the unauthorized use of trade marks until the beginning of the 20th century.[70]

Increasing recognition and use of trade marks in commercial practice led to the introduction of registration system for trade marks and the crystallisation of trade mark law.[71] Trade Marks Registration Act, by which first English trade mark register was introduced, came into force in 1875.[72] An exclusive right to a trade mark which is capable of being acquired by registration was first given by this Act.[73] The protection of trade mark use started under the head of fraud, deceit, misrepresentation and so on as early as the 16th or 17th century; but the formation of modern trade mark law begins with the TMR Act in 1875. Sir Duncan Kerly stated with regard to the beginning years of trade mark law: "The law on this subject cannot be traced back further than the nineteenth century."[74]

As mentioned above, in pre-industrial period trade mark used to identify the makers of the products.[75] However, the industrial revolution led to crucial changes in the structure of organizations and business activities.[76] The

edition, London

69 Sebastian, L.B., *The Law of Trade Mark Registration*, Stevens and Sons Limited, (1922), 2nd edition, London

70 *Blanchard v. Hill* (1742), *Crawshay v. Thompson* (1842), *Burgess v. Burgess* (1853), *Hall v. Barrows* (1863), *Hirst v. Denham* (1872), *Magnolia Metal Company v. Tandem Smelting Syndicate Ltd.* (1900); Schechter, F.I., *The Historical Foundations of the Law Relating to Trade-Marks,* Colombia University Press, (1925),1st edition, New York

71 Sherman, B. and Bently, L., *The Making of Modern Intellectual Property Law: The British Experience, 1760-1911*, Cambridge University Press, (1999), 1st edition, Cambridge, 167

72 Clifton, R., *Brands and Branding*, The Economist in association with profile books, (2009), 2nd edition, London, 15

73 Stephen, H.J., *Mr. Serjeant Stephen's New Commentaries on the Laws of England*, Butterworth & Co., (1914), 16th edition, London

74 cited from the 5th edition of *Kerly's Treatise on the Law of Trade-marks* by Schechter, F.I., *The Historical Foundations of the Law Relating to Trade-Marks,* Colombia University Press, (1925),1st edition, New York

75 Maniatis, S.M., Sandres, A.K., 'A consumer trade mark: protection based on origin and quality', European Intellectual Property Review, (1993), 15(11), 407

76 Griffiths, A., 'Modernising trade mark law and promoting economic efficiency: an evolution of the Baby Dry judgement and its aftermath' (2003),1, 5

companies were characterized by a separation of producer and consumer through a distribution chain.[77] In other words, the emergence of the mass distribution system caused the loss of the traditional direct relationships between the maker of products and the consumer of products.[78] Schechter explained the effect of this change on trade mark use after industrial revolution. According to Schechter, a trademark may be affixed to products by a manufacturer thousands of miles away from the consumer, or by an importer who has not manufactured but merely selected the products and put them on the local market, or by a commission merchant who has not selected the products or rendered any service relating to them except to sell such as may have been sent to him/her by the owner.[79]

The producer's identity and reputation were no longer known to the purchaser through the intimacy of personal familiarity between seller and purchaser.[80] Nevertheless, the need for an undertaking to differentiate its products from similar products of other undertakings remained even though the identity and reputation were not sustained any more by personal connections.[81] Hence, the role that a trade marks play in trading has become more crucial than it used to be. In the late 19th century, in the case of *Powell v. Birmingham Vinegar Brewery Co.*, Lord Justice Lindley stated:

"Persons may be misled and may mistake one class of goods for another, although they do not know the names of the makers of either. A person whose name is not known but whose mark is imitated is just as much injured in his trade as if his name were known as well as his mark. His mark as used by him has given a reputation to his goods. His trade depends greatly on such reputation. *His mark sells his goods* [Emphasis added]".[82]

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77 Wilkins, M., 'The neglected intangible asset: the influence of the trade mark on the rise of the modern corporation', Business History, 34, 68

78 Blakeney, M., 'Trade marks and the promotion of trade', 'International Trade Law & Regulation', (1999), 5(6), 140-146, 140

79 Schechter, F.I., 'The rational basis of trademark protection', Harvard Law Review, (1926-1927), 815

80 Wilkins, M., 'The neglected intangible asset: the influence of the trade mark on the rise of the modern corporation', Business History, 34, 68

81 *Ibid*., p. 68

82 The fact of the case were that: "For thirty-five years the plaintiff had made, from a secret recipe, and sold in round glass bottles, a sauce which he called " Yorkshire Relish," and those words were impressed into the glass of the bottles, and were printed, together with the plaintiff's name, on the labels fastened to the bottles, and without the plaintiff's name on the wrappers in which the bottles were sold. The plaintiff's trade was very large and profitable; and some years ago he had registered the words " Yorkshire Relish" as an old

The changes in the structure of organizations and business activities led to the functional revision of trademarks. A trade mark no longer indicates that products to which it has been affixed came from a particular physical origin.[83] In other words, they do not identify by whom the products has been made as they did in the pre-industrial period.

If a trade mark cannot be described as indicators of physical source of the products any more, how should we describe the new role that trade mark is playing? Schechter argued the new concept of trade mark as an identifier of origin in the early 20th century while the Supreme Court of the United States in the leading case of *Hannover Star Milling Co. v. Metcalf* was defining "the primary and proper function of a trademark" as being "to identify the origin or ownership of the goods to which it is affixed".[84] Schechter claimed that that a trade-mark indicates either origin or ownership may have been an adequate explanation of its function to Gerard Malynes and his temporaries, but today only by ignoring realities can one sat that to the consuming public a trade-mark actually indicates the specific ownership or origin of goods to which such trademark is affixed. Give a popular product with an international or at any rate consumption through the complicated channels of modern distribution, knowledge of its specific source can by no means generally be attributed to those who purchase it.[85]Here, Schechter argued the definition

trade-mark of his own; but, after litigation with the defendants, those words had been expunged from the register. The plaintiff had, however, hitherto succeeded in preventing any person other than himself from using the words " Yorkshire Relish" to denote a sauce. The defendants had not discovered the plaintiff's secret, but they were making and selling, under the name of " Yorkshire Relish," and in bottles similar to those of the plaintiff, a sauce very like the plaintiff's sauce, and at a lower price. The defendants printed their own names on their own labels, and there were certain other differences in the labels and in the wrappers; but the evidence proved that the defendants' sauce could be, and in some instances had been, mistaken by ordinary buyers for that made by the plaintiff" and "Held, by the Court of Appeal (Lindley, Kay, and A. L. Smith L.JJ.), affirming the decision of Stirling J., that the plaintiff was entitled to an injunction to restrain the defendants from selling their sauce as " Yorkshire Relish" without better distinguishing it from the sauce made and sold by the plaintiff." "APPEALED by the defendants from a decision of Stirling J., restraining them from using the words " Yorkshire Relish" as applicable to sauces other than those of the plaintiff's manufacture without clearly distinguishing the same from the sauce of the plaintiff." The appeal was dismissed. *Powell v. Birmingham Vinegar Brewery Company* [1896] 2 Ch. 54 available at www.westlaw.com

83 Drescher, D.T., 'The transformation and evolution of trademarks—from signals to symbols to myth', The Trademark Reporter, (1992), 82, 313

84 Schechter, F.I., 'The rational basis of trademark protection', Harvard Law Review, (1926-1927), 40, 833

85 Schechter, F.I., *The Historical Foundations of the Law Relating to Trade-Marks,* Colombia

of a trade mark used by the Supreme Court of the United States on the basis that the conventional views of trade mark theory fails to take into account new commercial practices.[86] He also described a modern trade mark as being a sign which merely guarantees to the consumer that the goods in connection with which it is used emanate from the same source or have reached the consumer through the same channels of trade as certain other goods that have given the consumer satisfaction and that bore the same trade-mark.[87]

Trade marks do not indicate that all of the products to which they were affixed have a same physical source or have been made by the same manufacturer.[88] The essential function of modern trade mark does not focus indicating the physical origin of the products. Rather it focuses on the identification of the product itself.[89] Thus, modern trade mark may possess an identity independent from the maker of the product.[90]

A modern trade mark merely indicates that there is an economic link of some kind between the products to which it has been attached and one particular undertaking and this undertaking has responsibility for the presence of these products on the markets.[91] In other words, all products bearing a particular trade mark have originated under the unitary control of one undertaking which accepts economic responsibility for those products.

Therefore, the new role of the essential function in the industrial period was to enable consumers to comprehend that two products bearing the same trade mark came from a particular trade origin and that is responsible for the quality of these products. Nevertheless, the source of those products can be anonymous to them. In other words, consumers might not know where the products have been derived from. In the matter of McDowell's Application, it was said by Lord Justice Warrington that the deception which the registration would be calculated to produce is that the two products emanate from the same source, and for the purposes of the present question it does not matter

University Press, (1925), 147

86 Pickering, C.D.G., *Trade Marks in Theory and Practice*, Hart Publishing (1998), 43

87 Schechter, F.I., *The Historical Foundations of the Law Relating to Trade-Marks,* Colombia University Press, (1925), 150

88 Griffiths, A., 'Modernising trade mark law and promoting economic efficiency: an evolution of the Baby Dry judgement and its aftermath', Intellectual Property Quarterly, (2003), 1, 5

89 Drescher, D.T., 'The transformation and evolution of trademarks—from signals to symbols to myth', The Trademark Reporter, (1992), 82, 338

90 *Ibid.,* p. 338

91 Griffiths, A., 'Modernising trade mark law and promoting economic efficiency: an evolution of the Baby Dry judgement and its aftermath', Intellectual Property Quarterly, (2003), 1, 5

whether the public do, or do not, know what physical source is.[92]

Consumers in fact do not attach importance where the trade marked products have been manufactured or by whom they have been made. In other words, consumers do not regard a trade mark as a signifier of the physical source of products that it has been attached. Rather, as Schechter pointed out, consumers regard a trade mark as an identifier of commercial origin which has responsibility for the likely product quality bearing the trade mark.[93] Connection indicated by a trade mark in industrial period was not between the marked products and a particular, known source but between the marked products and a source from where previously satisfactory products emanated.[94] However, the changes in the function of trade mark did not end in the industrial period and the developments in the post-industrial period added a new dimension to the function of trade mark.

4. Post-Industrial Period

Since the end of the Second World War during which profound improvements to the well-being of much of the world's population have occurred, exploitation of trade marks to the world has appeared.[95] The collapse of communism, the rise of mass media and arrival of the internet has contributed to the exploitation of trade marks.[96] They have become an important marketing tool for the trade mark owners to broaden their marketplace with the contribution of advertising. Some of trade marks have become worldwide known brands such as Coca Cola drinks, McDonald's burgers and Levi's jeans. Products of a trade mark reached the shelves of the shops in different markets around the world through a variety of organizational structures and business devices.[97]

The changes of organization structures and business practices in the post-industrial period was well summarised in a paper, *Reform of Trade Marks Law*, issued by the Department of Trade and Industry in September 1990.

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92 Schechter, F.I., 'The rational basis of trademark protection', Harvard Law Review, (1926-1927), 40, 817

93 Schechter, F.I., *The Historical Foundations of the Law Relating to Trade-Marks,* Colombia University Press*,* (1925), 150

94 Pickering, C.D.G., *Trade Marks in Theory and Practice*, Hart Publishing (1998), 43

95 Blackett, T., *Trademarks*, Macmillan Press, (1998), 1st edition, 6

96 Clifton, R., *Brands and Branding*, The Economist in association with profile books, (2009), 2nd edition, London, 15

97 Griffiths, A., 'Modernising trade mark law and promoting economic efficiency: an evolution of the Baby Dry judgement and its aftermath', Intellectual Property Quarterly, (2003), 1-37, 5

It is stated in this paper that whatever may have been the position in 1938, the public is now accustomed to goods or services being supplied under the licence from the trade mark owner. For example there has been growth of franchise operations.[98]

In post-industrial period, the trade mark law has responded to the changes arising from the exploitation of trade marks. There are two significant developments in relation to trade mark and trade mark rights in this period. First, the conceptual change in the essential function of trade mark because of the structural changes of business organizations. Second, emerge of the additional functions that a trade mark performs and the expansion of the trade mark protection to cover them. The conceptual change of the essential function of trade mark and its impact on the trade mark rights can be viewed in the early judgments of the CJEU. The issue in relation to the notion of the essential function appeared as early as *Hag I*[99]case. In this case, Hag Bremen was the owner of *Hag* coffee trade mark for Germany, Belgium and Luxemburg. At the end of the Second World War the *Hag* trade mark was sequestrated by the Belgian and Luxemburg authorities and assigned to the Van Zuylen family for these countries. After twenty years later, Hag Bremen decided to sell *Hag* coffee in Luxemburg. However, it was prevented by Van Zuylen on the basis of infringement of its exclusive rights under the national law. In relation to this case, the CJEU held that the Belgian owner was not entitled to prohibit the German owner from marketing its products in Luxemburg under the identical trade mark because products of these two firms had a common origin.[100]

Nevertheless, the judgment of the CJEU was criticized by commentators on the basis of understanding of the concept of commercial origin signified by trade mark.[101] In *Hag II*[102], which came after twenty years, German owner of *Hag* coffee sought to prohibit the use of the identical trade mark by Belgian owner for marketing its products in Germany. In *Hag II* case, the approach of the CJEU was different from that of the *Hag I* case though the facts are the same as in *Hag I* case.

In this case, the CJEU overruled its *Hag I* judgment. The CJEU revised the notion of a common origin. According to the judgment of the CJEU, the

98 *Scandecor v Scandecor* [2001] E.T.M.R. 74, p. 814,815

99 *Hag I* [1974] 2 C.M.L.R. 127

100 Gagliardi, A., F., 'Trade mark assignments under E. C. law', European Intellectual Property Review, (1998), 371-378, 373.

101 *Ibid.,* p.373

102 *Hag II* [1990] 3 C.M.L.R. 571

word 'origin' in this context does not refer to the historical origin of the trade mark; it refers to the commercial origin of the products. The consumer is not interested in the genealogy of trade mark. Rather, the consumer is interested in knowing who made the products that he/she purchases. The function of a trade mark is to signify to the consumer that all goods sold under that mark have been produced by, or under the control of, the same person and will, in probability, be of uniform quality.[103]

In *Hag I,* the historical link of two different enterprises had been found enough to consider them as the same commercial origin. However, the decision of the CJEU in *Hag II* emphasized the importance of unitary control on the quality of the trade marked goods when considering whether two different enterprises are the same commercial origin. Thus, according to approach of the CJEU in *Hag II* case, the historical link of two enterprises is not enough to consider them as the same commercial origin. In order for a group of enterprises to be considered as the same commercial origin, the quality control of the products bearing the trade mark must be unitary. Therefore, the essential function of trade mark was revised by the CJEU as being to guarantee that all the products bearing it have been manufactured or supplied under the control of a single undertaking which is responsible for their quality.

As can be understood from the explanation of the CJEU, a trade mark does not only convey information about the commercial origin of the products bearing it, but it also guarantees a particular economic context of that origin. In the essential function theory, the CJEU recognized quality guarantee provided by a trade mark to some extent by saying that trade mark must offer a guarantee that all the products bearing it have been originated under the control of a single undertaking which is responsible for their *quality*.

However, the economic aspect of a trade mark was much more than what is explained in the essential function theory. Therefore, the additional functions of trade mark are identified by the CJEU in *L'Oréal v Bellure* as being "... that of *guaranteeing the quality* of the goods or services in question and those of *communication, investment or advertising* [Emphasis Added]" and found to merit protection under the provision of Article 5(1) (a) of the TMD.[104] In other words, the core zone of exclusive right provided under 5 (1) (a) of TMD has been expanded through the judgments of the CJEU to protect

[103] *Ibid*., p.586
[104] *L'Oréal v. Bellure* (C-487/07)[2009] E.T.M.R. 987 at [58]

the economic aspect of a trade mark in addition to its essential function of indicating commercial origin.

As a matter of fact, the economic aspect of trade mark was pointed out by Schechter as early as 1920s. According to Schechter, a trade mark indicates not that the article in question comes from a definite or particular source, the characteristics of which or the personalities connected with which are specifically known to the consumer, but merely that the products in connection with which it is used "*emanate from the same - possibly anonymous - source* or *have reached the consumer through the same channels as certain other goods that have already given the consumer satisfaction"*, and that bore the same mark.[105] Therefore, the "true function" of a trade mark is described by Schechter as being "to identify a product as satisfactory and thereby to stimulate further purchases by the consuming public".[106] Schechter pointed out here that a trade mark has become an important communication tool for trade mark owners in the absence of personal direct relationship by imprinting an "impersonal guaranty of satisfaction" upon the mind of consumers and creating a desire for further satisfactions. In other words, Schechter emphasized the economic meaning of trade mark for its owner in order to convey message as to the likely consistency of product quality and create reputation to gain the loyalty of consumers.[107] The formulation of Schechter as to the economic meaning of a trade mark may be accepted as the early identification of the additional functions.

However, the concept of quality guarantee function performed by trade mark was described by Beier in 1970s. According to the Beier's definition, the quality or guarantee function has no independent legal significance. It is derived from the essential function of identifying the origin of goods and simply means that public, from its knowledge that trademarked artefacts have the same origin, often believes these to be of the same quality. However, this expectation to the extent that it really exists is not protected by trade mark law.[108] Here, Beier put emphasis on the fact that there is no legal obligation for trade mark owners to provide trade marked products at specific quality.

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105 Schechter, F.I., 'The rational basis of trademark protection', Harvard Law Review, (1926-1927), 40, 833, p.816

106 *Ibid.,* p.818

107 *Ibid.,* p.818

108 F.K., Beier, 'Territoriality of Trade Mark law and international trade', (1970), 1 IIC 48-72, p. 64 Cited by Phillips J., *Trade Mark Law A Practical Anatomy,* Oxford University Press, (2003), Chapter 2 .36

[109] In other words, a trade mark does not provide consumers with a legal guarantee about the likely product quality. The reassurance about the likely product quality provided by trade mark is economic in nature. It is based on an assumption that the owner of a trade mark will not let the quality of the trade marked products decline in order to retain or increase the benefits which he derives from consumers' expectations of consistency.

If products covered by a particular trade mark possess certain expected quality, consumers may use this trade mark to identify to them as a source of satisfactory and repeat their purchasing. If products covered by a particular trade mark do not possess certain expected quality, consumers may use this trade mark to identify to refrain from purchasing them. The economic pressure created by the consumers induces trade mark owners to keep the quality of trade marked products constant. In other words, the expectation of consumers as to the likely product quality is a crucial economic factor which creates incentives for firms to keep the quality of their products constant though they are not under a legal obligation to do that.[110]

Moreover, a trade mark enables firms to create additional purchasing motivations in order to attract consumers to their products. Firms may use their trade mark to generate a brand image which might be associated with a desirable attitude or lifestyle such as quality, elegance, exclusivity, luxury, modernity. However, firms need to make an investment in the creation, development and protection of that brand image. The brand image that a trade mark may come to symbolize can be created in a variety of marketing techniques but especially through advertising.[111]

Consumers may develop attachments to the trade mark signifying a brand image in response to their cognitive and emotional experiences which is going to play an effective role in making their decision to purchase.[112] The choice of a product because of the attraction of the brand image signified by a trade mark will lead the trade mark to acquire a selling power, which is also called

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109 Pickering, C.D.G., *Trade Marks in Theory and Practice*, Hart Publishing (1998), p. 47

110 Landes, W.M., Posner, R.A., *The Economic Structure of Intellectual Property Law,* The Belknap Press of Harvard University Press, (2003), London, p. 168; Economides, N.M., 'The economics of trademarks', Trademark Reporter, (1988), 78, 523-539, p. 527

111 Arıkan, Ö., Trade Mark Rights and Parallel Importation in the European Union, Onikilevha, (2016), 1st Edition, p. 79.

112 Gerhardt, R.D., '*Consumer investment in trademarks*', North Carolina Law Review, (2010), 88, 427-500, p. 459-460.

its suggestive value.[113] For instance, *Louis Vuitton* is not only a registered trade mark for clothing or *Apple* is not only a registered trade mark for electronics. Firms who own those trademarks succeeded to create a brand image signified by them using advertising and other marketing techniques. Therefore, those brands express consumers something more than the commercial origin and the material quality characteristics of products bearing them.

According to Gerhardt, trade mark associated with a brand image has become a "*powerful vehicle for self-expression and personal affirmation of beliefs and values"* in the twenty first century.[114] The choice of a product bearing a particular trade mark associated with a brand image that a consumer will repeatedly show may send strong signals as to the identity, preferences and lifestyle or attitude of that consumer. In other words, consumers of this century may use the products of a particular trade mark which is associated with a brand image as "powerful repositories of meaning" to express their personal unique preferences.[115]

In addition to affirming personal identity and enhancing individual expression, the choice of the products of a particular trade mark signifying a brand image may give an individual consumer a means of feeling part of a larger community.[116] In other words, consumers may prefer to purchase a specific trade mark which is associated with a brand image in order to feel part of a particular, but generally artificial, society.

For example, *Burberry* is a well-known British trade mark for clothing with a brand image of luxury. Queen Elizabeth II and The Prince of Wales have granted the company Royal Warrants which is seen as a guarantee of acceptable quality and an indicator of prestige.[117] Therefore, consumers may prefer to purchase the products of *Burberry* not only because of its reliable long-term commercial source or quality but also the brand image of British luxury which gives consumers the feeling of being part of high-class society with the taste of British royalty and aristocracy.[118]

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113 Ghidini, G., *Innovation, Competition and Consumer Welfare in Intellectual Property Law*, Edward Elgar (2010), p. 177; Sakulin, W., *Trademark Protection and Freedom of Expression*, Wolters Kluwer, (2011), Rotterdam, p. 61

114 Gerhardt, R.D., '*Consumer investment in trademarks*', North Carolina Law Review, (2010), 88, 427-500, p. 459-460.

115 *Ibid.,* p. 461

116 *Ibid.,* p. 462

117 Available at http://www.brandfinance.com/knowledge_centre/stories/how-we-valued-the-monarchy-as-a-brand-royal-warrants 12.08.2012

118 Arıkan, Ö., Trade Mark Rights and Parallel Importation in the European Union, Onikilevha,

According to Holt, experiencing trade marks accompanied with a brand image of a certain attitude or lifestyle in today's modern secular society substituted for the rituals of religious myth that anthropologists have documented in every human society. Einstein elaborates this point in "*Brands of Faith*" by saying that much as religion created meaning for people's lives over the centuries, now marketers create meaning out of the products that fill our existence.[119] According to Einstein, today's products come to be not just clothes to wear or cars to drive, but elements of who we are.[120]

As Ramello and Silva remarked, the relationship between consumers and today's trade marks accompanied by a strong brand image goes beyond "the informational sphere", which is the essential function of trade mark, to touch "the emotive and psychological realms", which is the additional functions of trade mark.[121] Haig referred to the words of Scott Bedbury, *Starbucks'* former vice-president of marketing, who controversially admitted that 'consumers don't truly believe there's a huge difference between products,' and pointed out that trade marks have to establish 'emotional ties' with their customers so as to gain their loyalty.[122]

Therefore, it is possible to say that trade mark itself has become the actual object of consumption rather than the product it represents. Moreover, the product might be used as a vehicle to sell the brand image of trade mark it is attached. [123] The appreciation of trade mark itself can be seen as the individualisation of trade mark or separation of it from physical product. Lemley underlined this change in his article: "... [T]here is an increasing tendency of treating trademarks as assets with their own intrinsic value, rather than as a means to an end."[124]

Trade marks with a strong brand image have acquired a specific economic value which is independent of its associated product. The independent economic value of trade marks accompanied with a strong brand image

(2016), 1st Edition, p. 82.

119 Einstein, M., *Brands of Faith: marketing religion in a commercial age*, Routledge, (2008), 1st edition, p. 71

120 *Ibid.*

121 Ramello, G.B. and Silva, F., 'Appropriating signs and meaning: the elusive economics of trademark', Industrial and Corporate Change, (2006), 937-963, p. 947

122 Haig, M., *Brand Failures*, Kogan Page (2003), p. 5

123 Ramello, G.B. and Silva, F., 'Appropriating signs and meaning: the elusive economics of trademark', Industrial and Corporate Change, (2006), 937-963, p. 958

124 Lemley, M.A., 'The Modern Lanham Act and the Death of Common Sense', Yale Law Review, (1999), 108, 1687-1715, p. 1693

is known as "brand equity" or "brand value". The brand equity of a trade mark might be increasingly significant in the total financial value of firms compared to their tangible assets. For instance, the most significant asset of *Coca-Cola Company* is probably the brand value of its registered *Coca-Cola* trade mark.[125] According to report of *Brand Finance Brand Evaluation Consultancy Company*, the estimated brand equity of *Coca-Cola Company* was $ 26 billion while its estimated enterprise value was $ 69 billion.[126] It means that almost 40 % of enterprise value of *Coca-Cola Company* belongs to its brand equity. These numbers illustrate the economic importance of trade mark with a strong brand image in business of this century. According to Pickering, this aspect of trade mark cannot be explained directly by the essential function theory.[127]

Therefore, the CJEU held in its recent judgments that the quality guarantee and communication, investment or advertising functions of a trade mark merits protection under Article 5(1) (a) of TMD as well as its origin function.[128] The idea that there might additional economic functions in addition to the essential function of indicating origin was first suggested in *Arsenal Football Club v Reed.*[129] In his opinion to the CJEU, AG Colomer raised an argument as to the traditional determination of the scope of trade mark rights by saying that "it seems to me to be simplistic reductionism to limit the function of the trade mark to an indication of trade origin" because a trade mark can indicate at the same time origin of the products, the quality of the products it represents and also the reputation of the firm. Thus, there is "…no reason whatever not to protect those other functions of the trade mark and to safeguard only the function of indicating the trade origin of goods and services."[130]

As a result, the CJEU in its ruling hinted at the economic functions of trade mark. According to the judgment of the CJEU, the exercise of the exclusive right under Article 5(1) (a) of the TMD must be reserved to cases in which a third party's use of the sign affects or is liable to affect "*the functions of the*

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125 Ghidini, G., *Innovation, Competition and Consumer Welfare in Intellectual Property Law*, Edward Elgar (2010), p. 178

126 Available at < http://www.brandfinance.com/knowledge_centre/reports/september-update-of-brandfinance-global-100-brands-2011> visited at 20 January 2012

127 Pickering, C.D.G., *Trade Marks in Theory and Practice*, Hart Publishing (1998), p. 47

128 *Interflora Inc v Marks & Spencer (C-323/09)* [2012] E.T.M.R. 1; *Google France and Google Inc v Louis Vuitton Malletier, Google France v Viaticum Luteciel* and *Google France v CNRRH* (C-236/08, C-237/08 and C-238/08) [2010] E.T.M.R. 30; *L'Oréal v Bellure* [2009] E.T.M.R. 55

129 *Arsenal Football Club* v *Matthew Reed* [2002] E.T.M.R. 82

130 *Ibid.,* at [46]- [47]

trade mark", in particular its essential function of guaranteeing to consumers the origin of the goods. [131]

The identification of those functions came with its judgment in *L'Oréal v Bellure*[132]*.* In *L'Oréal v Bellure* and the subsequent cases such as the *Google* and *Interflora* cases, the CJEU identified the additional functions of trade mark in order to apply them in the interpretation of the scope of the trade mark rights under article 5 (1) (a) of the TMD.[133]

Having said that, a trade mark must always perform its origin function while performing its additional functions, in particular the advertising or investment functions, depends on whether the owner of the trade mark wants to use it to that end. However, this difference between the essential function of a trade mark and the additional functions cannot justify excluding the protection of the additional functions under Article 5 (1) (a) of TMD as long as one of those functions that a trade mark performs have been adversely affected by the unauthorised use of the third parties.[134]

In other words, there is no difference between the essential function and the additional functions of a trade mark in terms of meriting protection under Article 5(1) (a) of TMD if the owner of trade mark decided to use its trade mark to convey further messages as to the material quality of products bearing it or a brand image which consumers wish to be associated with.

5. Conclusion

In this paper, the functional development of trade mark and its impact on trade mark rights is examined under the three periods: "pre-industrial period", "industrial period" and "post-industrial period". The reason to divide the evolution of trade mark into three different periods is to indicate the significant changes in the function of trade mark owing to the developments in the business activities and organisations and its impact on the development of the trade mark rights. Industrial revolution was on threshold of the changes in the function of trade mark. Hence, industrialisation is used as key point to divide the development of trade mark and trade mark rights.

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131 *Arsenal Football Club* v *Matthew Reed* [2003] E.T.M.R. 19 at [54]

132 *L'Oréal v Bellure* [2009] E.T.M.R. 55

133 *Google France and Google Inc v Louis Vuitton Malletier, Google France v Viaticum Luteciel* and *Google France v CNRRH* (C-236/08, C-237/08 and C-238/08) [2010] E.T.M.R. 30; *Budějovický Budvar, národní podnik v Anheuser-Busch Inc* (C-482/09) [2012] E.T.M.R. 2

134 *Ibid.,* at [40]

First, we examine emerge of trade mark and trade mark rights in the pre-industrial period. We subdivide the trade mark of pre-industrial period into two: ancient times and medieval times. This is because the difference of market system and business activities between these two pre-industrial times created different reasons for trade mark use. Interestingly, trade mark of ancient times shows some similarities with the modern trade mark in terms of indicating material quality features of the products and gaining reputation through its quality assurance function owing to the free market economy system in the ancient times. However, the individual liability of medieval craftsmen for the quality standards of their marked products does not really correspond to the commercial responsibility of modern trade mark. There is a legal obligation for the owners of medieval marks to provide their marked products at a certain quality while the quality assurance of modern trade mark is economic in nature.

Nevertheless, the essential function of both ancient and medieval marks was to identify the physical source of the products although the essential function of the modern trade mark identifies the commercial origin of products. In this sense, there is a conceptual difference between the essential function of the pre-industrial trade marks and the post-industrial trade marks.

As a matter of fact, the most important development of the industrial period, in which trade mark law commenced to crystallise with the introduction of registration system, was the evolution of trade mark function from indicating the physical source of products to identifying commercial origin of products owing to the changes in the structure of organizations and business activities.

Nonetheless, the revision of the concept of "the essential function", which is to identify the commercial origin of products, is required in the post-industrial period because of the changes arising from the exploitation of trade marks. The amendment of the concept of "the essential function" and the application of it in the interpretation of the exclusive rights given trade mark under Article 5 (1) (a) of the TMD was clarified in the *Hag I and Hag II* judgments of the CJEU.

More importantly, the post-industrial period witnessed the emerge of the additional functions that a trade mark performs and the expansion of the trade mark protection by the case law of the CJEU to cover those additional functions. This means that the CJEU applies to the additional functions of trade mark as well as its essential function in the interpretation of the scope of the exclusive right provided under Article 5 (1) (a) of the TMD. The rights of

trade mark owners have been gradually expanded since the trade mark use first appeared in the society. However, the rapid change in the nature of trade mark and the response of the CJEU's judgments in recent years moved the European trade mark law to another level in the post-industrial period.

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ALTERNATIVE DISPUTE RESOLUTION METHODS IN DISPUTES REGARDING PROTECTION OF HISTORICAL AND CULTURAL PROPERTIES IN THE UNITED STATES

Amerika Birleşik Devletleri'nde Tarihi ve Kültürel Varlıkların Korunması Konusundaki İhtilaflarda Alternatif Uyuşmazlık Çözüm Yöntemleri

Dr. Orhan KARABACAK*

ABSTRACT

Historic and cultural properties face danger of extinction due to globalization, industrialization, urbanization pressure arising from the increasing need for dwelling and similar dynamics. The United States of America has developed a unique protection approach in which private sector and civil society act as a locomotive in preserving historic and cultural properties. In the U.S, on the one hand, there are efforts to protect historic and cultural properties exposed to various negative impacts due to the activities of federal administration, on the other hand there is a relatively solid protection approach putting forward by local administrations that brings serious restrictions on the right to property.

The activities for protection of cultural properties are considered in the scope of ensuring the public welfare. On the other hand, the works regarding preservation of these properties cause emergence of legal disputes. These disputes arise between public agencies and private individuals or private organizations and solution of disputes witnesses conflict of interests.

The complexity of the preservation activities broadens the scope of disputes. The cost, duration, strict procedural rules, lack of confidentiality and the like in traditional judicial system increase the demand to alternative dispute resolution methods in the U.S. Also public participation to activities concerning with protection of historic and cultural properties in the all process from the preparation stage to implementation and supervision continues after emergence of disputes and parties opt for coming together to reach agreement rather than go to court.

Besides, the policies of public agencies which encourage applying to alternative dispute resolution methods contribute to development and common usage of these methods.

Many methods are used, especially mediation and arbitration. But the practice of these methods is demonstrated differences at federal and local levels.

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Keywords: Historic Preservation, Cultural Property, Alternative Dispute Resolution Methods, the United States, Litigation.

ÖZET

Tarihi ve kültürel varlıklar, küreselleşme, sanayileşme, artan konut ihtiyacının getirdiği şehirleşme baskısı ve benzeri dinamiklerden kaynaklanan yok olma tehlikesi ile karşı karşıya bulunmaktadır. Tarihi ve kültürel varlıkların korunması konusunda, Amerika Birleşik Devletleri, özel teşebbüs ve sivil toplumun lokomotif olarak rol oynadığı kendisine has bir koruma yaklaşımı geliştirmiştir. ABD'de bir tarafta, federal idarelerin faaliyetleri nedeniyle çeşitli olumsuz etkilere maruz kalan tarihi ve kültürel varlıkların korunmasına yönelik çabalar, diğer tarafta yerel idarelerce ortaya konulan ve mülkiyet hakkı üzerinde ciddi kısıtlamalar getiren nispeten daha katı bir koruma anlayışı bulunmaktadır.

Kültür varlıklarının korunmasına yönelik faaliyetler kamu yararının sağlanması kapsamında değerlendirilmektedir. Öte yandan, bu varlıkların korunmasına ilişkin çalışmalar hukuki uyuşmazlıkların doğmasına neden olmaktadır. Bu uyuşmazlıklar, kamu idareleri ile bireyler ya da özel kuruluşlar arasında ortaya çıkmakta ve uyuşmazlıkların çözümü farklı menfaatlerin çatışmasına sahne olmaktadır.

Koruma faaliyetlerinin çok boyutluluğu, uyuşmazlıkların da kapsamını genişletmektedir. Geleneksel yargı sisteminin maliyeti, süresi, katı usul kuralları, gizlilik taşımaması gibi unsurlar ABD'de alternatif uyuşmazlık çözüm yöntemlerine olan talebi artırmaktadır. Ayrıca tarihi ve kültürel varlıkların korunması ile ilgili faaliyetlere, hazırlık aşamasından uygulama ve denetim aşamalarına kadar tüm süreçlerde halkın katılımı, uyuşmazlıkların ortaya çıkmasından sonra da devam etmekte ve taraflar mahkemeye başvurmak yerine bir araya gelip uzlaşmaya varmayı tercih etmektedir.

Kamu idarelerinin alternatif uyuşmazlık çözüm yöntemlerine başvurulması konusundaki teşvik edici politikaları da bu yöntemlerin gelişmesine ve genel olarak uygulanmasına katkı sağlamaktadır.

Arabuluculuk ve tahkim başta olmak üzere birçok yöntem kullanılmaktadır. Ancak bu yöntemlerin pratiği federal ve yerel düzeyde farklılıklar sergilemektedir.

Anahtar Kelimeler: Tarihi Koruma, Kültürel Varlık, Alternatif Uyuşmazlık Çözüm Yöntemleri, Amerika Birleşik Devletleri, Hukuk Davası.

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INTRODUCTION

Cultural property is a specific form of property that enhances identity, understanding, and appreciation for the culture that produced the particular property. History is the most important aspect of a cultural property. Thus,

definition and scope of cultural property always refer to its historic features. In literature, we encounter different terms with respect to protection of cultural properties such as "preservation of cultural heritage", "cultural protection" and "historic preservation". The use of these terms varies from country to country in terms of understanding, scope and language. In the U.S, for instance, historic preservation mostly is used for historic landmarks and districts whereas cultural property refers generally movable cultural assets.

It is difficult to find a town or city in the United States today that does not have some kind of significant preservation activity.[1] Because of the increasing attention to historic preservation, the number of cases related to the various dimensions of the preservation issue takes important place in the legal arena. Similar to the different kinds of disputes in other areas of law, alternative dispute resolution methods (ADR) have been discussed to handle disputes regarding with historic preservation. Along with the developments in case law, historic preservation is deemed as a valid exercise of the police power.[2] Historic preservation falls in public interest. Due to the fact that there is an undeniable connection between historic preservation and public interest, any level of governmental entities are involved in disputes arising from preservation concerns. Therefore, unlike the other areas of law, the content and effectiveness of ADR in historic preservation disputes have various challenges. In this work, we will usually focus on mediation and in some parts, arbitration because of the existing developments establishing the legal framework with respect to ADR and historic preservation.

Sometimes it may be helpful to bring a third party to mediate a dispute. A third party mediator is "any disinterested person brought in by agreement of the disputing parties to help them resolve their differences."[3] A mediator has many responsibilities to keep parties on the table and mediation process itself requires a comprehensive understanding of disputes so the issues such as motivation of parties, nature of the disputes and confidentiality play quite significant role that determines possible consequences. Where a party is a

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1 Miriam Joels Silver, "Federal Tax Incentives For Historic Preservation: A Strategy For Conservation And Investment", **Hofstra Law Review,** Vol.10, Issue 3, (Spring, 1982), p.890.

2 The preservation of historically significant residential and commercial districts falls within the police power since it protects and promotes the general welfare. *A-S-P Associates v City of Raleigh, N.C. Sup.Ct. 258., 2d 444* (1979), Westlaw. An ordinance designed to protect values and to maintain a high character of community development is a constitutional exercise of the police power by a city if it is in the public interest and contributes to the general welfare. *Reid v. Architectural Board of Review of City of Cleveland Heights*, Ohio Ct. App., 192 N.E. 2d 74 (1963), Westlaw.

3 Susan L. Carpenter, W. J. D. Kennedy, **Managing Public Disputes,** San Francisco: Jossey-Bass Publishers, 1988, p.187.

public entity which is a usual fact in historic preservation, the assessment of requirements of mediation process is shaped differently. Arbitration, as another method of ADR, also has other concerns in historic preservation. Ceding the ultimate authority to decide on issues to a third party arbitrator creates controversy. Why does a public authority that has ultimate power to make determinations turn over this power to another party?

1. THE NATURE OF HISTORIC PRESERVATION DISPUTES AND CASE LAW

We have been witnessing a struggle between historical preservation and urban development and this struggle reflects very complicated aspects of the law today.[4] The need for urbanization triggers tension that people are very sensitive because of the fact that property rights sit in the center of the discussions.

Historic properties are parts of human environment and environmental issues cover historic resources or vice versa. Mostly, disputes have many aspects to look at. However, in general, there seems one right solution.[5] "Solving environmental issues entails more than finding a technical solution."[6] These conflicts present politic, historic, cultural and social values. Possible decisions depend upon what society prioritizes.[7]

Historic Preservation disputes generally involve three parties; the landowner who wants to use his or her property without its property being declared historic, including demolishing it and make renovations that do not strictly comply with the historic preservation ordinance. On the other side you have those who seeking to have a building preserved because it believes that the structure should be preserved even though it has no possible economic use. Finally there is the city whose interests are conflicted because it wants new development as an economic driver but also wants to preserve structures that made that area that area. Simply, city government, if wants everyone to go away "semi-happy."[8]

Dan Pellegrini mentioned a conflict that he was personally involved to illustrate the nature of historic preservation disputes and a possible solution:

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4 James E. Smith, "Are We Protecting The Past? Dispute Settlement And Historical Property Preservation Laws," **North Dakota Law Review**, 71 N.D. L. Rev. 1031,(1995), p.1031.

5 Lisa V. Bandwell, "Problem-Framing: A Perspective on Environmental Problem-Solving," **Environmental Management**, Volume 15, Issue 5, (September 1991), pp 603-612, p.603.

6 Lisa V. Bandwell, p.604.

7 Lisa V. Bandwell, p.604.

8 Interview with Dan Pellegrini, President Judge, Commonwealth Court of Pennsylvania, in Pittsburgh, PA (June 22, 2014).

In the early 1980's, the City of Pittsburgh was attempting to renovate the Stanley Theater in Pittsburgh which was a historic landmark. It was going to be partially finance by the development of an office building across the street in a complicated financial transaction. On the site of the office building was the Moose Hall designated as a historic structure because that is where the Czechoslovakia was founded. Negotiations were entered into by the various parties that allowed the Moose Hall to demolished. Below are links that describe the compromise used to allow for the Moose Hall to be demolished and the Stanley Theater to be restored.[9] My recollection is that in addition to what is mentioned, is that the facade of the front of the building was placed into storage to allow it or portions of it to be used in the future on other buildings.[10]

1.1. Questions Presented in the Courts at Federal Level

Section 106 of the National Historic Preservation Act (NHPA) requires that while federal agencies approving or carrying out any federal undertaking, such as development projects, the issuance of any license or the approval of federal assistance, that may have adverse impacts on historic properties, the agencies should consult with the State Historic Preservation Officer to take into account the effects of the undertaking on historic properties; and to afford the Advisory Council on Historic Preservation, a reasonable opportunity to comment on the undertaking.[11]

The Advisory Council has laid down regulations determining agency responsibilities under Section 106.

At the federal level the most common question is what an "undertaking" subject to Section 106 is. An "undertaking" subject to Section 106 must be either a license, approval, or grant of financial assistance, and subject to federal control."[12]The issue of "undertaking" may be clarified by giving some examples as follow.

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9 Historic American Buildings Survey Loyal Order of Moose Building (Moose Hall) Habs No. Pa - 5149, **Historic American Buildings Survey Mid-Atlantic Region National Park Service Department of the Interior Philadelphia, Pennsylvania**, .http://lcweb2.loc.gov/pnp/habshaer/pa/pa1600/pa1677/data/pa1677 data.pdf (06.28.2014), p.24 -26. and http://www.trustarts.org/visit/facilities/benedum/benedum-center-history (06.28.2014).

10 Interview with Dan Pellegrini, President Judge, Commonwealth Court of Pennsylvania, in Pittsburgh, PA (June 22, 2014).

11 16 U.S.C. § 470f.

12 Andrea C. Ferster, "Recent Developments In Case Law Interpreting The National Historic Preservation Act (NHPA): 1990 to Present," **SH026 Ali-Aba, American Law Institute - American Bar Association Continuing Legal Education ALI-ABA Course of Study** October 7-8, 2002, Historic Preservation Law Cosponsored by the National Trust for Historic Preservation, p.150.

Verification by the U.S. Army Corps of Engineers of a project which is subject to a Nationwide Permit is subject to Section 106 unless the permit authorizes "truly inconsequential" activities from the perspective of impact on navigable waters.[13] Federal agency's review of an action affecting a particular historic property was not a new "undertaking" where property had previously been the subject of a Section 106 review by a different agency.[14] Federal Energy Regulatory Commission's order certifying incinerator as small power production facility under the Public Utility Regulatory Policies Act was not an "undertaking" since FERC had no authority to approve construction or operation of the facility, but merely regulates the rates paid by users, and because FERC certification was ministerial in nature.[15] State Department decision not to exercise its power to veto plan of chancery to demolish its present historic chancery building was not an "undertaking" because failure to veto a project is not tantamount to a "license."[16]Surface mining permits issued by states pursuant to authority delegated by Office of Surface Mining (OSM) was an "undertaking" subject to Section 106 because OSM retained a "powerful oversight role" over the state agencies.[17] Demolition-by-neglect that could adversely affect historic properties is actionable under Section 106.[18]Highway agency did not violate Section 106 when it executed Memorandum of Agreement that postponed the consideration of impacts of "ancillary" construction activities.[19]

Federal Aviation Administration did not violate Section 106 when it conditionally approved plans to build new airport runway and other facilities subject to post-approval compliance with Section 106, so long as compliance occurred prior to construction of challenged runway.[20]Decision of the U.S. Forest Service not to renew a use permit for a recreational facility and concessionaire

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13 Vieux Carré Property Owners, Residents & Associates v. Brown, 875 F.2d 453 (5th Cir. 1989), cert. denied, 493 U.S. 1020 (1990), appeal after remand, 948 F.2d 1436 (5th Cir. 1991), appeal after second remand, 40 F.3d 112 (5th Cir. 1994), reh'g en banc denied, 49 F.3d 730 (5th Cir. 1995), Westlaw.

14 McMillan Park Committee v. National Capital Planning Comm'n, 968 F.2d 1283 (D.C. Cir. 1992).quoted by Andrea C. Ferster, p.150.

15 Sugarloaf Citizens Ass'n v. Federal Energy Regulatory Comm'n, 959 F.2d 508 (4th Cir. 1992), Westlaw.

16 Sheridan Kalorama Historical Ass'n v. Christopher, 49 F.3d 750 (D.C. Cir. 1995) quoted by Andrea C. Ferster, p.150.

17 Indiana Coal Council v. Lujan, 774 F. Supp. 1385 (D.D.C. 1991), vacated in part and appeal dismissed, No. 91-5397 (D.C. Cir. April. 26, 1993).quoted by Andrea C. Ferster, p.151.

18 North Oakland Voters Alliance v. City of Oakland, No.C-92-0743 MHP (N.D. Cal. Oct. 6, 1992).quoted by Andrea C. Ferster, p.151.

19 City of Alexandria v. Slater, 198 F.3d 862 (D.C. Cir. 1999),Westlaw.

20 City of Grapevine v. Department of Transportation, 17 F.3d 1502 (D.C. Cir.), cert. denied, 513 U.S. 1043 (1994).

could precede compliance with Section 106 as a "nondestructive planning activity" so long as historic concession facilities were not removed prior to completion of Section 106.[21]Agency failure to consult with the SHPO or Advisory Council in determining that permit had no potential to affect historic properties was harmless error, since agency findings were supported by record.[22] The Surface Transportation Board (STB) erred in not giving sufficient consideration to the views of the Advisory Council on Historic Preservation or the Keeper of the National Register, and that the STB's purported "termination" of consultation failed to comport with the Advisory Council's regulations.[23]

An alleged "telephone authorization" from the SHPO could not substitute for the written notification set forth in the Advisory Council's Section 106 regulations. The Court also held that the Army Corps could not rely on its own regulations where these regulations were at variance with the Advisory Council's regulations, and where the Advisory Council had never concurred in the Corps' regulations.[24]Forest Service violated Section 106 by failing adequately to identify potential traditional cultural properties affected by undertaking, ruling that agency's mailing of form letters soliciting information from Indian Tribe and its failure to consult in "good faith" with the SHPO violated Section 106.[25] National Park Service (NPS) not required considering private Golf Club an "interested or consulting party" in Section 106 consultation where NPS found that proposed undertaking to curtail Golf Club's preferential access to golf facilities and to build a new public golf course clubhouse would not adversely affect historic clubhouse owned by private club.[26]

Determination by the U.S. Forest Service that transfer of historic trail to a logging company would have no adverse effect on trail based on proposed "mitigation" consisting solely of photographing and documenting trail violated Section 106, and that agency is obligated "to minimize the adverse effect of transferring the intact portions of the trail."[27] Bureau of Indian Affairs violated Section 106 when it failed to consult with the SHPO in identifying historic properties potentially affected by proposed undertaking to construct fence and livestock watering facilities on Hopi Indian Reservation.[28]

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21 Yerger v. Robertson, 981 F.2d 460 (9th Cir. 1992), Westlaw.

22 Save Our Heritage, Inc. v. Federal Aviation Admin., 269 F.3d 49 (1st Cir. 2001), Westlaw.

23 Friends of Atglen-Susquehanna Trail, Inc. v. Surface Transportation Board, 252 F.3d 246 (3d Cir. 2001), Westlaw.

24 Committee to Save Cleveland's Huletts v. U.S. Army Corps of Engineers, 163 F. Supp. 2d 776 (N.D. Ohio 2001), Westlaw.

25 Pueblo of Sandia v. United States, 50 F.3d 856 (10th Cir. 1995), Westlaw.

26 Presidio Golf Club v. National Park Service, 155 F.3d 1153 (9th Cir. 1998), Westlaw.

27 Muckleshoot Tribe v. U.S. Forest Service, 177 F.3d 800 (9th Cir. 1999), Westlaw.

28 Attakai v. United States, 746 F. Supp. 1395 (D. Ariz. 1990), Westlaw.

These two cases are important as they order the enforcement of MOAs:[29] Members of the public had standing to enforce MOA[30] as "third party beneficiaries" to the agreement even though they were not signatories, where MOA specifically gave members of the public right to make objections.[31] Court refused to enforce MOA executed by EPA in the early 1970s in connection with the construction of a sewer system in historic area, finding that completion of the project had extinguished the EPA's continuing obligations under the MOA.[32]

1.2. Local Litigations

Over the years, the number of cases regarding local historic preservation has been increasing.[33] Since the historic properties mostly are protected at local level, it is quite normal that various disputes are brought to the courts. Giving some types of local cases as examples may shed a light how historic preservation takes place in local community life.[34]

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29 In order to see a sample of Memorandum of Agreement: http://www.hcd.ca.gov/financial-assistance/ community-development-block-grantprogram/manual/memorandum_of_ agreement_with_shpo_thpo.doc (06.15.2015).

30 "An MOA is a document prepared under Section 106 of the National Historic Preservation Act. What are the parts of an MOA? A typical MOA is divided into three parts: **a)** "Whereas" clauses that describe: i) the funding source ii) the activities undertaken by the project iii) whether the ACHP will participate iv) all participants in the agreement **b)** Stipulations that describe requirements for and steps to be taken to: i) document and record the site ii) protect archaeological sites iii) deal with any discoveries made in the course of the work iv) resolve any disputes between parties to the MOA v) amend the agreement vi) terminate the agreement vii) report on the implementation of the agreement Stipulations are specific to the project and can also include details of acquisitions, mitigation and/or salvage measures where appropriate. **c)** Signature pages" http://www.preservationiowa.org/downloads/DR_MOA-description.pdf (08.15.2015).

31 Tyler v. Cuomo, 236 F.3d 1124 (9th Cir. 2000), Westlaw.

32 Waterford Citizens Ass'n v. Reilly, 970 F.2d 1287 (4th Cir. 1992), Westlaw.

33 "A recent study by the National Center for Preservation Law suggests that local preservation commissions are becoming involved in litigation much more frequently than had been previously thought. Seventeen percent (39 commissions) of the 222 preservation commissions responding to a National Center questionnaire stated that they had been involved in a court case within the previous two years. This indicates that it is important for commissions and their staffs to know how commissions and local preservation ordinances have fared in court over the years. This issue of Local Preservation briefly summarizes and analyzes preservation commissions' participation in litigation."Stephen N. Dennis,When Preservation Commissions Go To Court A Summary of Favorable Treatment of Challenges To Ordinances and Commission Decisions,Office of Archaeology and Historic Preservation History Colorado Publication #808, available at http://www.historycolorado.org/sites/default/files/files/OAHP/ crforms_edumat/pdfs/808.pdf (05.25.2014).

34 The cases placed in this section of this work are cited from the report prepared by National Center for Preservation Law July 1988. at http://www.historycolorado.org/sites/default/files/files/OAHP/crforms_ edumat/pdfs/808.pdf (05.25.2014).

The Court ruled that "designation of Grand Central Terminal in New York City and the subsequent denial to the terminal's railroad owner of a permit sought for the demolition of portions of the structure for erection of a high-rise office building on the site." The Supreme Court stated that the application of New York City's Landmarks Law has not affected a "taking" of appellants' property. The restrictions imposed are substantially related to the promotion of general welfare and not only permit reasonable beneficial use of the landmark site but also afford appellants opportunities further to enhance not only the Terminal site proper but also other properties."[35]

Early days` concern was generally related to "taking" issues.[36] Then, simultaneously the courts begun to handle the question whether aesthetic can be a reason to restrict private property rights. The court held that "the police power encompasses the right to control the exterior appearance of private property when the object of such control is the preservation of the State's legacy of historically significant structures."[37]

The right to demolish person`s own property has been discussed. The court held that "an ordinance forbidding the demolition of certain structures if it serves a permissible goal in an otherwise reasonable fashion, does not seem on its face constitutionally distinguishable from ordinances regulating other aspects of land ownership, such as building height, set back or limitations on use. We conclude that the provision requiring a permit before demolition and the fact that in some cases permits may not be obtained does not alone make out a case of taking."[38]

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35 Penn Central Transportation v. New York City, 438 U.S. 104 (1978), Westlaw.

36 "When a government actually or constructively takes private property for public use, that government must pay "just compensation" to the property's former owners. Many types of government action infringe on private property rights. Accordingly, the Fifth Amendment's compensation requirement is not limited to government seizures of real property. Instead, it extends to all kinds of tangible and intangible property, including but not limited to easements, personal property, contract rights, and trade secrets. The Fifth Amendment's just compensation rule applies not only to outright government seizures of private property, but also to some government regulations. "Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time." *United States v. Dickinson*, 331 U.S. 745 (1947). It is not always clear which regulations constitute takings, and why. The government absolutely must compensate property owners for regulations requiring a physical invasion of private property, even if it is a small invasion. On the other hand, the government generally does not need to compensate for the effects of health and safety regulations or simple changes in the law." https://www.law.cornell.edu/wex/takings (09.12.2015). For more information about "taking" look at: http://www.law.pace.edu/sites/default/files/LULC/LandUsePrimer.pdf (09.12.2015).

37 A-S-P Associates v. City of Raleigh, 258 S.E. 2d 444 (N.C. 1979), Westlaw.

38 516 F.2d 1051 (5th Cir. 1975), Westlaw.

The meaning of exterior was also discussed. The Court ruled that exterior encompasses not only front side of the structures but also the architectural design of the sides, rear and roof of any building.[39]

Another preservation issue regarding religious building became a subject in litigations. Over the time, mostly churches have claimed that the separation between church and state precludes the designation and regulation of properties owned by such institutions. However, these arguments have not been successful in the courts.[40]

The answer of the question whether local ordinances cover only private properties has been sought. In other words, can a local preservation commission have the authority to regulate property owned by a county or state? The court held that to accomplish the primary purposes of historic area zoning, it is necessary that the exterior of the building having historic or architectural value be preserved against destruction or substantial impairment by everyone, whether a private citizen or a governmental body.[41]

The issues of "hardship" exclusion demands[42], inclusion of vacant lots in plan[43], permissions for alterations[44] and the like have been subject to challenges in the courts.

2. ALTERNATIVE DISPUTE RESOLUTION AT THE FEDERAL LEVEL

2.1. The Administrative Dispute Resolution Act

The Administrative Dispute Resolution Act (ADRA) provides a framework for dispute resolution, including mediation, as a part of administrative proceedings. "ADRA of 1990 authorized and encouraged federal agencies to implement ADR process to enhance the possibility of reaching agreements expeditiously within the confines of agencies` authority and power."[45] The Act did not limit the types of ADR.

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39 City of New Orleans v. Impastato, 3 So. 2d 559 (La. 1941), Westlaw.

40 Society for Ethical Culture in the City of New York v. Spatt, 415 N.E.2d 922 (N.Y. 1980), Westlaw.

41 Mayor and Aldermen of City of Annapolis v. Anne Arundel County, 316 A.2d 807 (Md. 1974), Westlaw.

42 900 G Street Associates v. Department of Housing and Community Development, 430 A.2d 1387 (1981), Westlaw.

43 A-S-P Associates v. City of Raleigh, 258 S.E.2d 444 (N.C. 1979), Westlaw.

44 Faulkner v. Town of Chestertown, 428 A.2d 879 (Md. 1981);Chase F. Parker, Trustee v. Beacon Hill Architectural Commission (No. 80370, Suffolk County Superior Court, decided June 21, 1988), Westlaw.

45 Marshall J. Breger, **Federal Administrative Dispute Resolution Act of 1996 and Private Practitioner, Federal Alternative Dispute Resolution Deskbook**, ed. Marshall J. Breger and Gerald S. Schatz, Deborah Schick Laufer, Chicago: American Bar Association,2001, p. 1.

Alternative discipline[46], bindingarbitration[47], conciliation[48], cooperative

[46] Alternative discipline can be characterized as a form of alternative dispute resolution (ADR) that, like more traditional ADR techniques such as mediation, facilitation, etc., can be used effectively to resolve, reduce, or even eliminate workplace disputes that might come from a circumstance where disciplinary action is appropriate. As the term suggests, AD is an alternative to traditional discipline usually when the traditional penalty would be less than removal.

[47] Binding arbitration involves the presentation of a dispute to an impartial or neutral individual (arbitrator) or panel (arbitration panel) for issuance of a binding decision. Unless arranged otherwise, the parties usually have the ability to decide who the individuals are that serve as arbitrators. In some cases, the parties may retain a particular arbitrator (often from a list of arbitrators) to decide a number of cases or to serve the parties for a specified length of time (this is common when a panel is involved). Parties often select a different arbitrator for each new dispute. A common understanding by the parties in all cases, however, is that they will be bound by the opinion of the decision maker rather than simply be obligated to "consider" an opinion or recommendation. Under this method, the third party's decision generally has the force of law but does not set a legal precedent. It is usually not reviewable by the courts. Binding arbitration is a statutorily-mandated feature of Federal labor management agreements. Consistent with statute, the parties to such agreements are free to negotiate the terms and conditions under which arbitrators are used to resolve disputes, including the procedures for their selection. Some agreements may provide for "permanent" arbitrators and some may provide for arbitration panels.

[48] Conciliation involves building a positive relationship between the parties to a dispute. A third party or conciliator (who may or may not be totally neutral to the interests of the parties) may be used by the parties to help build such relationships.
A conciliator may assist parties by helping to establish communication, clarifying misperceptions, dealing with strong emotions, and building the trust necessary for cooperative problem-solving. Some of the techniques used by conciliators include providing for a neutral meeting place, carrying initial messages between/among the parties, reality testing regarding perceptions or misperceptions, and affirming the parties' abilities to work together. Since a general objective of conciliation is often to promote openness by the parties (to take the risk to begin negotiations), this method allows parties to begin dialogues, get to know each other better, build positive perceptions, and enhance trust. The conciliation method is often used in conjunction with other methods such as facilitation or mediation.

problem-solving[49], dispute panels[50], early neutral evaluation[51], fact findings[52],

[49] Cooperative problem-solving is one of the most basic methods of dispute resolution. This informal process usually does not use the services of a third party and typically takes place when the concerned parties agree to resolve a question or issue of mutual concern. It is a positive effort by the parties to collaborate rather than compete to resolve a dispute.
Cooperative problem-solving may be the procedure of first resort when the parties recognize that a problem or dispute exists and that they may be affected negatively if the matter is not resolved. It is most commonly used when a conflict is not highly polarized and prior to the parties forming "hard line" positions. This method is a key element of labor-management cooperation programs.

[50] Dispute panels use one or more neutral or impartial individuals who are available to the parties as a means to clarify misperceptions, fill in information gaps, or resolve differences over data or facts. The panel reviews conflicting data or facts and suggests ways for the parties to reconcile their differences. These recommendations may be procedural in nature or they may involve specific substantive recommendations, depending on the authority of the panel and the needs or desires of the parties. Information analyses and suggestions made by the panel may be used by the parties in other processes such as negotiations.
This method is generally an informal process and the parties have considerable latitude about how the panel is used. It is particularly useful in those organizations where the panel is non-threatening and has established a reputation for helping parties work through and resolve their own disputes short of using some formal dispute resolution process.

[51] Early neutral evaluation uses a neutral or impartial third party to provide a non-binding evaluation, sometimes in writing, which gives the parties to a dispute an objective perspective on the strengths and weaknesses of their cases. Under this method, the parties will usually make informal presentations to the neutral to highlight the parties' cases or positions. The process is used in a number of courts across the country, including U.S. District Courts.
Early neutral evaluation is appropriate when the dispute involves technical or factual issues that lend themselves to expert evaluation. It is also used when the parties disagree significantly about the value of their cases and when the top decision makers of one or more of the parties could be better informed about the real strengths and weaknesses of their cases. Finally, it is used when the parties are seeking an alternative to the expensive and time- consuming process of following discovery procedures.

[52] Fact-finding is the use of an impartial expert (or group) selected by the parties, an agency, or by an individual with the authority to appoint a fact-finder in order to determine what the "facts" are in a dispute. The rationale behind the efficacy of fact-finding is the expectation that the opinion of a trusted and impartial neutral will carry weight with the parties. Fact-finding was originally used in the attempt to resolve labor disputes, but variations of the procedure have been applied to a wide variety of problems in other areas as well.
Fact finders generally are not permitted to resolve or decide policy issues. The fact-finder may be authorized only to investigate or evaluate the matter presented and file a report establishing the facts in the matter. In some cases, he or she may be authorized to issue either a situation assessment or a specific non-binding procedural or substantive recommendation as to how a dispute might be resolved. In cases where such recommendations are not accepted, the data (or facts) will have been collected and organized in a fashion that will facilitate further negotiations or be available for use in later adversarial procedures.

mini-trials[53], interest-based problem-solving[54], mediated arbitration[55], negotiated

[53] Minitrials involve a structured settlement process in which each side to a dispute presents abbreviated summaries of its cases before the major decision makers for the parties who have authority to settle the dispute. The summaries contain explicit data about the legal basis and the merits of a case. The rationale behind a minitrial is that if the decision makers are fully informed as to the merits of their cases and that of the opposing parties, they will be better prepared to successfully engage in settlement discussions. The process generally follows more relaxed rules for discovery and case presentation than might be found in the court or other proceeding and usually the parties agree on specific limited periods of time for presentations and arguments.

A third party who is often a former judge or individual versed in the relevant law is the individual who oversees a minitrial. That individual is responsible for explaining and maintaining an orderly process of case presentation and usually makes an advisory ruling regarding a settlement range, rather than offering a specific solution for the parties to consider. The parties can use such an advisory opinion to narrow the range of their discussions and to focus in on acceptable settlement options--settlement being the ultimate objective of a minitrial.

The minitrial method is a particularly efficient and cost effective means for settling contract disputes and can be used in other cases where some or all of the following characteristics are present: (1) it is important to get facts and positions before high-level decision makers; (2) the parties are looking for a substantial level of control over the resolution of the dispute; (3) some or all of the issues are of a technical nature; and (4) a trial on the merits of the case would be very long and/or complex.

[54] Interest-based problem-solving is a technique that creates effective solutions while improving the relationship between the parties. The process separates the person from the problem, explores all interests to define issues clearly, brainstorms possibilities and opportunities, and uses some mutually agreed upon standard to reach a solution. Trust in the process is a common theme in successful interest-based problem-solving.

Interest-based problem-solving is often used in collective bargaining between labor and management in place of traditional, position-based bargaining. However, as a technique, it can be effectively applied in many contexts where two or more parties are seeking to reach agreement.

[55] Mediated arbitration, commonly known as “med-arb,” is a variation of the arbitration procedure in which an impartial or neutral third party is authorized by the disputing parties to mediate their dispute until such time as they reach an impasse. As part of the process, when impasse is reached, the third party is authorized by the parties to issue a binding opinion on the cause of the impasse or the remaining issue(s) in dispute.

In some cases, med-arb utilizes two outside parties--one to mediate the dispute and another to arbitrate any remaining issues after the mediation process is completed. This is done to address some parties’ concerns that the process, if handled by one third party, mixes and confuses procedural assistance (a characteristic of mediation) with binding decision making (a characteristic of arbitration). The concern is that parties might be less likely to disclose necessary information for a settlement or are more likely to present extreme arguments during the mediation stage if they know that the same third party will ultimately make a decision on the dispute.

Mediated arbitration is useful in narrowing issues more quickly than under arbitration alone and helps parties focus their resources on the truly difficult issues involved in a dispute in a more efficient and effective manner.

rulemaking[56], settlement conferences[57], non-binding arbitration[58], ombudsmen[59],

[56] Negotiated rulemaking, commonly known as "reg-neg," brings together representatives of various interest groups and a Federal agency to negotiate the text of a proposed rule. The method is used before a proposed rule is published in the Federal Register under the Administrative Procedures Act (APA). The first step is to set up a well-balanced group representing the regulated public, public interest groups, and state and local governments, and join them with a representative of the Federal agency in a Federally chartered advisory committee to negotiate the text of the rule. If the committee reaches consensus on the rule, then the Federal agency can use this consensus as a basis for its proposed rule.
While reg-neg may result in agreement on composition of a particular rule an agency may wish to propose, when the rule is proposed it is still subject to public review under the APA. This is the last step in the process. Federal agency experience is that the process shortens considerably the amount of time and reduces the resources needed to promulgate sensitive, complex, and far-reaching regulations--often regulations mandated by statute.

[57] Settlement conferences involve a pre-trial conference conducted by a settlement judge or referee and attended by representatives for the opposing parties (and sometimes attended by the parties themselves) in order to reach a mutually acceptable settlement of the matter in dispute. The method is used in the judicial system and is a common practice in some jurisdictions. Courts that use this method may mandate settlement conferences in certain circumstances.
The role of a settlement judge is similar to that of a mediator in that he or she assists the parties procedurally in negotiating an agreement. Such judges play much stronger authoritative roles than mediators, since they also provide the parties with specific substantive and legal information about what the disposition of the case might be if it were to go to court. They also provide the parties with possible settlement ranges that could be considered.

[58] Non-binding arbitration involves presenting a dispute to an impartial or neutral individual (arbitrator) or panel (arbitration panel) for issuance of an advisory or non-binding decision. This method is generally one of the most common quasi-judicial means for resolving disputes and has been used for a long period of time to resolve labor/management and commercial disputes. Under the process, the parties have input into the selection process, giving them the ability to select an individual or panel with some expertise and knowledge of the disputed issues, although this is not a prerequisite for an individual to function as an arbitrator. Generally, the individuals chosen are those known to be impartial, objective, fair, and to have the ability to evaluate and make judgments about data or facts. The opinions issued by the third party in such cases are non-binding; however, parties do have the flexibility to determine, by mutual agreement that an opinion will be binding in a particular case.
Non-binding arbitration is appropriate for use when some or all of the following characteristics are present in a dispute: (1) the parties are looking for a quick resolution to the dispute; (2) the parties prefer a third party decision maker, but want to ensure they have a role in selecting the decision maker; and (3) the parties would like more control over the decision making process than might be possible under more formal adjudication of the dispute.

[59] Ombudsmen are individuals who rely on a number of techniques to resolve disputes. These techniques include counseling, mediating, conciliating, and fact-finding. Usually, when an ombudsman receives a complaint, he or she interviews parties, reviews files, and makes recommendations to the disputants. Typically, ombudsmen do not impose solutions. The power of the ombudsman lies in his or her ability to persuade the parties involved to accept his or her recommendations. Generally, an individual not accepting the proposed solution of the ombudsman is free to pursue a remedy in other forums for dispute resolution.

partnering,[60] peer review[61], conflict coaching[62], consultation[63], team building[64] may be stated as methods.[65]

Ombudsmen may be used to handle employee workplace complaints and disputes or complaints and disputes from outside of the place of employment, such as those from customers or clients. Ombudsmen are often able to identify and track systemic problems and suggest ways of dealing with those problems.

60 Partnering is used to improve a variety of working relationships, primarily between the Federal Government and contractors, by seeking to prevent disputes before they occur. The method relies on an agreement in principle to share the risks involved in completing a project and to establish and promote a nurturing environment. This is done through the use of team- building activities to help define common goals, improve communication, and foster a problem-solving attitude among the group of individuals who must work together throughout a contract's term.

Partnering in the contract setting typically involves an initial partnering workshop after the contract award and before the work begins. This is a facilitated workshop involving the key stakeholders in the project. The purpose of the workshop is to develop a team approach to the project. This generally results in a partnership agreement that includes dispute prevention and resolution procedures.

61 Peer review is a problem-solving process where an employee takes a dispute to a group or panel of fellow employees and managers for a decision. The decision may or may not be binding on the employee and/or the employer, depending on the conditions of the particular process. If it is not binding on the employee, he or she would be able to seek relief in traditional forums for dispute resolution if dissatisfied with the decision under peer review. The principle objective of the method is to resolve disputes early before they become formal complaints or grievances.

Typically, the panel is made up of employees and managers who volunteer for this duty and who are trained in listening, questioning, and problem-solving skills as well as the specific policies and guidelines of the panel. Peer review panels may be standing groups of individuals who are available to address whatever disputes employees might bring to the panel at any given time. Other panels may be formed on an ad hoc basis through some selection process initiated by the employee, e.g., blind selection of a certain number of names from a pool of qualified employees and managers.

62 Conflict Coaching: In its simplest terms, a coach is a thinking partner, someone who can assist others in identifying and exploring options, support risk taking, and, if necessary, develop the skills necessary to move forward.

63 Consultation: a process wherein a neutral third party explores the issues, positions, and interests of the parties in an effort to help diagnose the issues and assess the situation. It is a tool for framing and clarifying issues in dispute.

64 Team Building: Team building is a type of facilitation process in which a third party neutral assists a team or a group of individuals with interrelated roles and responsibilities. The team members operate within a set of norms and rules and define the goals and guidelines for a group to effectively achieve stated goals.

65 The definitions above were cited from Alternate Dispute Resolution Handbook prepared by The United States Office of Personnel Management, which is an independent agency of the United States government that manages the civil service of the federal government. This Handbook available at https://www.opm.gov/policy-data-oversight/employee-relations/employee-rights-appeals/alternative-dispute-resolution/handbook.pdf (05.21.2014 and 05.22.2014).

The Act of 1990 required federal agencies to establish an office and a senior official to oversight all programs in terms of ADR potentials. The head of office ensures ADR training for interested personnel, checks grants and other contracts to include clauses promoting use of ADR.[66] The Act eliminated ambiguity with respect to agencies` authority to use ADR to resolve disputes arising under federal administrative programs, provided that the parties are willing to attend the such resolution method.[67]

The Act acknowledged that ADR is not useful in all kinds of disputes. Section 4 of the Act of 1990 lists six circumstances which agencies should consider not use ADR.[68] "The Act expired on October 1, 1995, and the successor regulation, the Administrative Dispute Resolution Act of 1996 reauthorized alternative means of dispute resolution in the Federal administrative process.[69] As did its predecessor statute of 1990, the Administrative Dispute Resolution Act of 1996 authorized and encouraged federal agencies to use arbitration, mediation, negotiated rule-making, and other consensual methods of dispute resolution."[70] The six circumstances that agencies should consider not to use ADR are those:

(1) a definitive or authoritative resolution of the matter is required for presidential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent;

(2) the matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made, and such a proceeding would not likely serve to develop a recommended policy for the agency;

(3) maintaining established policies is of special importance, so that variations among individual decisions are not increased and such a proceeding would not likely reach consistent results among individual decisions;

(4) the matter significantly affects persons or organizations who are not parties to the proceeding;

(5) a full public record of the proceeding is important, and a dispute resolution proceeding cannot provide such a record; and

(6) the agency must maintain continuing jurisdiction over the matter

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66 Marshall J. Breger, p.2.

67 Marshall J. Breger, p.2.

68 Marshall J. Breger, p.7.

69 5 U.S.C.A. §§ 571 Westlaw.

70 Bette J. Roth, "Dispute Resolution Practice Guide", **III. Federal Developments Alternative Dispute Resolution Practice Guide**, Electronic Resource Westlaw.

with authority to alter the disposition of the matter in the light of changed circumstances, and a dispute resolution proceeding would interfere with the agency's fulfilling that requirement.[71]

It should be noted that even though the Act describes six circumstances above, use of ADR is never explicitly prohibited.[72] "ADR is intended to supplement, not limit, available methods of resolving disputes.[73]

The Act of 1996 extended confidentiality protection. The Act states that a dispute resolution communication between a neutral and a party may not be revealed. In order to do so three conditions must be met:

1. The communication must be made for purposes of the ADR process,

2. The communication must not be otherwise discoverable,

3. The communication must not fall within one of the exceptions of section 574.[74]

After enactment of the Act of 1996, agencies have preferred to assess their own personnel, other agencies` personnel, administrative law judges, private lawyers, academics, retired judges, and other individuals.[75]

Administrative Dispute Resolution Act added Administrative Procedure Act Section 556(c)(6), (7), (8) and section 571-83.[76] These provisions authorize and promote use of all types of ADR.[77] "This process is voluntary so neither agencies nor regulated parties can be compelled to utilize them."[78]

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71 5 U.S.C.A. § 572 General Authority, LexisNexis Database.

72 Diane R. Liff, **Administrative Dispute Resolution Act of 1996, Federal Alternative Dispute Resolution Deskbook,** ed. Marshall J. Bregerand Gerald S. Schatz, Deborah Schick Laufer, Chicago: American Bar Association, 2001, p. 37.

73 Diane R. Liff, p.37.

74 Marshall J. Breger, p.7,8

75 Marshall J. Breger, p.12.

76 Administrative Procedure Act Section 556(c)(6), (7), (8): "subject to published rules of the agency and within its powers, employees presiding at hearings may—(6) hold conferences for the settlement or simplification of the issues by consent of the parties or by the use of alternative means of dispute resolution as provided in subchapter IV of this chapter(7) inform the parties as to the availability of one or more alternative means of dispute resolution, and encourage use of such methods;(8) require the attendance at any conference held pursuant to paragraph (6) of at least one representative of each party who has authority to negotiate concerning resolution of issues in controversy." See detailed rules regarding use of ADR in administrative cases set forth Administrative Procedure Act Section 571-83.

77 Michael Asimov and Ronald M. Levin, **State and Federal Administrative Law**, St Paul: West Publishing, 2009, p.155,156.

78 Michael Asimov and Ronald M. Levin, p.156.

2. 2. National Historic Preservation Act

National Historic Preservation Act of 1966 (NHPA), which is a fundamental law governing historic preservation in the U.S, has an alternative dispute resolution mechanism. The core legal basis of the settlement procedure is laid down in Section 106 of the NHPA. It requires a review process where federal agencies` undertakings might have impact on historic properties.[79]

NHPA also established an independent body, the Advisory Council on Historic Preservation (ACHP), mediating disputes in historic preservation. Major duty of this body is to facilitate dispute settlement between federal agencies and historic preservation interests.[80]

"Section 106 of the NHPA requires Federal agencies to take into account the effects of undertakings they carry out, assist, fund, or permit on historic properties and to provide the ACHP a reasonable opportunity to comment on such undertakings."[81] "The process provides for participation by SHPO (State Historic Preservation Officers), THPO (Tribal Historic Preservation Officers), tribal, state, and local governments, Indian tribes and Native Hawaiian organizations, applicants for Federal assistance, permits, or licenses, representatives from interested organizations, private citizens, and the public. Federal agencies and consulting parties strive to reach agreement on measures to avoid, minimize, and mitigate adverse effects on historic properties and to find a balance."[82]

The Council provides with a regulatory consultation process that has resolved many challenges to agency undertakings. However, it should be noted that in spite of the increasing attention to historic preservation, federal agencies are not willing to obey the requirements set forth by NHPA.[83] Federal Agencies must take into account the effects of their undertakings on historic properties and afford the Council a proper opportunity to comment on it.[84]

Federal agency must determine whether its action could affect historic properties that are included in the National Register of Historic Places

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79 Thomas N. Palmer, "Strengthening Federal Agency Mediation In Public Sector Disputes: A Model From Historic Preservation," **Ohio State Journal on Dispute Resolution**, Ohio St. J. on Disp. Resol. 369,(1992), p.370.

80 Thomas N. Palmer, p. 369.

81 NEPA and NHPA: A Handbook for Integrating NEPA and Section 106, **Council On Environmental Quality Executive Office of the President And Advisory Council on Historic Preservation** (March 2013), p. 8

82 Id.

83 Thomas N. Palmer, p. 369.

84 Section 106 Regulations Summary, http://www.achp.gov/106summary.html (05.19.2014).

or that meet the criteria for National Register.[85] Basically, "prior to federal undertakings, NHPA requires agency;

• make reasonable and good faith effort to identify historic properties,

• determine whether identified properties eligible for listing on National Register,

• assess effects of undertakings on any eligible properties found,

• determine whether effects will be adverse,

• avoid or mitigate any adverse effects.[86]"

In order to follow these steps, the responsible agency must contact with State Historic Preservation Officer.[87] Then, the agency should evaluate possible effects to properties. Where there is no adverse effect the federal agency may proceed its actions.[88] If there is an effect on a historic property, the agency will identify whether the effect is adverse or non-adverse.[89] Assessment of adverse effects on the identified historic properties is based on criteria found in the Council`s regulations.[90] After assessment of adverse effect, if the

85 Section Id.

86 Pit River Tribe v Bureau of Land Management, 306 F.supp.2d. 929,944 (E.D.Ca.2004), Westlaw.

87 "State Historic Preservation Officers (SHPOs) administer the national historic preservation program at the State level, review National Register of Historic Places nominations, maintain data on historic properties that have been identified but not yet nominated, and consult with Federal agencies during Section 106 review. SHPOs are designated by the governor of their respective State or territory. Federal agencies seek the views of the appropriate SHPO when identifying historic properties and assessing effects of an undertaking on historic properties. Agencies also consult with SHPOs when developing Memoranda of Agreement." http://www.achp.gov/shpo.html (05.19.2014).

88 Thomas N. Palmer, p. 372.

89 Thomas N. Palmer, p. 372.

90 "Criteria of adverse effect: An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register. Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.
Examples of adverse effects: Adverse effects on historic properties include, but are not limited to:
(i) Physical destruction of or damage to all or part of the property;
(ii) Alteration of a property, including restoration, rehabilitation, repair, maintenance, stabilization, hazardous material remediation and provision of handicapped access, that is

agency concludes that there is non-adverse effect, the agency notifies SHPO and Advisory Council.[91] In case of adverse effect, the agency and SHPO are involved in consultation process.[92]

The sections 36 CFR PART 800 of Section 106 regulations describe the process.[93] It states that "if the Council decides to participate in the consultation, the agency official shall consult with the SHPO/THPO, the Council, and other consulting parties, including Indian tribes and Native Hawaiian organizations under § 800.2(c)(3), to seek ways to avoid, minimize or mitigate the adverse effects. If the agency official, the SHPO/THPO, and the Council agree on how the adverse effects will be resolved, they shall execute a memorandum of agreement, MOA.[94]"

In this part of the process, the Council begins acting like a mediator.[95] End of the process parties may come to an agreement and prepare an enforceable document, Memorandum of Agreement (MOA).[96] The consultation process

not consistent with the Secretary's Standards for the Treatment of Historic Properties (36 CFR part 68) and applicable guidelines;
(iii) Removal of the property from its historic location;
(iv) Change of the character of the property's use or of physical features within the property's setting that contribute to its historic significance;
(v) Introduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features;
(vi) Neglect of a property which causes its deterioration, except where such neglect and deterioration are recognized qualities of a property of religious and cultural significance to an Indian tribe or Native Hawaiian organization; and
(vii) Transfer, lease, or sale of property out of Federal ownership or control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property's historic significance.
(3) Phased application of criteria. Where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the agency official may use a phased process in applying the criteria of adverse effect consistent with phased identification and evaluation efforts conducted pursuant to § 800.4(b)(2)." http://www.achp.gov/regs-rev04.pdf, p.5,6 (05.19.2014).

91 Thomas N. Palmer, p.372.

92 Thomas N. Palmer, p.372.

93 The National Historic Preservation Act (NHPA) of 1966 as amended (16 USC 470-470t,) Section 201-212 established the Advisory Council on Historic Preservation (ACHP) and authorized them to develop implementing regulations. Then the Council issued the section 106 Regulations, http://www.achp.gov/regs-rev04.pdf p.7 (05.19.2014).

94 "Memorandum of agreement: "Under the Federal regulations governing compliance with Section 106 of the National Historic Preservation Act (36 CFR 800), Federal agencies and others negotiate, draft, finalize, execute, and implement "Memoranda of Agreement" (MOA) stipulating how the adverse effects of Federal actions on historic properties will be resolved." http://www.npi.org/Stipulations.htm (05.19.2014).

95 Thomas N. Palmer, p.373.

96 Look at some examples of MOAs, the federal Highway Administration in coordination

closely parallels traditional non-binding mediation and 95% of disputes submitted to the Council concluded with MOA.[97]

2.3. Department of Transportation (DOT) Act

Department of Transportation (DOT) Act Section 2(b) (2) stated that "declared ... the national policy that special effort should be made to preserve . . . historic sites." Moreover, section 4 (f) requires that the Secretary of Transportation shall not approve any program or project which requires the use of ... any land from a historic site of national, State or local significance as ... determined…[by the federal, state, or local officials having jurisdiction thereof] unless (i) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such . . .historic site resulting from such use.[98]

The wording of the Act is pretty strong to lead to Agency to seek common grounds to handle conflicts stemming from transportation projects. It is important to note that the Act does not have any definition about the scope of historic properties.[99] As opposed to this, NHPA requires agencies to take into consideration the effects of undertakings on historic properties which are listed or eligible for listing of National Register. In other words, there can be any kind of historic properties to consider the impacts of federal undertakings.[100]

Having considered the emphasis on "special effort" that should be spent by agencies and the scope of description of historic properties in the Act, agencies should have many reasons to seek cooperation to avoid probable harms to properties. This fact may make agencies more willing to go through practicable and applicable ADR process.

2.4. National Environmental Policy Act

National Environmental Policy Act (NEPA) also requires that Federal agencies evaluate their projects` environmental effects, constituting impacts

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with State of Hawaii Dep. of Transportation proposes the Kuhio Highway short-term improvements and its effects on historic properties and mitigation methods, http://www.npi.org/Stipulations.htm (05.20.2014) see other examples: http://www.firststreetcemetery.org/uploads/tx.nps.lwcf.waco_first_street_cemetery.moa.oct09.pdf; http://www.lm.doe.gov/cercla/documents/fernald_docs/PROD/251148.pdf;http://archives.hud.gov/offices/cpd/environment/section106/pdf/wv_wheeling_a.pdf (05.20.2014).

97 Thomas N. Palmer, p.373.

98 49 U.S.C. § 303 and 23 U.S.C. § 138, Westlaw.

99 Oscar S. Gray, "The Response of Federal Legislation to Historic Preservation, Law and Contemporary Problems", **Historic Preservation,** Vol. 36, No. 3, (Summer, 1971), p. 317, 318.

100 Oscar S. Gray, p.318.

on historic properties. Agencies follow to the NEPA processes set forth in their NEPA implementing procedures and Council of Environment Quality's regulations.[101]

NHPA Section 110 states that "nothing in this Act shall be construed to require the preparation of an environmental impact statement where such a statement would not otherwise be required under the National Environmental Policy Act of 1969 [42 U.S.C. 4321 et seq.], and nothing is this Act shall be construed to provide any exemption from any requirement respecting the preparation of such a statement under such Act."[102] Because of such kind of regulation and the fact that NEPA has its own review process, there was no integrated implementation between NHPA and NEPA.

Federal agencies have independent obligations while carrying out their projects under NEPA and NHPA. The review mechanism in Section 106 of NHPA and the NEPA ensures that natural, cultural, and historic environment is taken into consideration in Federal undertakings.[103]

Title I of NEPA sets forth a "Declaration of National Environmental Policy" which requires the federal government to use all appropriate means to establish and further conditions under which man and nature can exist in productive harmony. "Section 102 requires federal agencies to incorporate environmental considerations in their planning and decision-making through a systematic interdisciplinary approach. Specifically, all federal agencies are to prepare detailed statements assessing the environmental impact of and alternatives to major federal actions significantly affecting the environment. These statements are commonly referred to as environmental impact statements."[104]

NEPA has its own review process and during this process some conflicts occur. A report was released to promote alternative dispute resolutions to utilize in the conflicts arising from NEPA.[105] The report states that "Today, agency decisions affecting the environment are often highly confrontational. Project and resource planning processes routinely are too lengthy and costly.

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101 NEPA and NHPA :A Handbook for Integrating NEPA and Section 106, p. 9.

102 16 U.S.C. 470h-2(i) Applicability of National Environmental Policy Act.

103 NEPA and NHPA :A Handbook for Integrating NEPA and Section 106, p. 6

104 National Environmental Policy Act, http://www.epa.gov/compliance/basics/nepa.html (05.25.2014)

105 This report was produced by the National Environmental Conflict Resolution Advisory Committee (Committee), a federal advisory committee chartered by the U.S. Institute for Environmental Conflict Resolution (U.S. Institute) of the Udall Foundation. available at National ECR Advisory Report: An Introduction http://www.ecr.gov /pdf/NECRAC_Report_intro.pdf (05.25.2014).

Environmental protection measures are often delayed. Public and private investments are foregone. Decisions and plans often suffer in quality. Hostility and distrust among various segments of the public and between the public and the federal government seem to fester and worsen over time. The traditional model for NEPA is not responsible for all these problems--indeed it is not even applicable in all cases--but it does not take full advantage of the many strengths of Section 101."[106] In order to over such serious conflicts the Institute for Environmental Conflict Resolution was established.

2.5. The Role of the U.S Institute for Environmental Conflict Resolution and the Advisory Council in Dispute Resolution

2.5.1. Institute for Environmental Conflict Resolution

USIECR is a federal agency located in Tucson, Arizona. Its role is to assist in the resolution of environmental, natural resources, or public land use conflicts that involve a federal agency or interest. USIECR, working with EPA, has developed the National Roster of Environmental Dispute Resolution and Consensus Building Professionals.[107]

The U.S. Institute is charged to work on environmental conflicts where there is a federal agency involved. That means it cannot work on local land use issues unless they involve a federal agency of the U.S. government.[108] "Since 1998 the U.S. Institute has been an impartial entity inside the federal government, independent of other agencies, that provides conflict resolution services to help public and private interests manage and resolve environmental conflicts nationwide. The 2005 Federal Policy Memorandum on ECR and subsequent 2012 Federal Policy Memorandum on ECCR recognize the U.S. Institute's status as a key provider of Environmental Conflict Resolution services, and encourage Federal agencies to draw on the U.S. Institute services to increase the effective use of ECO."[109]

The Institution has significant roles in historic preservation. Some environmental disputes constitute historic property concerns.[110] The

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106 National ECR Advisory Report: An Introduction http://www.ecr.gov /pdf/NECRAC_Report_intro.pdf (05.25.2014).

107 Resource Guide: Resolving Environmental Conflicts in Communities, p.4, available at http://www.epa.gov/ adr/Resguide.pdf (05.22.2014).

108 https://www.ecr.gov/HowWeWork/HowWeWork.aspx (05.25.2014).

109 https://www.ecr.gov/HowWeWork/AboutUs.aspx#overview, (05.25.2014).

110 In the 1950s, Stillwater, Minnesota, and Houlton, Wisconsin, began discussing how to improve local transportation. The towns are currently connected by an historic lift bridge over the St. Croix River, a waterway within the Wild and Scenic River System. In 1995, federal and state transportation agencies decided to build a new bridge and remove the

Institution also is involved in Federal and Tribal government relations such as how to respect tribal sovereignty and protect sacred sites when planning or implementing projects. "Environmental Conflict Resolution (ECR) is defined as third-party assisted conflict resolution and collaborative problem solving in the context of environmental, public lands, or natural resources issues or conflicts, including matters related to energy, transportation, and land use."[111] The institution uses almost all types of ADR methods in conflict resolutions.

2.5.2. The Advisory Council on Historic Preservation

As we pointed out, the responsible federal agency is required to consult with the relevant State or Tribal Historic Preservation office (each US state and territory has a designated State Historic Preservation Office). If the agency and the State agree with the agency's assessment of the impacts of a proposed action and if they agree on the mitigation for such an action the Advisory Council doesn't get directly involved. In many cases, there is disagreement, particularly from various stakeholders that have legal standing as consulting parties, in those cases the Advisory Council will become directly involved in the process as mediator.[112]

The Council provides with a regulatory consultation process that has resolved many challenges to agency undertakings. Over the period "the Advisory Council's role in mediation was changed from mandatory to optional, and the negotiation process itself was decentralized to allow for greater participation by the various state historic preservation officers. This

lift bridge. But an environmental group successfully challenged this decision in court. By 2000, the intersection of three public policy goals – enhancement of transportation services, preservation of historic resources, and protection of a wild and scenic river – had produced gridlock among state and federal transportation, environmental and historic protection agencies. In 2001, the Federal Highway Administration and the departments of transportation in both states requested the assistance of the U.S. Institute. Based on a U.S. Institute assessment and recommendations, the agencies agreed to participate in a collaborative process involving both private and public stakeholders. In 2002, a group of 27 agency and non-agency stakeholders began meeting to find a collaborative solution. This was part of the project development and NEPA review process. The three-year collaborative process resulted in an agreement among 26 of 27 stakeholders to retain the lift bridge as a pedestrian and bicycle crossing and add a new, signature bridge for vehicular traffic. This case highlights both the importance and the challenge of integrating collaborative problem solving into NEPA reviews. After three years of intense negotiation, conflict that had simmered for over 50 years was resolved and the NEPA process was completed. https://www.ecr.gov/ SupportFiles/CaseBriefings/pdf/0440PR02.pdf (05.27.2014). See other accomplishments: http://www.ecr.gov/ Projects/Projects.aspx. (05.27.2014).

111 http://www.ecr.gov/Basics/SampleProcessOutline.aspx (05.27.2014).

112 Stephen Morris, Chief, Office of International Affairs National Park Service (personal communication, May 13, 2014).

change permitted a conservation of resources, eliminated many delays, and preserved the right of the Advisory Council to demand greater involvement when necessary."[113] On the other hand, the Council has undertaken several successful projects to preserve historical properties. These projects can contribute to conflict resolution before dispute arises.[114]

3. STATE AND LOCAL PROTECTION SPHERE AND ALTERNATIVE DIPUTE RESOLUTION

3.1. State Protection System and Alternative Dispute Resolution

Along with the amendments to National Historic Preservation Act (NHPA) the roles of states have increased under federal preservation structure.[115] Because of the fact that the Federal government has begun to reduce the funding of preservation efforts, states have started to play significant roles in preserving historical values.[116] National trends such as budget cuts, slow regulatory regime, and attention paid mostly on economic growth as well as demographic trends put significant pressure on landmark buildings and these challenges have been converting to opportunities for the states to initiatives in preservation.[117] The way the states have used to protect cultural and historical properties is to delegate regulatory power to local governments.[118] Planning and zoning process and establishment of historic districts are among the methods bestowed by the states to local governments to regulate historic preservation.[119] In order to gain historic properties, most states grant the authority to the local bodies. States also have enacted laws establishing new agencies that have many responsibilities including register of historic places. [120]Most states have acts regulating environment that require states take the adverse effects of government undertakings on historic properties into account.[121]

At the state level, it can be seen very similar protection framework with federal review system. For instance, New Jersey has very similar process. According to the state law, the request for a grant of alteration or demolition

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113 Thomas N. Palmer, p.382.

114 The Advisory Council on Historic Preservation, Section 106 Success Stories, .http://www.achp.gov/ sec106_successes.html (05.24.2014)

115 Donald G. Hagman and Julian Conrad Juergensmeyer, **Urban Planning and Land Development Control Law**, St. Paul: West Publishing, Second Ed. 1986, p.466.

116 Donald G. Hagman and Julian Conrad Juergensmeyer, p.466.

117 Christopher J. Duerksen, Ed, **A Handbook on Historic Preservation Law**,Washington D.C : The Conservation Foundation and The National Center for Preservation, 1983, p.25.

118 Donald G. Hagman and Julian Conrad Juergensmeyer, p.466.

119 Donald G. Hagman and Julian Conrad Juergensmeyer, p.466.

120 Christopher J. Duerksen, p.130.

121 Christopher J. Duerksen, p.130.

must be decided within 120 days. Otherwise the application is deemed granted.[122]

There are some states that provide alternative dispute resolution systems. For example, Minnesota provides for mediation service between state agencies and the aggrieved party.[123] Minnesota Historic Sites Act states as follows:

"The state, state departments, agencies, and political subdivisions, including the Board of Regents of the University of Minnesota, have a responsibility to protect the physical features and historic character of properties designated in sections 138.662 and 138.664 or listed on the National Register of Historic Places created by Public Law 89-665. Before carrying out any undertaking that will affect designated or listed properties, or funding or licensing an undertaking by other parties, the state department or agency shall consult with the Minnesota Historical Society pursuant to the society's established procedures to determine appropriate treatments and to seek ways to avoid and mitigate any adverse effects on designated or listed properties. If the state department or agency and the Minnesota Historical Society agree in writing on a suitable course of action, the project may proceed. If the parties cannot agree, any one of the parties may request that the governor appoint and convene a mediation task force consisting of five members, two appointed by the governor, the chair of the State Review Board of the State Historic Preservation Office, the commissioner of administration or the commissioner's designee, and one member who is not an employee of the Minnesota Historical Society appointed by the director of the society. The two appointees of the governor and the one of the director of the society shall be qualified by training or experience in one or more of the following disciplines: (1) history; (2) archaeology; and (3) architectural history".[124]

This is very comprehensive regulation that covers not only the state`s direct undertakings but also other parties` responsibilities. Notably, the regulation initially encourages agencies to consult with Minnesota Historical Society; if it fails then parties may appeal to mediation process. More importantly, the law regulates how to confer\organize mediators and their qualifications.

In states historic preservation laws, North Dakota demonstrates a unique experience by using arbitration in historic preservation.[125] However, this

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122 James E. Smith, p.1043.

123 James E. Smith, p. 1043.

124 Minnesota Historic Sites Act, "Duties of State in Regard to Historic Properties", available at https://www.revisor.mn.gov/statutes/?id=138.665 (05.19.2014).

125 James E. Smith, p.1052.

arbitration system is limited to historical property alteration and demolition requests by political subdivisions. In other words, currently, arbitration law of North Dakota is not applicable to disputes arising from private entities and individuals. Even though North Dakota`s law effectuates arbitration in historic preservation disputes, there are still concerns regarding whether arbitration is an effective way in such an area.[126]Many claim that "a historical preservation dispute is an all or nothing proposition.[127]

Another concern as to whether arbitration is a reasonable method is that the lack of time limitation on arbitration process could cause irreparable problems.[128] North Dakota Uniform Arbitration Act lays down a selection system of arbitrators based on partisan composition. For this reason, legislators of North Dakota argued that historic preservation disputes cannot be solved by the partisan arbitrators. Instead, the system must be depending upon the expertise of preservationists.[129]

The basic idea is that arbitration is not entirely applicable when dealing with issues of public law such as environmental and land use disputes.[130] Another argument related to the use of arbitration is that arbitration should be restricted to areas where there are clearly defined legal rules.[131] A suggested solution for historic preservation disputes is that possible disputes should be settled through a series of administrative reviews with judicial appeals and then after fundamental rules for disputes settlement are laid down; arbitration could be carried out properly.[132]

State of Illinois has statutory requirements to facilitate mediation in historic preservation. Illinois State Agency Historic Resources Preservation Act has some similar provisions that NHPA does.[133] It also establishes "Historic Preservation Mediation Committee". Once State Historic Preservation Officer and State agency do not agree the effects of agency undertakings on historic properties and the way of mitigation of adverse effects the agency shall call a public meeting in the county where the undertaking is proposed within 60

126 James E. Smith, p.1053.
127 County of Stusman v State Historical Society, 371 N.W. 2d, 321 (N.D. 1985) quoted by James E. Smith, p. 1054.
128 James E. Smith, p. 1054.
129 James E. Smith, p. 1054.
130 Harry T. Edward, "Alternative Dispute Resolution: Panacea or Anathema?", **Harvard Law Rev**, Vol 99, (1986) p.674.
131 Harry T. Edward, p. 680.
132 Harry T. Edward, p. 680.
133 Illinois State Agency Historic Resources Preservation Act. (20 ILCS 3420/1), Also available at http://www. ilga.gov/legislation/ilcs/ilcs3.asp?ActID=372&ChapterID=5 (05.22.2014).

days.[134] If, within 14 days following conclusion of the public meeting, the State agency and the Director (State Historic Preservation Officer) fail to agree on a feasible and prudent alternative, the proposed undertaking, with supporting documentation, shall be submitted to the Historic Preservation Mediation Committee. The document shall be sufficient to identify each alternative considered by the Agency and the Director during the consultation process and the reason for its rejection.[135]

The Statute sets forth the structure of the Committee and procedure should be followed. As seen from the provisions below, the structure and process is very similar to Section 106 procedures of NHPA:

"The Mediation Committee shall consist of the Director and 5 persons appointed by the Director for terms of 3 years each, each of whom shall be no lower in rank than a division chief and each of whom shall represent a different State agency. An agency that is a party to mediation shall be notified of all hearings and deliberations and shall have the right to participate in deliberations as a non-voting member of the Committee. Within 30 days after submission of the proposed undertaking, the Committee shall meet with the Director and the submitting agency to review each alternative considered by the State agency and the Director and to evaluate the existence of a feasible and prudent alternative. In the event that the Director and the submitting agency continue to disagree, the Committee shall provide a statement of findings or comments setting forth an alternative to the proposed undertaking or stating the finding that there is no feasible or prudent alternative. The State agency shall consider the written comments of the Committee and shall respond in writing to the Committee before proceeding with the undertaking."[136]

California Public Resources Code includes rules regarding mediation akin to Illinois`s statutory rules. It also encompasses Indian Tribes` historic properties.[137]

3.2. The Regulatory Framework of Local Historic Preservation Laws and Alternative Dispute Resolution

Historic preservation laws are based upon the police power of local

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134 Sec. 4. State agency undertakings. 20 ILCS 3420/4) (from Ch. 127, par. 133c24) . http:// www.ilga.gov/ legislation/ ilcs/ilcs3.asp?ActID=372&ChapterID=5 (05.22.2014).

135 Sec. 4. State agency undertakings. 20 ILCS 3420/4) (from Ch. 127, par. 133c24) . http:// www.ilga.gov/ legislation/ ilcs/ilcs3.asp?ActID=372&ChapterID=5 (05.22.2014).

136 Sec. 4. State agency undertakings. 20 ILCS 3420/4) (from Ch. 127, par. 133c24) . http:// www.ilga.gov/ legislation /ilcs/ilcs3.asp?ActID=372&ChapterID=5 (05.22.2014).

137 California Public Resources Code, Section 5024.5, available at http://ohp.parks.ca.gov/ pages/ 1069/files/10%20comb.pdf (05.22.2014).

governments.[138] "Historic preservation has been specifically upheld as a valid public purpose under the police power authority and an entirely permissible governmental goal."[139] Historic preservation contributes to the quality of life.[140]The Supreme Court held that New York City's landmarks preservation ordinance is constitutional.[141]The court emphasized on the fact that because of economy-centered purposes, historical properties were destroyed without consideration of their cultural values and then the court stated that historical values enhance people`s life. The nature of the cultural and historical properties is that they reflect common interests rather than individual ones.[142]

The most important preservation work occurs at the local level, and the major issues are encountered and resolved there. The City ordinance that controls the rights of the property owners was handled by Penn Central court and this local case marked on history of preservation in the U.S.[143]

Since the federal preservation scheme only covers the federal agencies actions that may have impact on historic properties, additional measures are needed to preserve cultural and historical resources of the country.[144] Also, at the federal level, the owners of cultural and historical properties that eligible for National Register may object to listing of their properties. Once they object, then, the property remains out of the list and so do protection system. However, at the local level, landowner opposition alone is not a strong challenge for listing.[145]

Although most of disputes are local, the most of local regulations do not constitute ADR methods to overcome many serious conflicts. In some city comprehensive plans may include provisions allowing mediation regarding challenges to the plan. For instance, in Pensacola\Florida, the comprehensive plan gives an opportunity to parties for dispute resolution

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138 Laura S. Nelson, "Remove Not The Ancient Landmark: Legal Protection For Historic Religious Properties In An Age of Religious Freedom Legislation", Symposium: State And Federal Religious Liberty Legislation: Is It Necessary? Is It Constitutional? Is It Good Policy? Policy Perspectives On And Impact Of Religious Liberty Legislation, **Cardozo Law Review**, 21 Cardozo L. Rev. 721, (December, 1999), p.724-725.

139 Penn Cent. Trans. Co. v. New York City, 438 U.S. 104, 126 (1978).Westlaw.

140 Penn Central Transportation v. New York City, 438 U.S. 104,126 (1978), Westlaw.

141 Penn Cent. Trans. Co. v.New York City, 438 U.S. 104, 126 (1978). Westlaw.

142 Laura S. Nelson, p.725.

143 Julian Conrad Juergensmeyer and Thomas E. Roberts, **Land Use Planning and Development Regulation Law § 12:8** (3d ed.) Use Planning and Development Regulation Law (Westlawnext Database updated November 2013), p.1.

144 Julian Conrad Juergensmeyer and Thomas E. Roberts, p.1.

145 Julian Conrad Juergensmeyer and Thomas E. Roberts, p.1.

in consideration of revisions of the plan. Pensacola` s comprehensive plan includes the provision as follows:

"Opportunity shall be afforded, pursuant to F.S. 163.3181 (4), for informal mediation or other alternative dispute resolution to a property owner whose request for an amendment to the Comprehensive Plan pertaining to his property is denied. The costs of the mediation or other alternative dispute resolution shall be borne equally by the local government and the property owner. If the owner requests mediation, the time for bringing a judicial action is tolled until the completion of the mediation or 120 days, whichever is earlier."

Florida Statute allows and encourages using mediation in comprehensive plan process. The statute states that "if a local government denies an owner's request for an amendment to the comprehensive plan which is applicable to the property of the owner, the local government must afford an opportunity to the owner for informal mediation or other alternative dispute resolution. The costs of the mediation or other alternative dispute resolution shall be borne equally by the local government and the owner. If the owner requests mediation, the time for bringing a judicial action is tolled until the completion of the mediation or 120 days, whichever is earlier."[146]

Florida statute enables not only mediation but also other alternative dispute resolution methods. It also puts a time limitation for the completion of mediation process. The statute does not constrain the use of ADR regarding specific aspects of land use. Rather, it covers all kind of disputes arising from comprehensive plans provided that the dispute must be related to the applicant`s property.

City of Carmel in California has a historic preservation ordinance that allows mediation to handle disputes stemming from historical properties.[147] The ordinance sets forth some rules concerning with applications of major alterations of historic properties. Before explaining the rules with respect to mediation, substantial elements of the ordinance should be pointed out. First, in order to proceed an alteration request, the criteria of determination of consistency must be met. The ordinance defines determination of consistency as "…shall mean a finding adopted by the City that the proposed

[146] Florida Statute Chapter XI Title 163 Section 3181, available at http://www.flsenate.gov/Laws/Statutes/ 2012/163.3181(05.20.2014).

[147] The Historic Preservation Ordinance of City of Carmel available at http://www.codepublishing. com/ca/carmelbythesea/html/carmel17/Carmel1732.html#17.32.140 (05.21.2014).

new construction, addition, alteration, and/or relocation comply with all of the provisions of this chapter and the Secretary's Standards."[148]

Alteration requires certain condition to be proceed. The ordinance mentions that "it shall be unlawful for any person, corporation, association, partnership or other legal entity to directly or indirectly alter, remodel, demolish, grade, relocate, reconstruct or restore any historic resource without first obtaining a determination of consistency with the Secretary's Standards, complying with the requirements of the California Environmental Quality Act, and obtaining a building permit or other applicable permit from the City."[149] Ordinance requires an evaluation of alterations whether it is harmful to historic properties or not. It is basically the determination of consistency.

Actually the mediation plays very important role in this step of the ordinance and the ordinance constitutes detailed rules concerning with mediation process as follows:

"If an evaluation concludes that a proposed alteration is not consistent with the Secretary's Standards, the report shall list aspects of the project that are not consistent along with guidance for modifying the project to comply with the Secretary's Standards. The applicant shall be required to elect in writing within 10 days of receipt of the evaluation whether they will (a) work with the City to modify the project to conform, (b) request a mediation process, or (c) request that processing of the application proceed without modification".[150]

The ordinance offers some options to applicants to decide how to comply with Secretary Standards in proposed alteration projects. If the applicant wants to get through a mediation process and staff concurs, certain rules must be followed by the parties.

In the mediation process, "the City shall retain, at the expense of the applicant, a second qualified professional to serve as an independent mediator. Parties to the mediation shall include (1) the applicant and their representatives, (2) the City as represented by the Director, and (3) the original qualified professional(s) that determined that the proposed alteration does not comply with the Secretary's Standards. The mediator shall be responsible for structuring the mediation process and facilitating negotiation among the parties. The mediator shall complete an independent evaluation of the project,

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148 Section 17.32.230 of the Ordinance, Definitions (L). Also see more information about standards, The Secretary of Interior`s Standards for the Treatment of Historic Properties. http://www.nps.gov/ history/hps/tps/standguide /overview/choose_treat.htm (05.20.2014)

149 The Ordinance Section "Alteration of Historic Resources" 17.32.120.

150 The Ordinance Section "Historic Evaluation Process for Major Alterations" 17.32.160.

determine if it complies with the Secretary's Standards and, if necessary, make recommendations for modifications to achieve compliance."[151]

At the end of the process "if all parties reach agreement that the proposed alteration is consistent with the Secretary's Standards, or reach agreement on modifications that will achieve consistency, staff shall forward the application, evaluation, and work products of the qualified professional, along with any conditions of approval to the Board for review and approval of a determination of consistency."[152]

Even though the parties bring an agreement reached through mediation, the last decision is based on the approval of the city. "If all parties to the mediation do not reach agreement, then the original determination of inconsistency shall be considered evidence of substantial adverse impact and an Environmental Impact Report shall be prepared prior to any further action on project permits."[153]

Although mediation process only applies to "major alteration" applications, the scope of major alteration is broadly defined in the ordinance.[154] Thus, the ordinance covers many aspects of historic preservation.

On the other hand, some city ordinances may give a function to mediation in complaint files. City of Oklahoma has such an ordinance that allows citizens to file formal written complaints with the Historic Preservation Officer regarding alleged violations of the ordinance.[155] "The Historic Preservation Officer shall promptly notify the complainant and the person, or persons, alleged to have committed the violation by registered or certified mail, return receipt requested, of the time and place of the hearing and the nature of the complaint, and invite the parties to appear and to be heard."[156] Attendance

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151 The Ordinance Section "Historic Evaluation Process for Major Alterations" 17.32.160.

152 The Ordinance Section "Historic Evaluation Process for Major Alterations" 17.32.160.

153 The Ordinance Section "Historic Evaluation Process for Major Alterations" 17.32.160.

154 Major alteration is defined as "(1)any minor alteration not in compliance with the Secretary's Standards,(2) Substantial alterations: any visual change, exterior design modification or addition to a building, structure, or site design, including but not limited to changes in architectural style or details, or changes in exterior materials, paving or decks that does not meet the definition of a demolition or a rebuild, or does not comply with adopted design objectives and/or design guidelines or does not qualify for track one design review, (3)Additions exceeding two percent of existing floor area or volume, (4) Relocation on the same site and with the same setting or context, (5)Demolitions."The Ordinance Section "Historic Evaluation Process for Major Alterations" 17.32.160.

155 The Ordinance of Historic Preservation District (Hp) and Historic Landmark Overlay District (HL) of City of Oklahoma. Available at http://www.okc.gov/planning/hp/documents/historicpreservationhandout_ 06_21_2011 _revised101911.pdf (05.21.2014).

156 The City of Oklahoma Historic Preservation Ordinance Section 3300.5 "Mediation Hearing".

to mediation is voluntary. The purpose of the mediation is (1) mediating the dispute that is the subject of the filed complaint and (2) fostering compliance with this chapter.[157] "The Historic Preservation Commission schedules a mediation hearing to consider such complaints."[158] All citizens including the stuff working for city can bring complaints. The scope of complaints is very broad. The ordinance puts forth the powers of the Historic Preservation Commission, which seems mediator for complaints, and defines the Commission as an investigative body for complaints. Thus, it is ambiguous that how the commission could be neutral to function as a mediator.

3.3. The Case of Miami and Authority of Parties in Mediation Talks

Archaeologists found remains of a pre-historic Tequesta Indian Village in downtown Miami. The owners of the site were actually planning to build a hotel and entertainment complex.[159]However, because of the fact that the area was inhabited by Tequesta Indians and there are remnants including postholes in the bedrock that archaeologists believe mark the foundations of Tequesta dwellings or other structures dated back 1500 years ago and a brick-lined well believed to have been part of a 19th Century U.S. Army fort, a long lasting controversy arose.[160]

The parties of the conflict which are the developer, MDM group, consulting archaeologist, preservation groups and state, city and Miami-Dade County legal and historic preservation staffers agreed to go through a mediation process. At the end of two days of intensive mediation talk, the parties came to an agreement. According to the agreement, "the plan will preserve and showcase two areas where *Tequesta Indians*, who inhabited the area for two millennia, are believed to have dug postholes in the limestone bedrock to erect thatched buildings some 1,500 years ago. One area will be covered with a glass floor and managed as a public museum space by *History Miami*, a local organization, and the other will be sealed behind glass walls and easily seen from an adjacent restaurant and the sidewalk. A third area will be preserved for future study. The developer, working with local historians, will

157 The City of Oklahoma Historic Preservation Ordinance Section 3300.5 "Mediation Hearing".

158 The City of Oklahoma Historic Preservation Ordinance Section 3300.5 "Mediation Hearing".

159 "Intense mediation leads to agreement on historic Tequesta site in downtown Miami", **Miami Herald**, (03.20.14), available at: http://www.miamiherald.com/2014/03/20/4008109/intense-mediation-leads-to agreement .html#storylink=cpy (05.20.2014).

160 Developers and Preservationists Find Historic Common Ground in Miami, **National Geographic** (03.28.2014) available at http://news.nationalgeographic.com/news/2014/03/140328-archeology-miami-tequesta-indians preserva tion-met-square-native-americans/ (06.12.2014).

also construct a museum plaza on the grounds, as well as interpretive exhibits explaining the history of the site."[161]

Although the parties agreed upon the plan, the agreement still must be approved by the city commission pursuant to the city ordinance that gives the authority to city commission.[162] The requirement for approval differentiates the mediation process in administrative law cases from other types of mediation. The parties in Miami case were aware of the lack of authority that they had to make ultimate decision on the issue. That`s why, they also agreed that "under City of Miami Ordinance §§ 23-4(c)(7) and 23-6.2(e), the City Commission may affirm, modify, or reverse the [City of Miami Historical and Environmental Preservation("HEP")] board's decision. In reviewing this matter on appeal, Ordinance §§ 23-4 (c)(7) and 23-6.2(e) also provide that the City Commission's review is de novo and it may consider new evidence or materials."[163] Because of the matter of ultimate authority, no elected officials or members of the city's preservation board participated in the talks because they might need to vote on the issue and related matters.[164]

Very similar issue whether the mediation agreement can be an ultimate decision that is not subject to any other decision-making process were discussed by the Indiana Supreme Court. In the Indiana Case, following denial of a request for a plat approval for a subdivision, the developer appealed and the trial court ordered mediation.[165] In the mediation, the Plan Commission and the developer reached a written agreement including that the developer presents a revised primary and sketch plan in accordance with the Agreement, and then the Commission would, at its next regular meeting, approve the Agreement.[166] The developer agreed on submission, and the Commission gathered as arranged, but voted to defer a decision on the subdivision for thirty days. The developer, after that, filed a motion to enforce the Agreement,

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161 In order to see the full text of the agreement; http://origin.library.constantcontact.com/download/get/file /111299406955787/Original+Signed+Mediation+Agreement+PDF1.PDF (5.29.2014).

162 Miami, Florida, Code of Ordinances, Part I- The Code Chapter 23 Historic Preservation, https://library .municode.com/HTML/10933/level3/PTIITHCO_CH23HIPR_ARTIHIPR.html, (5.29.2014).

163 Agreement reached at mediation, http://origin.library.constantcontact.com/download/get/file/111299 406955787/Original+Signed+Mediation+Agreement+PDF1.PDF, (06.12.2014).

164 "Intense mediation leads to agreement on historic Tequesta site in downtown Miami", **Miami Herald**, (03.20.14) available at: http://www.miamiherald.com/2014/03/20/4008109/intense-mediation-leads-to-agreement.html#story link=cpy (05.20.2014).

165 Lake County Trust Co. v. Advisory Plan Com'n of Lake County, 904 N.E.2d 1274, 1275 (Ind.2009), Westlaw.

166 Id.

and the Commission voted to reject the Agreement.[167] The trial court ordered the Agreement be enforced, and it directed the Commission to approve the plat and issue any necessary permits. [168]Although the Commission complied, the trial court held that the Commission acted in bad faith in failing to approve the subdivision after having granted its attorneys' full settlement authority.[169] The Developers asserted that the settlement agreement was final and not required by the Open Door Law to be subsequently approved in a public meeting. According to the Developers, the Open Door Law was satisfied by the Plan Commission's pre-mediation public meeting which authorized its attorney and representative to participate in the mediation with full settlement authority.[170] The Supreme Court held that Administrative actions taken by delegated representatives of governing bodies, however, are not subject to the Open Door Law. An advisory plan commission is authorized by statute to delegate authority to perform ministerial acts in all cases "except where final action of the commission is necessary."[171] In this case, exclusive control over the approval of plats is vested by statute to plan commissions. The court concluded that "this statutory scheme functions to preclude the delegation of plan commission authority for final approval of subdivision plats, but instead requires final approval by a majority of the commission members at meetings subject to the Open Door Law. Since the settlement agreement resulting from the mediation was thus not final until its approval by a majority of the Plan Commission at a public meeting, the Commission's failure to promptly approve the subdivision did not constitute bad faith conduct warranting sanctions."[172]

CONCLUSION

Historic preservation disputes require comprehensive approaches. Disputes present economic, politic, historic, cultural and social aspects. It is also quite usual that historic preservation disputes involve more than two parties which make disputes more complicated.

At the federal level, the legal framework pushes parties to consult with each other in pre-conflict terms of situations. There is the government that encourages the federal agencies to assess possible impacts of their undertakings on historic properties and to use alternative dispute resolution methods. At this level, the most dominant factor that determines the fate

167 Id.
168 Id.
169 Id. at 1280.
170 Id.
171 Id. at 1281.
172 Id. at 1282.

of historic properties is the stance of the federal agencies. The more aware agency means the more protection for historic and cultural values. Pursuant to Section 106, consultation is an essential part of the way it works. The responsible federal agency is required to consult with the relevant State or Tribal Historic Preservation office (each US state and territory has a designated State Historic Preservation Office). If the agency and the State agree with the agency's assessment of the impacts of a proposed action and if they agree on the mitigation for such an action the Advisory Council on Historic Preservation doesn't get directly involved. In many cases, there is disagreement, particularly from various stakeholders that have legal standing as consulting parties, in those cases the Advisory Council will become directly involved in the process.

Section 106 does not apply to private property. Private property owners may manage their historic property in any way they see fit, up to and including demolition, with no requirements that they consult with federal or state authorities.

On the other hand, local ordinances, those that are created through local landmarking authority, can and usually do apply to private property and privately-funded projects that affect locally-designated historic properties. Historic preservation regulations and structures are quite similar in many cities. There are city ordinances which determine the way to use properties and limit certain property rights and historic preservation commissions that are made up of various numbers of members from relevant professions and laypersons. Having considered historic preservation regulations restricting property rights and unavoidable urbanization, the most complicated disputes are arisen at the local level.

Despite of the increasing attention on ADR methods in historic preservation disputes, it is hard to say that the use of ADR in this area is common and effective. There are some problematic aspects that lead to hesitation to use ADR in the disputes. Since there is always public interest in historic preservation we have many different ideas involving in process. Thus, the classical confidentiality issues of ADR do not fit exactly historic preservation disputes. Furthermore, there must be strong motivation that encourages parties to get together and that leads to governmental and local entities to share their ultimate authority. Most pointedly, there must be explicit rules that give the government such authority to solve problems through ADR. Even there are some problems regarding democratic system. The elected officials who are vested and supposed to use their authorities to decide on many matters affecting people`s life, to some extent, are turning over their powers to parties.

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LAW BLOGS: LEGAL CONSULTANCY AND GRASSROOT JOURNALISM IN THE PARTICIPATORY SOCIETY

Hukuk Blogları: Katılımcı Toplumda Hukuki Danışmanlık ve Tabandan Gazetecilik

Dr. Lutz PESCHKE[1]

ABSTRACT

Since the implementation of the social media, online media have become a central part in our communication. Before the starting process of social media communication, the newsmakers and global storytellers were journalists escorted by a big army of public relations and marketing experts. The 20th century was characterized by mass-media with its pure top-down structure. They decided what is a good story and worth to publish. The mass were reduced only to receive messages. With the development of social media the journalism branch changed dramatically. It is transformed from a mass media structure to something more from the grassroots and more democratic. The social media gave voice to the people which could be globally perceived. In the system of global newsmakers appeared a new player: the active blogger. Jurists use more and more blogs as a platform to publish legal news. The expectation of the public on jurist's blogs is not only to get the information in a style, which is easier to understand, but also an interpretation about consequences, what happens, if you infringe rights etc. The act of mediatisation is consequently an act of commenting and translation on legal issues. In this paper, the two German law blogs "Social Media Recht" and "Recht 2.0" with emphasis on social media related and relevant legal themes were introduced and qualitatively analysed. It could be shown, that two different styles of blogging succeed nearly in the same way: The style of storytelling with its higher degree of entertainment as well as a serious style, which offers the themes in a scientific discourse.

Keywords: Social Media, Social Media Law, Blog, Microblogging, Grassroots Journalism.

ÖZET

Sosyal medyanın gelişiminden itibaren, online medya iletişimimizin merkezine yerleşmiştir. Sosyal medya iletişiminden önce, haber yapanlar ve hikaye anlatanlar,

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yerine göre halkla ilişkiler ve pazarlama uzmanları ile çalışan gazetecilerdi. İyi bir hikayenin ne olduğuna ve yayınlanmaya değer olup olmadığına onlar karar verirlerdi. 20. Yüzyılda kitle iletişim araçlarının en belirgin özelliği, yukarıdan aşağıya doğru olan yapısıydı. Sosyal medyanın gelişimiyle birlikte, gazetecilik mesleği de değişikliğe uğramıştır. Kitle iletişim araçlarının yapısı, daha tabandan ve demokratik bir şekle dönüşmüştür. Artık, sosyal medya küresel ortamda, insanların sesi haline gelmiştir. Böyle bir ortamda, küresel haber yapanlar içine yeni bir oyuncu eklenmiştir: aktif blogçular. Hukukçular, hukuk haberlerini yayınlamak için sıklıkla sosyal medya bloglarını platform olarak kullanmaktadırlar. Hukukçuların hazırladığı bu bloglardan kamunun beklentisi, sadece hukuki konular hakkında anlaşılır bilgi sahibi olmak değil, aynı zamanda hukuki olayların sonuçları hakkında da yorumlara ulaşmaktır. Bu çalışmada, hukukçular tarafından bu blogların kullanımına ilişkin bilgiler verilmiş, Almanya'da sosyal medya üzerinden hukuki konuların tartışıldığı "Social Media Recht" ve "Recht 2.0" adlı iki farklı hukuk bloğu incelenmiş ve niteliksel olarak analiz edilmiştir. Her iki blok da iki farklı şekilde oluşturulmasına rağmen, hukuki konulara ilişkin bilimsel yaklaşımları ve ciddi ama anlaşılır dil kullanımları açısından, her ikisi de aynı şekilde başarılı görülmüştür.

Anahtar Kelimeler: Sosyal Medya, Sosyal Medya Hukuku, Blog, Mikrobloglar, Tabandan Gazetecilik.

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Introduction: The Characteristics of Social Media

It started with web 2.0 which is called social media nowadays: With the introduction of this web concept in the middle of the first decade of the 21st century the World Wide Web mutated to a platform where every user got a new option of content participation. The users themselves can be active generators of content. They are not anymore only the consumers of content which is provided by a relatively small group of content providers. With help of the social media technology, the users can be producer and consumer of content at the same time. The border between producing and consuming starts to blur. Toffler (1981) introduced the term 'prosumer' for that kind of users group and followed the prediction of McLuhan and Nevitt, that with the introduction of electronic technology the consumer will become producer (McLuhan & Nevitt 1972). In other words as distinct from web 1.0 applications social media platforms are bottom-up media. It means that the content is transferred from the grassroots to the society. But the technology which enables, that users can submit content and discuss these with other peers, was not new in web 2.0. Many websites were equipped with chat rooms and forums. But the innovative feature of social media was the high potential of interconnectability and networking. The users could generate their own

contents and at the same time they were able to decide with whom they want to share it.

With help of commenting, drafting one's own article, rating, and uploading of media files such as images and videos, the user can influence in the digital world and take a public position. This induces a change in the question, which personal information should be made publicly available (Thimm, 2004). The consequence of social networking is the evolution of a participatory society, which has a reflexive impact on the World Wide Web. But the high level of participation does not change only the net itself, but also the media behaviour of the user: they take advantages of their potential influence to organize themselves collectively as individuals and their interests as well as their knowledge in the virtual space in multiple ways (Peschke & Schröder 2011).

Since the implementation of the social media, online media have become a central part in our communication. Krotz concludes that the media behaviour of users initiate a change of communication (Krotz 2001, 19). According to Krotz, there is an increasing medial dissolution regarding to time, space and social systems. Media are not used any longer step by step in a chronological way, like "first I use my telephone to call my friend and then watch TV". The media are rather used simultaneously. It is possible to call a relative via mobile, while watching TV, communicating with a friend in a foreign country via Skype and chatting with "friends" and "followers" via Facebook and Twitter seemingly at the same time (Güneş Peschke & Peschke 2013, 858). Furthermore, media are available at many more places like TVs in bars, wireless internet in airports etc. as additional virtual spaces and they are used in new contexts (Krotz 2001, 22).

Another important aspect is the question how the identity changes, caused by the mediatized communication. The computer generated communication does not occur only with real names and identities of the real world. Usually the users create nicknames. These nicknames fulfill two functions of a mask: on one hand, they protect users from others by hiding their identity of the real world. On the other hand, depending on the chosen nickname, it attracts the interest of the other users and the access to the communication network will be facilitated (Ackermann 2011). Thus, users create various partial identities, e.g. professional, gender or fan identities. These partial identities generate an identity patchwork of the individual (Konert & Hermanns 2002). The result of digital whoness can differ completely from the real world whoness. Associated with the aspect of digital whoness is the question about the relation between the real and digital privacy.

One central aspect of the digital privacy is the informational self-determination. The digital network offers search engines and data memories with an increasing abundance of pictures, movies and written texts. The shift of privacy to a digital privacy as stated above brings up the question of how to protect the privacy in the virtual world of the internet. Since the beginning of the digital age, the balance between forgetting and remembering has changed (Mayer-Schönberger 2009). Before the penetration of digital media into the everyday life, forgetting was the norm and remembering the exception. Thus, the power of society belonged to the interest not to be forgotten. Today, in times of search engines and data storage, there is a shift in the balance between remembering and forgetting. The hitherto existing principle "the web never forgets!" has to give way to the demand to be forgotten (Nolte 2011; Peschke 2015).

Grassroots Journalism and Weblogs

Before the starting process of social media communication the newsmakers and global storytellers were journalists escorted by a big army of public relations and marketing experts. The 20th century was characterized by mass-media with its pure top-down structure. The big media companies with their journalists brought news to the people like lectures. They decided what is a good story and worth to publish. The mass were reduced only to receive messages. Their only choice was to decide whether to consume or not to consume. Some media gave the chance for an active participation in form of publishing reader's letters, inviting the audience for attending radio game shows or vote for stars and starlets in TV shows. But the only power of the consumers was to unsubscribe newspapers and to turn off the TV or radio channels. The journalist Gillmor said "it was a world that bred complacency and arrogance on our part" (Gillmor 2004, XV).

With the development of social media the journalism branch changed dramatically. It is transformed from a mass media structure to something more from the grassroots and more democratic. The mass was dismissed from the passive role of a consumer. The social media gave a voice to the people which could be globally perceived. In the system of global newsmakers appeared a new player: the active blogger and other social content producer. This initiated a change in the structure of journalism in to different way. On one hand side the "Big Media" (Gillmor 2004) cannot be regarded any longer as the high level journalists. The bondage of the order to produce permanently good stories leads to the situation, that journalists shift their fields of investigation more and more into the multimedia platforms. This is especially obvious in times of crisis situations. A significant example is the

nuclear disaster which arose of a series of nuclear accidents at the "Fukushima I" nuclear power plant and which was caused by the Tohoku earthquake on March 11, 2011. For journalists it was an extraordinary situation, because during the race on getting the best and quickest news about this disaster, it was nearly impossible to go or send reporters into this area without risking their live. Hence, the Big Media were dependent on the reports of the people, who lived there or who were courageous enough to go to Fukushima at that time. The professional journalists published a big amount of information from blogs and micro-blogging systems like twitter without being able to approve the seriousness of the posts. Additionally, for a quite long time the degree and kind of disaster was not clear. The consequence was that many articles and broadcasts were published based on posts from scientific "pseudo-experts", which had to be revoked afterwards. This example show, that the consequence of the participation during the run for the first and best news is that the reports of the Big Media turns to a follow-up communication of posts of grassroots journalist with a high risk of producing wrong information.

On the other hand in the context of grassroots journalism in social media, millions of data are produced worldwide every minute. According to the flood of published data a new function of professional journalism is to filter, selected and visualized data in a way that the public can understand. Rogers works out, that the new role of professional journalists can be the bridge between the power of data and the public who wants to understand the data. E.g. the WikiLeaks story was a fruitful combination of traditional journalistic skills and the power of the open source web technology which leads to an "amazing story" (Rogers 2012, 62).

Personal or grassroots journalism was not an invention of new media. Before the era of digital media, personal journalism worked with help of pamphlets or flyers. The characteristics of these print media are the simple and low cost production of the media. The dominant aim of the producers is to reach as many people as possible with their ideas. There is no corporate style in the production of flyers and pamphlets. The edition is nearly unlimited and the distribution occurs conventionally via own or private channels. The occasion of the flyer production is normally a single event. Flyers and pamphlets are not sustainable media and are not produced for collecting or archiving.

The invention of the hypertext technology by Tim Berners-Lee in 1990 was the beginning of the World Wide Web. The hypertext mark-up language, HTML, enables the transfer of digital information from one personal computer to another. Berners-Lee's credits were the development of software for the data transfer and a so-called client programme, which could visualize the

transferred information. In fact he created the first browser. But he did not patent his invention. Instead, he gave the fundamental technology to the world and enabled innovative network applications (Gillmor 2004, 12). With his decision not to patent his invention, Berners-Lee started the era of new media. But new media was not only a new and powerful technology. In fact, it was a new philosophy of business. The central aspect is to share the basic knowledge. A big community arose which worked together on powerful tools. The basic technologies and software are published freely for everyone. Today there is no browser, which you have to buy. The most popular software is for free. If you want to write a blog, you can choose between many blog softwares which are free of charge. How can this philosophy become a business? Every software is based on a source code. If you want to sell a software product you should ensure that the source code is not available for the public. Otherwise, other people can copy these codes and create an own product based on that code. The disadvantage of this business model is, that the size of the interest group for this product is pretty small. Furthermore there are many different groups which use different software and there is no standard which enables the exchange of data. But to realize the idea of a World Wide Web means to work on a technology with only one standard. The advantage of the so-called open source technology is, that many programmers worldwide attend to the development of this technology. When there is a mistake in the programme it can be fixed in a very short time. The open source softwares are normally much more stable and flexible then licensed ones. The open source communities earn their money with the development of special extensions based on the open source software.

This philosophy of shared knowledge leads to a cultural aspect where the common goal is more important than individual activist. Without understanding this aspect of globalization of knowledge, it is impossible to describe and understand the mediatised world. This phenomenon is comparable with swarm behaviours. Their behaviours and characters can only be analyzed and described as a group. The analysis of the single individual elements does not succeed (cf. Peschke 2015b).

The developments in web technologies affect the investigative journalism, as well. Before the establishment of social media the media were termed as the forth authority and consisted in fact only a relatively small group of investigative journalists. The American Watergate scandal in the early 1970 was highlighted by the coverage of some investigative journalists, especially by Woodward and Bernstein from The Washington Post. It is assumed, that the Watergate scandal, which lead to the only resignation of a US president

in the American history, never could get this degree without the coverage of investigative journalists as mentioned.

In the era of social media the power shifted from investigative journalism to investigative crowdsourcing. The small group of investigators was replaced by a swarm with indefinable members. This led to an effective and incorruptible force, which is able to reveal scandals in a much more flexible way. One of the most prominent examples was the plagiarism scandal of the German Federal Minister for Defence Karl Theodor zu Guttenberg in 2011. Firstly, a small group of activists found out, that Guttenberg's PhD thesis contained many parts from other sources without referring to them. Because of his fatal reaction and behaviour in the public, many people were motivated to attend the investigations in a very short time. They were supported by a so-called wiki, a web tool, where everybody can write and add content. The most prominent wiki is the lexical application Wikipedia. Within the scope of the plagiarism scandal the activists created the platform GuttenPlag Wiki (2011). Everybody could submit their results of investigations which part of Guttenberg's PhD thesis were copied from other sources. There were only seven weeks between the first accusations against Guttenberg (February 16, 2011) and the last update (April 4, 2011). The results of swam investigations revealed, that 63.8% of his PhD thesis were plagiarism only 20 of 393 pages were free of plagiarism. This result leads to the resignation of Guttenberg of all posts on March 1, 2011 and as Minister of Defence on March 3, 2011.

Participatory Culture and Follow-Up Communication: The Usage of Blogs by the Jurists

The facts and phenomena described above show that the power of social media arises from the possibility that a nearly infinite number of activists can join an idea and participate on media activities. The result is a participatory culture with a new dimension of follow-up communication. In the classical model of communication studies, follow-up communication refers to a way of interpersonal communication. The subject of communication is almost the discussions about mass communication; the discussion about items what was read in the newspaper, watched on the TV, listened in the radio.

In this traditional context follow-up communication is an interconnection of mass media and interpersonal communication (Nuernbergk 2014, 191). This can lead to different levels of professionality. Starting point in this model is always mass media. The news defuse later to the public and will be discussed at kitchen tables, on parties, in bars or public events. On the other hand, the opinions which are distributed through mass media can influence decision makers on a professional level. With introduction and establishment

of social media and their tools, the medial framework conditions changed. Especially weblogs changed the transition between interpersonal and mass media communication. The interface between them is blurred, because of the grassroots journalism, which undertakes the function of mass media in many ways. In addition, the producer of social media content occupies the position of a mediator between the media content and the potential recipient. But this kind of content mediation is usually not objective or neutral. Rather the content mediation and transfer occur in form of evaluation and interpretation (Maireder 2013, 191). For example, jurists get their information about new court decisions, regulations and relevant announcements from special periodicals or journals which are not available for the public, but only for special interest groups, professionals and subscribers. Even if the publications would be available, the non-professional public is not able to understand the original law texts and codes.

Jurists use more and more blogs as a platform to publish legal news. The expectation of the public on jurist's blogs is not only to get the information in a style, which is easier to understand, but also an interpretation about consequences, what happens, if you infringe rights etc. The act of mediation is consequently an act of commenting and translation on legal issues. Thus, the result is a new text. Taking into consideration Maireder's contribution it can be seen, that a blogger is at the same time a translator of given texts and an author of a new text. This is the reason for the blurred boundaries between mass media communication and follow-up communication.

Law Blogs in Germany

Today the main activities in social media are microblogging, social networking as well as picture and video publishing, which occur predominantly in market-leading platforms like Twitter, Facebook, Instagram, YouTube and many more. By contrast even today, blogs are composed almost on own websites. Sometimes they are bundled in umbrella portals for a better distribution.

The advantage of a blog is its credibility in the public. In 2004 an American survey showed that 61% of the participants regard blogs as more trustable and serious as other platforms. One reason for the higher credibility of weblogs is the identifiable author and the independence on advertisements and other interest groups (Fölster 2011). This has a high impact on the public understanding of blogging, which is regarded as a kind of grassroots journalism with a high degree of professionalism. Thus, it contrasts strongly from activities on other social media platforms like Facebook, Twitter or YouTube. Some activities contain also a high degree of professionalism, but

they are almost marketing activities to promote products or ideas. Blogs are accepted as a genre of online journalism and there are many professional and meanwhile prominent bloggers, like in Germany Stefan Niggemeier or Sascha Lobo.

Blogs are certain components in many branches and enterprises. There are two roles of bloggers with respect of their branches. On one hand side, they are stakeholders, which represent the concerns *of* the branch, on the other side they are opinion makers *about* details and topics of their branch (Zerfaß 2005).

To preserve the credibility of blogs, the blogosphere evolved several codes of behaviour for authors as well as for users, which demonstrates the advanced institutionalisation of blogs. This code of behaviour is called netiquette, which includes the respect to the privacy of third persons, the protection of copyrights, the naming of the real identity, the equality of all bloggers and many more items (among others: Shea 2004).

Also jurists discovered blogs as a platform to inform people about new regulations and court decisions. In Germany there are many blogs where regulations and cases in the environment of social media are discussed. Social media, as a network and communication platform, have a quite young tradition. Facebook i.e. was firstly published in 2004. Because of its high impact in the society, many questions and law cases arose during these years: To whom do the contacts of professional network platforms belong, like LinkedIn? Does the digital identity end if someone dies in the real world? How can you get the access of network data of a dead relative? What is cyber mobbing? Is it legal to fire an employee because of comments on Facebook? How do you define digital privacy?

For a better understanding of the legal situations many forums and blogs offer news, interpretations and opinions on these themes. Hereafter two German law blogs with an emphasis on social media should be analysed: First of all socialmediarecht.de. which is published by Diercks and Dirks (2015). Nina Diercks and Stephan Dirks are practicing media lawyers in Hamburg and Kiel. They wrote their first blog on June 30, 2010. Until December 2015 they wrote 288 blog posts. Most of the posts are written by Nina Diercks. The blog is structured by categories almost related to the correspondent law subjects. The blog software (WordPress) enables the assignment to more than one category. Figure 1 shows the twelve categories with the most blog posts. It visualizes that, the most of the blog posts deal with the theme Data Protection Rights.

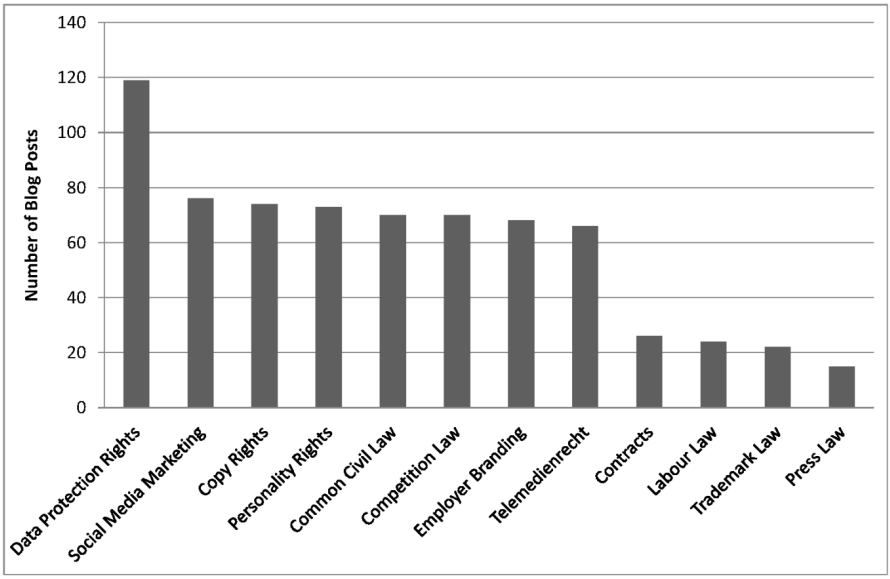

Figure 1: Twelve of the most used categories of the blog socialmediarecht.de

The second blog which should be analysed is the blog "Recht 2.0 – Internet, Social Media and Law" by Carsten Ulbricht (2015). Also Carsten Ulbricht is a practising media lawyer. All posts on his platform were written by himself. He started writing on January 8, 2007. His last post has the time stamp November 4, 2015. In these eight years he posted 227 blog contributions. He also assigned his postings to different categories. But as distinct from "Social Media Recht" he used terms of services (i.e. "practice tips") and social media related terms (i.e. "user generated content" or "Facebook and Law") beside law subjects. Overall he used with 51 categories nearly twice of the numbers of categories than "Social Media Recht" (26). The most of the postings were assigned in the category "Practice tips", which is shown in figure 2. Similar to "Social Media Recht" the category "Data Protection is the most frequently used category related with a law subject. This blog gives the biggest importance to the categories "Social Media Guidelines", "Copyrights", "Data Protection" and "Practice tips".

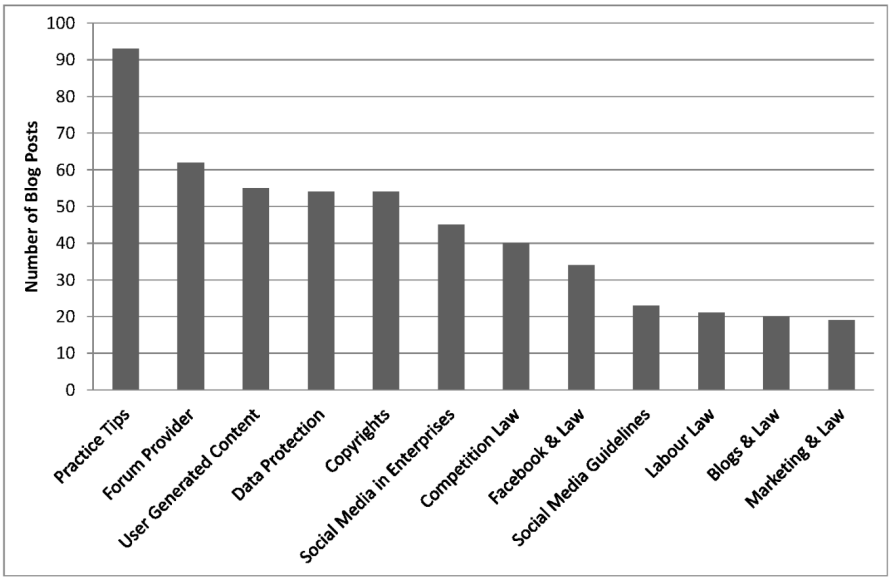

Figure 2: Twelve of the most used categories of the blog rechtzweinull.de

The two blogs are very different according to their styles. "Social Media Recht" is addressed informally by "du" (turkish: sen) while "Recht 2.0" uses the formal form "Sie" (turkish.: siz). "Social Media Recht" obviously understands the blog as a community platform where themes are discussed with the public on the same eye-level. The style of Diercks et al. is more related with storytelling. The text looks like thoughts of a diary. Typical sentences are:

"Nach knapp 15 Jahren sicherer Hafen hieß es diesen Herbst nun "ade und leb'wohl, liebes Safe Habor Abkommen!" (After 15 years safe habor this autumn it was time to say „good-bye and fare well, dear Safe Habor Privacy Principles!") (Blog "Safe Harbor: Quo Vadis Datenschutzabkommen?" by Melanie Ludoph, 21.12.2015)

"Strafverteidigung? Was ist denn hier los? Heißt es von Rechtsanwältin Diercks nicht, ihr sei am Ende der Strafrechtsprüfung im 2. Staatsexamen ein Jauchzer den Lippen entglitten [...]?" (Criminal attorney? What's going on here? Legend has about lawyer Diercks, that a jubilation slithered from her lips after her 2nd Staatsexamen in panel law [...]?) (Blog "Cybermobbing ist strafbar! Oder? – Ein Strafverteidiger nimmt Stellung" by Nina Diercks, 2.11.2015)

Additionally, the editors of "Social Media Recht" support regularly the BarCamp Kiel. A so-called Bar Camp is an event, where at the beginning only the location and event technique exists. The programme and schedule will

be democratically decided at the beginning of the event in a "session pitch". Everybody has the right to give proposals and they can give their presentations, if they find interested people. This user generated programme fits with the basic understanding of social media. The support of BarCamps by Diercks et al. demonstrates that they give much importance to these communities.

The "Social Media Recht" blog is flanked by a Facebook site and a Twitter blog as well as a PodCast "Jurafunk". But, although the blog authors use an entertaining style with a high degree of storytelling, the blog transfers serious information. The feedback in this blog is dependent on the blog posts quite high. Figure 3 visualizes the dates when blog posts and comments were written by the authors and the community in the category "Data Protection Rights". It shows the high activities on this blog platform. In March 2015 "Social Media Recht" was chosen as the second of the best law blogs 2015 in the category "IP, IT and Media" by the readers (kartellblog.de).

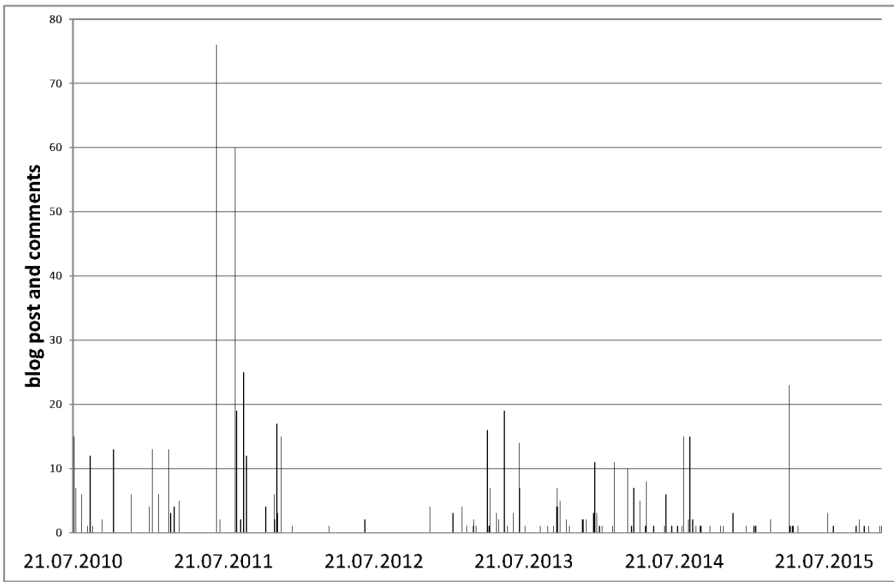

Figure 3: Dates when blogs and comments in the category "Data Protection Rights"were posted in socialmediarecht.de

The blog "Recht 2.0" is written in a much more formal style, as mentioned. The information is transferred in a text with a much higher density of information, which is shown in the following example:

"Nachdem das Urteil des Europäischen Gerichtshofes (Rs. C-362/14) vom 6.10.2015 ([Link]Volltext in deutscher Sprache) in Sachen „Safe Harbor" Abkommen nicht nur in der „Datenschutzwelt", sondern auch in den Medien

und bei zahlreichen betroffenen Unternehmen einigen Aufruhr ausgelöst hat, sortieren sich die Betroffenen langsam und suchen nach Lösungen und [Link] eigenen Positionen, um mit dem Urteil und den daraus resultierenden Folgen umzugehen.“ (“After the court decision of the European Court of Justice from October 6, 2015 ([Link] complete text in German language) in causa “Safe Habor Privacy Principles made a quite splash not only the ‘world of data protection’, but also the media and a high number of companies, the affected players arrange themselves step by step and look for a solution and [Link] own positions to handle the court decision and the resulted consequences.” (Blog “Die Folg[e] des Safe Harbor Urteils des EuGH – Aktuelles Positionspapier der Datenschutzbehörden und Handlungsempfehlungen“, 27.10.2015)

The primary aim of the blog is to inform the participants in an objective and factual way and to give them practical tips. The articles are well structured with sub-headers and sometimes with graphics.

The discussions with participants look more like a scientific discourse or a professional legal consultation. Like in the blog “Social Media Recht”, dependent on the theme there are high numbers of comments, which are carefully and professional answered and moderated by the editor of the blog. Figure 4 shows the number of posts and comments in the category “Data Protection.

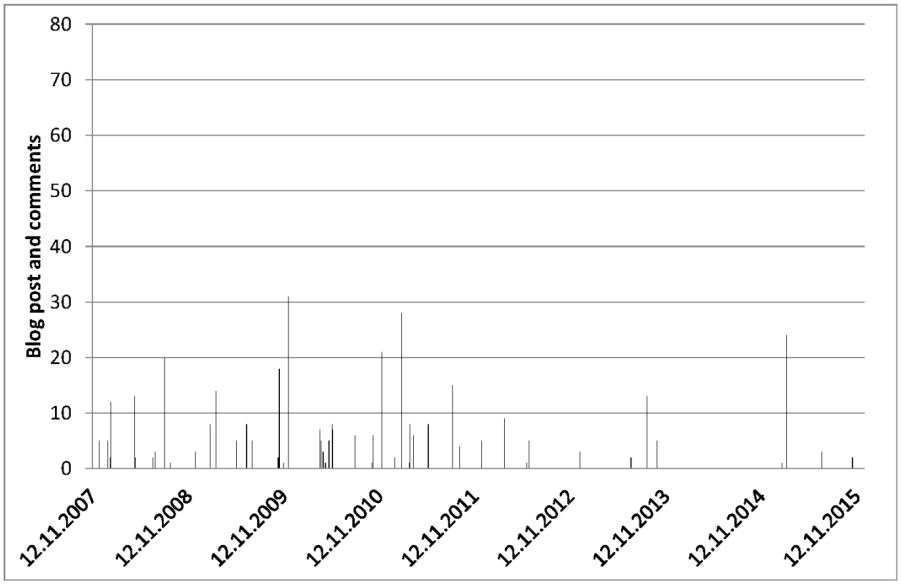

Figure 4: Dates when blogs and comments in the category “Data Protection”were posted in rechtzweinull.de

For arriving a high degree of attention of many users a blog needs a good network. This can be achieved with help of a so-called trackback or pingback function. With help of this function it is possible to get information about related or interested other blogs or platforms, which have cited your blog post. But this is only possible, if the guest blog is equipped with the trackback or pingback function as well. The difference between trackback and pingback is, that the pingback function is able to check, whether the guest website does really exist or whether it is an activity by a robot, which give the trackback information in an unserious way. Figure 5 and 6 show ten posts with the highest number of comments of both blogs. The dark parts of the columns are the rate of pingbacks. It is obvious that posts which are cited or announced on other websites attract participants to visit and comment the post.

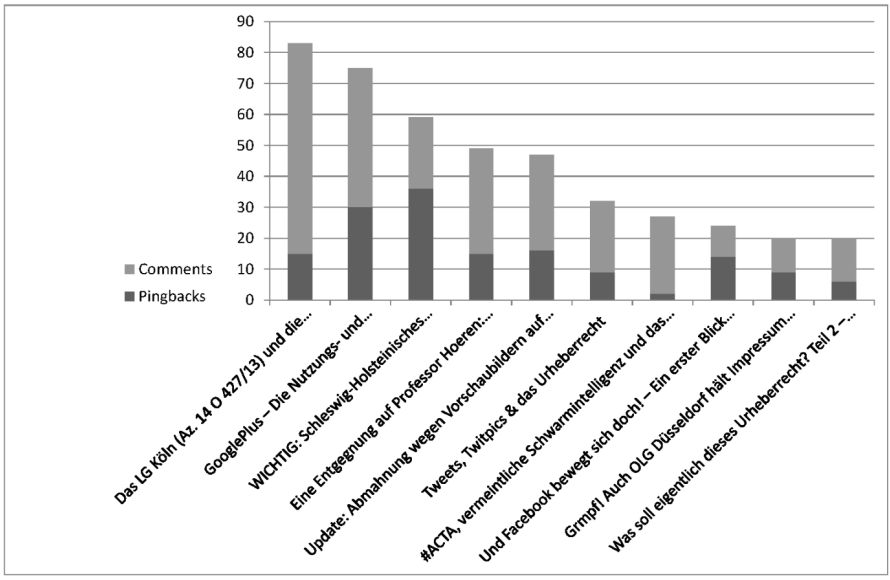

Figure 5: Ten blog posts with the biggest amount of comments at blog socialmediarecht.de

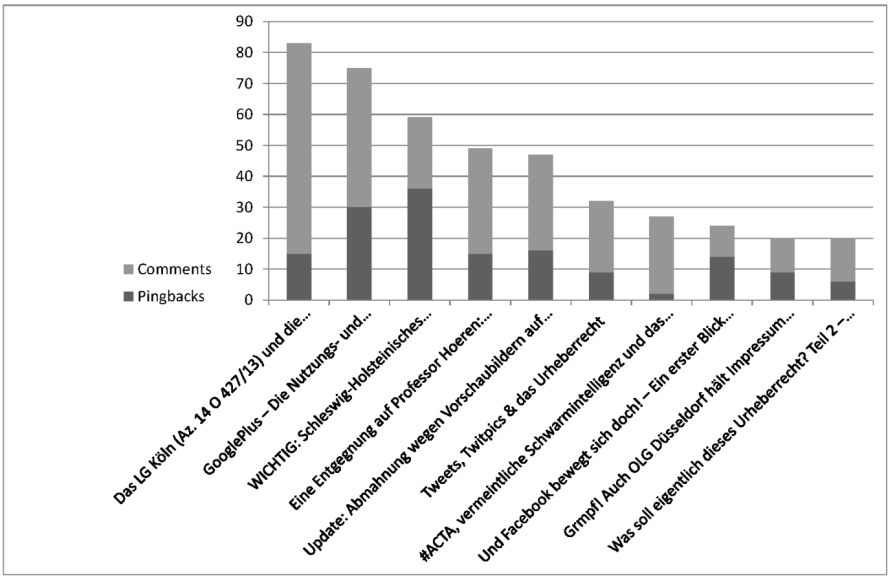

Figure 6: Ten blog posts with the biggest amount of comments at blog rechtzweinull.de

Conclusion

In this article it was mentioned that with the development of social media the journalism branch changed in different ways. Because of social media platforms and especially blogs, journalism is transformed from a top-down to a democratic grassroots profession. W by experts and enlarge the news by bottom-up media. The professional newsmakers are no longer the journalists and PR consultants, but also the blogging expert. With help of blogs the society including experts of every branch got a platform to communicate their expertises in a professional way.

Blogs possess a high potential of indirect public relations. While jurists have the opportunities to inform their potential clients about new cases and court decisions, they increase their publicity in the interest groups. As it is forbidden for Turkish lawyers to make active advertisements and sales promotion campaigns, blogs are suitable tools to present expertises and share court decisions to a wide range in a credible way. The content of blogs is permanently available for the potential readers. Readers can read it, if they need it. Thus, their appreciation of blogs with good quality content is very high.

In this paper, the two German law blogs “Social Media Recht” and “Recht 2.0” with emphasis on social media related and relevant themes were

introduced and qualitatively analysed. It could be shown, that two different styles of blogging succeed nearly in the same way: The style of storytelling with its higher degree of entertainment as well as a serious style, which offers the themes in a scientific discourse. The first style is more affine to the web community, the latter style reaches user group who are not so familiar with social media.

It is easy and cheap to build up and operate a blog. The most popular blog softwares are open source software and their usage is free of charge. In addition, the promotion of blogs can be realised actively with other social media platforms, like Twitter, Facebook, etc. On the other side, the readers submit and promote blogs in their own social media network. As mentioned, blogs are excellent tools to consult jurists and potential clients and the return of investment is the secondary effect of public relations.

♦♦♦♦

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SHOULD THE UNITED KINGDOM ADOPT A CODIFIED CONSTITUTION?

Birleşik Krallık Yazılı Bir Anayasa Benimsemeli mi?

Res. Asst. Ahmet Emrah GEÇER*

ABSTRACT

Notwithstanding "*Magna Carta Libertatum*", which is accepted the first constitutional document in the history, was issued by King John of England, the United Kingdom has not adopted a codified constitution until now. In 2015, the United Kingdom celebrated 800th anniversary of Magna Carta. However, the debate continues on whether or not the UK Constitution should be codified. In this study, legal opinions of distinguished jurists regarding the issue will be briefly analysed.

Keywords: Written Constitution-Unwritten Constitution- The Constitution of the United Kingdom - Magna Carta Libertatum - The Principle of Parliamentary Sovereignty

ÖZET

Tarihte kabul edilen ilk anayasal belge "*Magna Carta Libertatum*" İngiliz Kralı John tarafından düzenlenmesine rağmen şimdiye kadar Birleşik Krallık yazılı bir anayasa benimsememiştir. Birleşik Krallık, 2015 yılında Magna Carta'nın 800. yılını kutladı. Bununla birlikte, Birleşik Krallık Anayasasının tek bir anayasal metinde toplanmalı mı toplanmamalı mı konusundaki tartışma devam etmektedir. Bu çalışmada, önemli hukukçuların bu konu ile ilgili hukuki görüşleri öz bir biçimde analiz edilecektir.

Anahtar Kelimeler: Yazılı Anayasa - Yazısız Anayasa - Birleşik Krallık Anayasası - Magna Carta Libertatum - Parlamentonun Egemenliği İlkesi.

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I. INTRODUCTION

The lack of a codified constitution in the United Kingdom has gained considerable attention over the few decades in response to whether the present constitutional arrangements meet the expectations of British citizens. The issue is highly divisive in the doctrine of British constitutional law.[1]

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1 **Bogdanor,Vernon,** (2008),Enacting a British Constitution: Some Problems, Public Law, p.38-40.

Lord Hailsham regards the Parliament as an "*elective dictatorship*" since there is no legally enforceable guarantee against tyrannical government.[2] In addition, some point out that British constitutional settlement does not protect people from the legislative power of the Parliament.[3] What is more, the absence of a higher authority except with the legislature of the United Kingdom is likely to have some doubts about the enforceability of supreme rules.[4]

On the other side of the coin, several writers highlight that the current constitutional order of the United Kingdom has produced robust government, which provides British citizens with human rights, the provision of social welfare and accountability in administration.[5] They advocate that an uncodified constitution allows a great virtue of flexibility in the sense that government of the day may change comfortably any provision.[6] Hence, the demand of the citizens could precisely be echoed in the Parliament. Similarly, according to Bentham view, "*a codified constitution reflected solely the dead hand of the past*."[7] Dicey, furthermore, indicates that as the system can check automatically itself, a written constitution for Britain would seem unnecessary.[8] In the same vein, Ringen states that*"...British theory that hold a constitution to be a complex and evolving living organism that cannot be set in stone once and for all…"*.[9]

As above mentioned that there has been significant disagreement among writers in the doctrine concerning whether British historic constitution should be altered or remained. This paper, first of all, will provide a brief synthesis

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2 **Barendth, Eric,** (1997), Is There a United Kingdom Constitution?, Oxford Journal of Legal Studies, Vol.17(1), p.138.

3 **Elliott, Catherine/Quinn, Franches,** (2011), English Legal System, Essex, Pearson Press, p. 41.

4 **Madgwick, Peter/Woodhouse, Diana,** (1990),The Law and Politics of The Constitution, First published, The United Kingdom, Harvester Wheatsheat, p. 12.

5 **Barber, N.W.,** (2008), Against a Written Constitution, Public Law, Sweet & Maxwell Limited, p. 18; **Denham, Paul,** (1999), Law a Modern Introduction,4th edition, London, Hodder and Staughten Educational Press, p. 5-6.

6 **Bogdanor, Vernon/Khaitan, Tarunabh/Vogenauer, Stefan,** (2007), Should Britain Have a Written Constitution?, Political Quarterly Vol.74(4), p. 501.

7 **Bradley, A.W./Ewing,K.D.,** (2011), Constitutional and Administrative Law, 15th edition, Hampshire, Pearson, p. 2; **Bogdanor, Vernon/Khaitan, Tarunabh/Vogenauer, Stefan,** (2007), Should Britain Have a Written Constitution?, Political Quarterly Vol.74(4), p.501.

8 **Dicey, A.V.,** (1982), Introduction to the Study of the Law of the Constitution, USA, Liberty Fund Inc., p. 85.

9 **Blick,Andrew,** (2011), Codifying - or not Codifying-the UK Constitution: A Literature Review for the House of Commons Political and Constitutional Reform Committee, London, p. 9.

of recent literature from the field, and then analysis of disadvantages of the codification of the British constitution. Finally, it will attempt to justify the current constitutional order is more appropriate to the needs of the United Kingdom than a codified one.

II. WHY THE UNITED KINGDOM DOES NOT HAVE A CODIFIED CONSTITUTION?

Constitution, codified[10] or uncodified[11], establishes the character of a government by defining the basic principles to which a society must conform; by describing the organization of the government and regulation, distribution, and limitations on the functions of different government departments; and by prescribing the extent and manner of the exercise of its sovereign powers. It is known that constitution takes precedence over the other sources of law.

Almost all democratic countries in the world have a written constitution regulating the role of public institutions within the state and relationship between the citizens and the state.[12] The United Kingdom, however, does not have a single constitutional document due to the fact that it has been improved from the seventeenth century to the current time without any constitutional moment.[13] On the other hand, the majority of written constitutions were enacted for making fresh start in the sense that they experienced a historical break such as a revolution.[14]

Furthermore, it is stated that the United Kingdom constitution is flat since the status of the constitution is not hierarchically-superior to other statutes.[15]This is because Dicey theory predominates over British constitution, which advocates the sovereignty of parliament. It means that the Parliament

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10 Codified (written) constitution means that a constitution in which key constitutional provisions are provided for within a single written document.

11 Uncodified (unwritten) constitution means that a constitution is made up of rules that are found in a variety of sources in the absence of a single written document. British constitution has seven fundamental sources, which are statute law, European Union law, common law, judicial decisions, works of authority, conventions, Royal Prerogative.

12 **Turpin, Colin/Tomkins, Adam,** (2011), British Government and the Constitution, Cambridge, Cambridge University Press, p. 1.

13 **Tomkins, Adams,** (2005), Our Republican Constitution, Oregon, Hart Publishing, p. 7.

14 **Barnett, Hilaire,** (2011), Constitutional and Administrative Law, New York, Routledge Press, p.18.

15 **Elliott, Mark,** (2014), Cambridge Sixth Form Law Conference Talk: The UK's (unusual) Constitution.
http://publiclawforeveryone.com/2014/03/19/cambridge-sixth-form-law-conference-talk-the-uks-unusual-constitution/

can enact any law whatsoever and that there can be no superior authority to overturn or set aside it.[16] At this regard, Bogdanor states that if the Parliament is sovereign power in the United Kingdom, it is pointless to enact a codified constitution as it serves to demarcate the power of the Parliament.[17]

Nevertheless, with new improvements in the constitution of the United Kingdom, the parliamentary supremacy has been under pressure in recent years. For instance, European Communities Act 1972 has had a profound effect on British constitutional order since European law takes precedence over all domestic sources of law in certain legal matters. Moreover, the Devolution Acts[18] and the Human Rights Act 1998 are highly likely to limit the power of the United Kingdom Parliament. In this respect, it can be argued that it is time to consolidate the constitution of the United Kingdom into a single document. In the next title, the issue will be examined.

III. TO CODIFY OR NOT TO CODIFY?

First and foremost, a codified constitution may enable fundamental rules, which explain institutions of the state, individual rights and relationship between the citizens and the state. Particularly, it could impose limits on government and separates powers between legislature, executive and judiciary.[19] Therefore, the separation of powers would be crystallized. What is more, a written constitution might be pervaded by the rule of law on the ground that the basic rules of supreme document.[20] Thus, violation of individual rights may be prevented by a codified constitution. All of those are likely to be ensured by a written constitutional settlement because it can precisely delineate supreme rules.

In contrast, it can be stated that a single written document may lead to break down the flexibility of British constitution. Mackintosh highlights that the United Kingdom Constitution is "*sui generis*", which stems from ancient history as it is a product of historical development rather than deliberate design.[21] In the same vein, according to Low; *"Other constitutions have been*

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16 **Sueur,Andrew Le/Sunkin, Maurice/Murkens, Jo Eric Khushal,** (2010), Public Law Text, cases, and materials, First edition, New York, Oxford University Press, p. 28.

17 **Bogdanor, Vernon,** (2008), A Codified Constitution, Politics Review, Vol. 18 (1), p. 3.

18 The Scotland Act 1998, the Northern Ireland Act 1998, the Government of Wales Act 2006.

19 **Barendth, Eric,** (1997), Is There a United Kingdom Constitution? Oxford Journal of Legal Studies, Vol.17(1), p.138.

20 **Waldron, Jeremy,** (1990), The Law, USA, Routledge Press, p. 82.

21 **Denham, Paul,** (1999), Law a Modern Introduction, 4th edition, London, Hodder and Staughten Educational Press, p. 7.

built; that of England has been allowed to grow".[22] In addition, Bentham argues *"We have a matchless constitution. We ought not to be dominated by the lessons which our ancestors learned about constitutional government; nor should we reject those lessons out of hand or from sheer ignorance"*.[23] Moreover, Gamble argues that *"the danger of any kind of codified constitution […] is that it locks in a particular set of arrangements which may be the best available at the time, but may later be judged inappropriate and then may be very difficult to change."*[24] Those authors emphasizes that the flexibility of the constitution enables Britain to adopt contemporary principles due to the fact that British constitutional arrangements possesses a dynamic framework. It can be concluded that even though a codified constitution may provide fundamental principles that is not overturned by an act of parliament, it is likely to be inadequate to comprehend the needs of British citizens in the future.

Furthermore, it is asserted that an unwritten constitution creates omnipotent parliament since there is no fundamental rule to limit the power of the legislature. The parliamentary supremacy refers to the idea that there is no source of law higher than statutes. The theory has been debated by authors owing to the fact that it causes the legislature is controlled by the majority political party.[25] In this regard, Lord Hailsham defines government as an *"elective dictatorship"*.[26] He expresses that a codified constitution for the United Kingdom must be produced due to limit of political action, thereby protecting the rights of the minority groups. Marshall remarks that the limits on the exercise of legislative power must be examined by constitutional court to impede the infringement of individual rights.[27]

On the other hand, Grey argues that there is nothing to be gained and everything to be lost by restrictive definition of legal terms such as constitution.[28] He considers that enacting codified constitution completely

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22 **Bogdanor, Vernon,** (2008),A Codified Constitution, Politics Review,Vol.18(1), p. 1.

23 **Bradley, A.W./Ewing, K.D.,** (2011), Constitutional and Administrative Law, 15th edition, Hampshire, Pearson, p. 1.

24 **Turpin, Colin/Tomkins, Adam,** (2011), British Government and the Constitution, Cambridge, Cambridge University Press, p.31.

25 **Allen, Micheal/Thompson, Brian,** (2011), Constitutional and Administrative Law, Oxford University Press, p. 28.

26 **Bradley, A.W./Ewing, K.D.,** (2011), Constitutional and Administrative Law, 15th edition, Hampshire, Pearson, p. 4.

27 **Sueur, Andrew Le/Sunkin, Maurice/Murkens, Jo Eric Khushal,** (2010), Public Law Text, Cases, and Materials, First edition, New York, Oxford University Press, p. 24.

28 **Barendth, Eric,** (1997), Is There a United Kingdom Constitution?, Oxford Journal of Legal

meaningless if the constitutional document without legally enforceable guarantees of citizens' rights and precise balance between institutions of the state. The interest in written constitution started in the eighteen century to save citizens from absolute government. Those relatively include liberalism, democracy, individual rights and separation of powers, as termed "*the principles of constitutionalism*". However, despite the fact that there are a significant number of countries, which have a codified constitution, "*the features of constitutionalism*" cannot be found.[29] Sartori describes such constitutions as *"nominal"* and *"facade"*.[30] He stresses that a constitution must contain *"the principles of constitutionalism"*. Otherwise, it is submitted that a tyrannical government behaves constitutionally when people are subject to violation.

Nevertheless, when the Constitution of the United Kingdom is analysed in terms of the principles of constitutionalism, it can be seen that it is superior to the majority of countries, which have a codified constitution. Furthermore, Dicey emphasizes that Britain does not need a constitutional document to protect rights or impose limitations upon the exercise of powers because the courts provide the necessary protection with the rule of law.[31] He, also, expresses that governments should behave legitimately since they are democratically elected.

Moreover, British constitution has changed dramatically over the few decades. For example, Parliamentary sovereignty has come under challenge because the European Law prevails over all of law sources, including act of parliament in accordance with European Communities Act 1972. In addition, the Devolution Acts and the Human Rights Act 1998 have tended to weaken the power of legislature. As Bogdanor stated, *"…the authority of British parliament has now been dispersed, both upwards to Europe, downwards to the devolved bodied and sideways to the judge…"*[32] It would appear that existing British constitutional settlement outweighs enacting codified constitution because of the fact that it has been success to generate not only stable government but also provide people with democracy, individual rights and social welfare in

Studies, Vol. 17(1), p. 140.

29 Ibid, p. 140.

30 **Madgwick, Peter/Woodhouse, Diana,** (1990), The Law and Politics of The Constitution, First published, The United Kingdom, Harvester Wheatsheat, p. 31.

31 Ibid, p. 32.

32 **Bogdanor, Vernon,** (2008),Enacting a British Constitution: Some Problems, Public Law, p.38.

comparison with many counterparts as well as can limit on the Parliamentary sovereignty by virtue of some constitutional acts such as European Communities Act 1972, Human Rights Act 1998 and Devolution Acts.

Last but not least, the United Kingdom Constitution originates from conventions, statutes and case law lie in the history of the United Kingdom. According to an idea provided by Dicey: Constitutional law is divided into two sets of principles, the law of the constitution and the conventions of the constitution.[33] However, Barber argues that laws and conventions tend to place upon a spectrum of types of social rules instead of separate categories of rules.[34] It would seem that the latter is more persuasive owing to the fact that a sharp distinction between laws and constitutional conventions is delicate matter in the light of British constitutional law. On the other hand, those conventions, statutes and case law has been scattered over the history, from Magna Carta 1215 to the recent changes the European Communities Act 1972, the Human Rights Act 1998 and the Devolution Acts, requires deep detailed information.[35] Dicey argues that the understanding of British constitution is necessary to engross the attention of historians and statesmen.[36] The further aspect is that how the values are based is unclear notwithstanding the fact that ongoing debate has arisen in the issue. It can be discerned that there is a broad consensus regarding establishing a codified Britain constitution is likely to be a formidable task because it possesses longstanding history and sophisticated structure.

VI. CONCLUSION

The United Kingdom has always been unusual amidst democracies since it lacks a codified constitutional document.[37] Hence, numerous strong arguments indicated by scholars, who are in favour of the codification of the British constitution. For example, a codified constitution can prevent violation of individual rights by the state and protect minority groups from pressure of majority.

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33 **Sueur, Andrew Le/Sunkin, Maurice/Murkens, Jo Eric Khushal,** (2010), Public Law Text, cases, and materials, First edition, New York, Oxford University Press, p. 40.

34 **Barber, N. W.,** (2011), Law and Constitutional Conventions, Law Quarterly,Vol. 125, p. 294.

35 **Denham,Paul,** (1999), Law a Modern Introduction, 4th edition, London, Hodder and Staughten Educational Press, p. 6-7.

36 **Madgwick, Peter/Woodhouse, Diana,** (1990), The Law and Politics of The Constitution, First published, The United Kingdom, Harvester Wheatsheat, p. 33.

37 **Hockman, Stephen/Bogdanor,Vernon et al,** (2010),Towards a Codified Constitution, Justice Journal, p. 74.

On the other hand, taking everything into account, it is reasonable to conclude that the constitutional architecture of the United Kingdom should continue existing since, first of all, the codification of the constitution is likely to create serious deadlock in the future in spite of the fact that it might be appropriate at the day of present. The United Kingdom Constitution, also, enables British citizens to have more favourable welfare environment than many countries, which have a codified one. Lastly, a codified the UK constitution is difficult and demanding task since it originates from conventions, statutes and case law lie in the history of the United Kingdom.

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THE ISSUE OF THE PUNITIVE NATURE OF THE YOUTH JUSTICE SYSTEM OF THE UNITED KINGDOM

İngiliz Çocuk Adalet Sisteminin Cezalandırıcılığı Sorunu

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ABSTRACT

Upon the human rights violations occurred in the 20th century, a lot of work has been done at the international level in order to provide an international protection to children in the context of protecting human rights. Minimum standards have been adopted by international organisations and institutions, particularly by the United Nations, concerning the prosecution and trial of the children in conflict with law. The idea that children need to be protected and not to be treated, prosecuted and tried as adults has been developed and states have been encouraged to regulate their youth justice systems in accordance with international principles and rules.

Although the United Kingdom has been one of the first states adopting a separate juvenile justice system for children who have committed offences, later on, it has fallen behind the international standards; and therefore, has been criticised by both national and international authorities. The lowness of the age of criminal responsibility; the inconvenient conditions of prisons and detention centres for children to be rehabilitated; and the high rate of sentenced children, who commit suicide, suffer from assault and self-harm in secure estates give the impression that the United Kingdom's Youth Justice System is punitive and reveals the fact that the United Kingdom has a lot to do.

Keywords: Youth Justice System, Youth Courts, Age of Criminal Responsibility.

ÖZET

20. yüzyılda yaşanan sayısız insan hakları ihlalleri neticesinde, insan haklarının korunması bağlamında çocuk haklarının da korunması amacıyla uluslararası düzeyde çalışmalar yapılmıştır. Başta Birleşmiş Milletler olmak üzere birçok uluslararası kurum bu konu üzerine eğilmiş ve çocuklar tarafından işlenen suçların kovuşturulması ve çocuk suçluların yargılanmasına ilişkin minimum standartlar belirlenmiştir. Çocukların, suçlu dahi olsalar, korunmaları gerektiği ve yetişkinler gibi muamele görmemeleri, yargılanmamaları ve cezalandırılmamaları fikri gelişmiş ve bu hususlarda tüm ülkelerin

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çocuk adalet sistemlerini minimum standartlara göre düzenlemeleri uluslararası düzeyde teşvik edilmiştir.

İngiltere, çocuk suçlular için yetişkin mahkemelerinden ayrı çocuk mahkemeleri kurarak bu husus üzerine ilk eğilen ülkelerden biri konumunda bulunmuş olsa da ilerleyen zamanlarda uluslararası standartların gerisine düşmüş ve gerek yerel gerekse uluslararası otoritelerce eleştirilmiştir. Ceza ehliyeti yaş sınırının çok düşük olması, verilen cezaların yüksek sınırdan belirlenmesi, ceza, tutuk ve ıslah evlerinin durumlarının çocuk suçluların rehabilite olması bakımından elverişli olmaması ve buralarda yaşanan ölüm, intihar ve yaralanma vakalarının yüksek olması, İngiliz Çocuk Adalet Sisteminin cezalandırıcı bir yapıya sahip olduğu kanısını uyandırmakta ve bu konuda alınması gereken uzun bir yol olduğunu bizlere göstermektedir.

Anahtar Kelimeler: Çocuk Adalet Sistemi, Çocuk Mahkemeleri, Ceza Sorumluluk Yaşı.

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INTRODUCTION

Children have become one of the most important concerns for adults in the contemporary world, whereas they had been neglected, set at naught and their rights had been flouted by societies all over the world until the 20th century. As of the beginning of the 1900s, it has been understood that juveniles need to have a special protection and distinct treatment from that of adults from the law when they face a criminal proceeding since they are more vulnerable than adults. Hence, it has been accepted that it is unfair for juveniles to be prosecuted with the same law and by the same legal authorities as adults. However, the children who are accused of offences are prosecuted in accordance with the ordinary criminal justice and given similar sentences in some countries, while other countries apply different law, which includes lighter sentences, to child offenders, and do not punish them with certain punishments, such as capital punishment or life imprisonment.[3]

Throughout the years, the reintegration of juveniles who have committed a crime or are delinquent into the society have been aimed rather than punishing, which, in general, results in reoffending. Many approaches have been introduced in order to balance between the social status and the future of juveniles and the public good. At the international level, some instruments, such as the Geneva Declaration of the Rights of the Child[4], the first embodied

[3] Cappelaere, 2005, p. 47

[4] League of Nations, Geneva Declaration of the Rights of the Child, 1924

international regulation about juveniles, the European Convention on Human Rights (ECHR), the International Covenant on Civil and Political Rights, the UN Standard Minimum Rules for the Administration of Juvenile Justice and the UN Convention on the Rights of the Child, were introduced to protect and promote the rights of the child including those in conflict with the law. All these efforts contributed to the recognition and protection of the rights of children in civilised societies.

In relation to children and their rights, the United Kingdom (hereinafter UK) has endeavoured to reduce the inequalities in childhood, promoting a positive image of children and young persons and enabling them to have a powerful voice in all matters which affect their lives through the contribution of legislation and international instruments. As of 1908, juvenile courts, which made major strides in a satisfactory youth justice system, began their active duty to deal with children by the introduction of the Children Act in England and Wales.[5] Following this improvement, the Children and Young Persons Act 1933, 1963, 1969 and 2008, and the Crime and Disorder Act 1988 and 1998 were introduced in order to improve the rights of the child in criminal proceedings. However, it has been observed and proved that these changes have not always resulted in a decrease in the number of children who appear in juvenile courts. This situation has led to the questioning of youth justice in the UK whether it is excessively punitive, and thus breaches Human Rights. Despite endeavouring to meet the needs of international standards on youth justice in the UK, the government should take juvenile justice system a step further in order to set a higher standard for juveniles. Establishing a proper juvenile justice system has a significant importance for the society due to the fact that the principal goal of the juvenile justice system is to prevent children and young people from committing crimes.

This essay will examine the Youth Justice System of the UK, the legislation introduced to deal with child offenders, and the attributes and nature of the system in terms of being punitive or preventative. In that regard, the threshold of the age of criminal responsibility, the implementation of Anti-social Behaviour Orders to children, the children deprived of liberty, the right to a fair trial for children, the case of James Bulger, which is one of the best examples of the right to a fair trial, and children deaths in custody will particularly be examined. The compatibility of the system with international instruments and human rights will be critically evaluated in the light of the report of the

[5] Children Act, 1908

UN Committee on the Rights of the Child and case law. Whilst discussing the system, academic criticisms and opinions will also be considered.

1. A Brief Overview of the Development of Youth Justice System in the United Kingdom and the Influence of the International Instruments

The recent international instruments concerning children and their rights protect the rights of all children including those in conflict with the law, while the earlier documents adopted at the beginning of the 20th century included solely the basic human rights of children, such as feeding and sheltering.[6] "There is now a wide range of international instruments from the United Nations, the Council of Europe and other bodies on children's rights, both generally and with specific reference to children in conflict with the law."[7] The differences between the early and recent documents are quite obvious when the Geneva Declaration and the UN Convention on the Rights of the Child are compared with each other. Despite the improvement in the content of international instruments, they still have many aspects to be criticised: they are too ambiguous on detention as a last measure; uncertain on the age of criminal responsibility; and fragmentary on trial process, serious crimes and sentencing.[8]

With regard to domestic legislation, although youth justice reform has been unprecedented in England and Wales until the last two decades,[9] many Acts regarding the children who are in conflict with law were introduced in order to protect them and guarantee their fundamental human rights. Moreover, the UK has been one of the first states adopting a separate juvenile justice system for children who have committed offences.

"Prior to the 19th century, there was relatively little formal differentiation between adult and juvenile…"[10] In 1908, the Children and Young Persons Act was introduced and juvenile courts were established. The establishment of juvenile courts in England and Wales more than one century ago is important in terms of indicating the endeavours of the UK to protect children and provide them with a fair trial. Furthermore, a minimum age for the execution of child offenders was stipulated as 16 years by the Children's Act of 1908 for the first time. Prior to 1908 Act, even juveniles under 16 years could be executed in the UK.

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6 League of Nations, Geneva Declaration of the Rights of the Child, 1924, Art. 2
7 Kilkelly, 2008, p. 188
8 Kilkelly, 2008, p. 191
9 Muncie and Goldson, 2006, p. 34
10 Gelsthorpe, 2002, p. 47

Then, the 1933 Children and Young Persons Act was enacted in order to consolidate all existing legislation for child protection into one Act and this was modified by the Children and Young Persons Act of 1963, 1969 and 2008. The minimum age for execution and the age of criminal responsibility were raised from 16 to 18 and from 7 to 8, respectively, in 1933. As is seen, the UK satisfied the international rule concerning the implementation of the death penalty for persons under 18 years of age 33 years before the adoption of the International Covenant on Civil and Political Rights.[11] In 1963, the age of criminal responsibility, 8, was increased to 10 by the Children and Young Persons Act.

Through the end of the 20th century, the Youth Justice Board and youth offending teams were introduced in order to ensure the functioning of the youth justice by the Crime and Disorder Act. As seen, youth justice in the UK has been improved gradually by bringing a minimum age limit to the execution of children, by increasing the age of criminal responsibility, and by establishing institutions to promote the system.

2. Is the British Youth Justice System punitive?

Before evaluating the Youth Justice System of the UK in terms of being punitive, it will be useful to mention the report produced by the UN Committee on the Rights of the Child and some international instruments which protect the rights of the child.

The UN report dated 2008 contains the concerns and recommendations of the Committee relying on its observations of youth justice in the UK. One of the most remarkable determinations of the Committee is that policy and legislative matters regarding children were not in compliance with the principle of the best interest of the child, particularly in the field of juvenile justice.[12] Moreover, the Committee found the number of children who died in custody and exhibited self-harming behaviours while in custody concerning.[13] The restriction imposed by the Anti-social Behaviour Orders on the freedom of peaceful assembly of children was also found excessive.[14] Furthermore, it has been observed that physical restraint on children was being utilised in the places where they were deprived of their liberty.[15] With regard to the administration of juvenile justice, the Committee expressed its concerns

11 The United Nations General Assembly Resolution, 1966, Art. 6(5)
12 The United Nations Committee on the Rights of the Child (Report), 2008, p. 7
13 The United Nations Committee on the Rights of the Child (Report), 2008, p. 7
14 The United Nations Committee on the Rights of the Child (Report), 2008, pp. 8-20
15 The United Nations Committee on the Rights of the Child (Report), 2008, p. 9

related to the low age of criminal responsibility, the children tried in adult courts, the number of children who are on remand and deprived of liberty, the absence of a statutory guarantee for the educational rights of the children in custody, the practice of holding young persons and adults in the same places of deprivation in the Overseas Territories, the Youth Crime Action Plan which proposes removal of reporting restrictions for the children 16 and 17-year olds facing criminal proceedings, and the implementation of the Counter-Terrorism Bill to children.[16]

Other than the abovementioned Committee report, there are many documents protecting the human rights of children and establishing standard rules at the international level. One of the most significant instruments is the 1985 UN Standard Minimum Rules for the Administration of Juvenile Justice, in other words, the Beijing Rules. This is a resolution of the UN General Assembly and contains the rules for the treatment of child offenders and sets up standard rules, such as the age of criminal responsibility, the rules for investigation, prosecution and detention. Article 1 (4) of the Beijing Rules expresses two principal objectives of the juvenile justices as follows:

"Juvenile justice shall be conceived as an integral part of the national development process of each country, within a comprehensive framework of social justice for all juveniles, thus, at the same time, contributing to the protection of the young and the maintenance of a peaceful order in society."[17]

In the light of these information, the age of criminal responsibility applied in the UK, children tried in adult courts, the use of custody for children, the imposition of Anti-social Behaviour Orders on children and the case of James Bulger will be discussed.

2.1. Age of Criminal Responsibility

The UN Convention on the Rights of the Child imposes some obligations regarding the age of criminal responsibility and juvenile justice system on signatory states. Article 40 (3) of the Convention states that "States Parties shall seek to promote the establishment (…) of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law (…)".[18] Besides, the UN Committee on the Rights of the Child recommends that states should bring their legislation into line with the Convention and

[16] The United Nations Committee on the Rights of the Child (Report), 2008, pp. 18-19
[17] The United Nations General Assembly Resolution, 1985, Art. 1(4)
[18] The United Nations Convention on the Rights of the Child (Report), 1989, Art. 40 (3)

encourages states to increase their existing low minimum age of criminal responsibility.[19] The age of 12 years is recommended as a minimum age for criminal responsibility and the age below 12 is considered internationally unacceptable by the Committee.[20]

The age of criminal responsibility is one of the most important indicators to evaluate whether a country's juvenile justice system is punitive or not.[21] The age of criminal responsibility is the age at which a person is deemed capable of discernment (being aware of right and wrong) and, thus, can be prosecuted for a crime.[22] "It is the age from which the child is judged capable of contravening the criminal law."[23] The UN Convention on the Rights of the Child defines a child as "(…) every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."[24]

In the UK, children aged below 14 were legally presumed to not have the capacity to distinguish right from wrong and therefore could not commit an offence until 1999. This presumption, known as *doli incapax*, remained valid unless the prosecution could convince the court that the child was aware of the wrongfulness of the act.[25] However, the 1998 Crime and Disorder Act terminated the validity of this presumption by stating that "The rebuttable presumption of criminal law that a child aged 10 or over is incapable of committing an offence is hereby abolished."[26] Now, children aged 10 to 13 are treated in the same way as those aged 14 and over.

England, Wales and Northern Ireland have one of the lowest ages of criminal responsibility in Europe, whilst Scotland has recently increased the criminal responsibility age.[27] At the present time, the age of criminal responsibility in England, Wales[28] and Northern Ireland[29] is 10, whereas it is 12 in Scotland,[30] which was 8 until recently.

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19 The United Nations Committee on the Rights of the Child (Report), 2008, p. 3
20 The United Nations Committee on the Rights of the Child General Comment no:10, 2007, p. 11
21 Nordin, Mousavi and Shapiee, 2012, p. 797
22 Great Britain. Ministry of Justice, 2008, p. 30
23 Cappelaere, 2005, p. 60
24 The United Nations Convention on the Rights of the Child, 1989, Art. 1
25 *JM v Runeckles* (1984) 79 Cr App R 255
26 Crime and Disorder Act, 1998, p. 34
27 National Children's Bureau, 2010, p. 10
28 Children and Young Persons Act, 1963, s. 16(1)
29 Criminal Justice Order, 1998, s. 3
30 Criminal Justice and Licensing (Scotland) Act, 2010, p. 52

The research concerning the age of criminal responsibility conducted by the Ministry of Justice examined the jurisdictions of 90 countries, including the ones which have none. It has been found that 14 years was determined as the age of criminal responsibility most commonly, while the threshold was determined at 10 years in England, Wales and Northern Ireland. The study also revealed that the threshold is between 14 and 16 in most European countries.[31] Furthermore, the report of seminars produced by National Children's Bureau concluded that England, Wales and Northern Ireland have the lowest threshold among European Countries, and it is also low compared to the rest of the world.[32]

One of the most important consequences of having a low age of criminal responsibility is the high number of juveniles who are in custody. For instance, the number of children in prison in England and Wales is four times more than Portugal and twenty-five times more than Belgium. Other European countries look for alternative ways to prosecution. In Italy, pre-trial supervision is firstly tried and where successful, prosecution is not ensued by the investigating authority. Likewise, in France, the first resort which is implemented to child offenders is educational intervention and thus, proceedings are not used as the sole and exclusive remedy. [33]

There is a point of view in the UK that 10 year old children are capable of making decisions and distinguishing right from wrong.[34] However, it has been stated in Article 4 of the UN General Assembly Resolution that "In those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity."[35] Moreover, being aware of the difference between right and wrong should not be the only element in determining the age of criminal responsibility; being aware of the possible consequences of the acts should also be sought. Even if a child at the age of 10 is capable of basic moral judgments, this does not mean that the child knows the legal consequences of the act committed and it is not enough to make the child criminally responsible.[36]

England and Wales have still the first rank of the number of children under

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31 Great Britain. Ministry of Justice, 2008, p. 7
32 National Children's Bureau, 2010, p. 10
33 National Children's Bureau, 2010, p. 11
34 *V. v United Kingdom* [2000] 30 E.H.R.R. 121 para. 54
35 The United Nations General Assembly Resolution A/RES/40/33, 1985, Art. 4.1
36 McDiarmid, 2013, pp.158-159

the age of 18 who were sentenced and in custody among European countries although there is a dramatic decrease in the number from 93,436 to 43,601 and from 3,029 to 1,708, respectively, in the last decade.[37] Moreover, statistics show that the rate of assaults per 100 young people in custody was higher for the younger group, 10-14 year olds, than the older group, 15-18 year olds, in the youth secure estates in England and Wales in 2013. The number of self-harm incidents for the age group of 10-14 year was just over 100 in the youth secure estates.[38] Therefore, it is reasonable to say that holding children 10-14 year olds in the youth secures estates causes secondary sentence.

As a consequence, it could be convincingly argued that the Youth Justice System of the UK has not been regulated in favour of children. When looking at the current position of the youth justice system, England and Wales are wide of the mark in terms of the compatibility with international standards as the age of criminal responsibility in England and Wales is lower than both the recommended and the common age.[39]

2.2. Issues Concerning the Use of Custody for Children

The right to liberty is one of the fundamental human rights protected by European Convention on Human Rights (ECHR) under Article 5 and other international instruments, such as International Covenant on Civil and Political Rights, as well as the domestic laws of states. However, it is not an absolute right; it can be limited under the circumstances set out in Article 5 of ECHR. One of the circumstances where a person can be deprived of his liberty is "…the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority…"[40]

According to Article 37 (b) of the UN Convention on the Rights of the Child, for which the UN Committee accuses the UK of contravening the Convention:[41] "No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time."[42]

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37 Great Britain. Ministry of Justice, 2014, pp. 32-39
38 Great Britain. Ministry of Justice, 2014, pp. 46-48
39 National Children's Bureau, 2010, p. 10
40 ECHR, 1950, Art. 5 (1-d)
41 Great Britain. Youth Justice Board, 2008, p. 60
42 The United Nations Convention on the Rights of the Child, 1989, Art. 37

With regard to the children deprived of liberty in the UK, it has been observed that the number of children in custody has risen over the last two decades, and this increasing trend continued until 2007. Since then, the number has decreased. Some factors such as extensive availability of youth offending preventative activity and changes in policing practices have caused this downward trend.[43] Despite reforms and changing policies concerning the youth justice system, that number is still concerning, and the use of custody in England and Wales is remarkably higher than in other European States.[44]

In the meantime, it is difficult to say that the decrease in the numbers is satisfactory and promising to be able to mention a proper youth justice system. Therefore, the policy on accommodation should be renewed in the soonest time.[45] There are three different types of establishments to detain children: Secure training centres, secure children's homes and prisons (young offender institutions). 83 per cent of detained children are held in prison in England and Wales. "Young people who do need to be held in custody (because they represent a serious risk of harm to the public) should be placed in secure children's homes designed for the purposes of the care of vulnerable children. Children in custody are 16 times as likely to kill themselves as children in the community, and young offender institutions ill equipped to address the needs of those below the age of 18 should be decommissioned."[46]

The report produced by the Youth Justice Board indicated that the percentage of those convicted under 18 years old in prison was 3.8 per cent in England and Wales in 2002, which is the second highest rate among the compared states. Looking at the rates concerning custody, the countries that have the lowest ages of criminal responsibility also have the highest children custody figures, as in the UK.[47]

With regard to the maximum custodial sentence for children, England and Wales have indeterminate custodial sentences for juveniles who commit grave crimes (at Her Majesty's Pleasure) despite the fact that the maximum detention order given to child offenders is one year in custody in England and Wales.[48]

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43 Nacro, 2011, p. 2
44 Great Britain. Youth Justice Board, 2008, pp. 60-63
45 Nacro, n.d., p. 3
46 Nacro, n.d., p. 1
47 Great Britain. Youth Justice Board, 2008, pp. 59-60
48 Powers of Criminal Courts (Sentencing) Act, 2000, s. 101

Deaths of children in custody are another serious issue regarding children deprived of their liberty. The European Court of Human Rights (ECtHR) stated in *McCann and Others v. the United Kingdom* case that the right to life is one of the most fundamental provisions enshrined in the ECHR. Also, state parties have a positive duty to protect the lives of people, and this duty entails state parties to take preventative measures.[49] Likewise, the UN Committee "recommends that the State party use all available resources to protect children's rights to life, including by reviewing the effectiveness of preventive measures. The State party should also introduce automatic, independent and public reviews of any unexpected death or serious injury involving children – whether in care or in custody."[50]

The report of the House of Lords and House of Commons Joint Committee criticised the numbers of children and young people in custody who commit suicide and self-harm, and who are the victims of assault.[51] Between 1998 and 2002, there were 1,659 reported incidents of self-injury or attempted suicide by child prisoners in England and Wales.[52] Moreover, 33 children died in custody - 17 between 1990 and 2000, 16 from 2000 to 2014- since 1990.[53] These figures reveal the extent to which imprisonment is a psychologically damaging experience.[54]

To decrease the figures for custody, the UK has taken some measures. For instance, the UK invested in projects to make the physical custodial environment safer and in a number of schemes to enhance CCTV coverage in areas of potential conflict. Besides, the monitoring role of the Youth Justice Board in the secure estate has tried to be improved.[55]

Taking everything into account, it could be asserted that the figures for juveniles deprived of liberty is high in the UK. This situation shows that detention is not used as a last resort in the UK. However, the most effective way to decrease the figures is to use custody as a last resort if dangerousness of the child can be proved and he or she cannot be controlled in another way.[56]

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49 *McCann and Others v. United Kingdom* (Unreported) para. 147
50 The United Nations Committee on the Rights of the Child (Report), 2008, p. 7
51 Great Britain. Parliament. House of Lords and House of Commons, 2003, p. 3
52 Goldson, 2006, p. 148
53 Children's Commissioner, 2014, The Guardian, 2014
54 Goldson, 2006, p. 148
55 Great Britain. Youth Justice Board, 2014, pp. 6-7
56 Great Britain. Youth Justice Board, 2008, p. 60

2.3. Right to a Fair Trial for Children in the United Kingdom

As stated in the ECHR, everyone has the right to a fair trial,[57] which holds a prominent place in a democratic society.[58] The right to a fair trial includes various fair trial rights and different aspects. The age of criminal responsibility, the condition of children with communication or learning disabilities in criminal proceedings and the children tried in adult courts are some of the aspects regarding the right to a fair trial for children.

As mentioned above, the age of criminal responsibility is quite low in England and Wales, and it is argued that this situation indirectly causes a breach of Article 6 of the ECHR. Furthermore, children with communication or learning difficulties do not always receive adequate and appropriate special measures, which could be considered as a positive discrimination in favour of vulnerable defendants to ensure a fair trial. In the youth justice system of the UK, a quarter of young offenders have been identified as having problems in reading, writing, expressing themselves, understanding information and other people, whereas 23 per cent of children have IQs lower than 70.[59] Therefore, it is vital for the court staff to realise the condition of young offenders to provide them with a fair trial.

However, it has been observed that court staff remain incapable of realising the learning and communication difficulties or disabilities of young offenders who need personal assistance. The inability to realise the depth of the problem prevents court staff from communicating with children effectively and making appropriate provisions.[60] On the other hand, if a young offender does not understand the accusations imposed on him or legal questions, he may fail to respond and defend himself which might give rise to a breach of Article 6 of the ECHR. Hence, courts are obliged to ensure that children can comprehend and participate in the trial proceedings.

The ECtHR emphasised the aforementioned arguments in *S.C. v. the UK* case.[61] The applicant aged 11 and having learning difficulties was charged with robbery and tried in the Crown Court for jury trial. The right to a fair trial includes the right to participate effectively in the criminal trial process. However, it is obvious that the applicant was unable to participate in the trial

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57 ECHR, 1950, Art. 6

58 *Delcourt v. Belgium* [1979-80] 1 E.H.R.R. 355 para. 25

59 Prison Reform Trust, 2011, Bromley Briefings Fact file, p. 42

60 HM Inspectorate of Court Administration, 2007, p. 12

61 *S.C. v. United Kingdom* [2005] 40 E.H.R.R. 10

effectively due to his immaturity and low intellectual ability. Participation in trial does not only comprise being present in the court, but it also includes hearing and following the proceedings, understanding every point of law, the nature of trial and evidential detail.[62] The Court recommended that "he should have been tried by a specialist tribunal which could make proper allowances for his difficulties and enable him to have a general understanding of the process and its potential outcomes."[63] Therefore, the Court held that there has been a violation of Article 6 (1) of the ECHR.

Ordinarily, people aged between 10 and 18 are tried in youth courts, which are a special type of magistrates' court and deal with cases such as anti-social behaviour, drugs offences, theft and burglary.[64] However, children who committed serious crimes or committed crimes together with adults are tried in adult magistrates' courts.[65] Children can also appear in a Crown Court to be tried for grave or indictable offences, such as murder, sexual assault and firearms offences in England and Wales.[66] In youth courts, unlike adult courts, only people connected with the case, such as the victim, lawyers and family, may attend the hearing. While members of the press can be present in the court, they face some reporting restrictions; for example, they are not usually allowed to mention the child's name. Magistrates are trained to handle the children who come before them, and modifications will be in place to help children participate."[67]

With regard to the condition of the children tried in adult courts, "Every year, around 96,500 children aged lower than 18 are tried in British courts. The number of children tried in Crown Courts in 2009 and 2010 was 2,886, which is quite high, and almost half of the cases resulted in a custodial sentence. The report of the Equality and Human Rights Commission showed that "Children who are tried in Crown Courts are at risk of Article 6 breaches, as insufficient consideration is given to their age and maturity."[68]

The ECtHR expressed the view that **"…**it is essential that a child charged with an offence is dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that

62 *S.C. v. United Kingdom* [2005] 40 E.H.R.R. 10, Para. 11, 25
63 *S.C. v. United* Kingdom [2005] 40 E.H.R.R. 10, Para. 35
64 Great Britain. Ministry of Justice, 2014
65 Jacobson and Talbot, 2009, p. 33
66 Equality and Human Rights Commission, 2012, p. 247
67 Equality and Human Rights Commission, 2012, p. 242
68 Equality and Human Rights Commission, 2012, p. 219

steps are taken to promote his ability to understand and participate in the proceedings.."[69] Moreover, it is the recommendation of the UN Committee on the Rights of the Child that "…children in conflict with the law are always dealt with within the juvenile justice system and never tried as adults in ordinary courts, irrespective of the gravity of the crime they are charged with."[70]

Verkaik rightly points out the impact of adult courts on children tried in one of them by stating that the Old Bailey and adult courts are ill-equipped for children who have committed serious crimes. "Many are cleared of any wrongdoing but their experience of the adult criminal justice system can cause irreparable harm while they are growing up. Those convicted can find the experience undermines their chances of rehabilitation."[71]

Taking everything into account, it is unacceptable for children to be tried in adult courts since the formality and ritual of adult courts have an intimidating impact on children.[72] In that regard, it could be claimed that the criminal justice of the UK is punitive and breaches children's human rights, particularly the right to a fair trial, the right not to be subjected to inhuman or degrading treatment, as the trial process has an intimidating effect on children and the right to a private life, as they may be exposed to press and public unless the judge excludes the public and press from the court.

2.4. Anti-social Behaviour Orders and Their Effect on the Youth Justice System of the United Kingdom

The 1998 Crime and Disorder Act introduced Anti-social Behaviour Orders (ASBOs) which contain civil orders in England, Wales and Scotland. These orders were introduced by the 2006 Criminal Justice Act into Irish law. "They (…) were designed to deter anti-social behaviour and prevent the escalation of such behaviour without having to resort to criminal sanctions, although a breach does give rise to criminal proceedings and penalties."[73] Any person aged 10 or over who has committed some anti-social offences may be given an ASBO.[74] If a person is issued with an ASBO, the person can be banned from doing specific activities, such as drinking on the street and entering particular

[69] *V. v United Kingdom* [2000] 30 E.H.R.R. 121 para. 86
[70] The United Nations Committee on the Rights of the Child (Report), 2008, p. 19
[71] Verkaik, 2007, p. 1
[72] *V. v United Kingdom* [2000] 30 E.H.R.R. 121 para. 86
[73] Great Britain. Home Office, 2002, p.vi
[74] Crime and Disorder Act, 1998, s.1 (1)

areas, at least 2 years[75] which could be reviewed if the behaviour improves.[76]

However, there are some criticisms about ASBOs and most of the concerns focus on the implementation of the orders on children as young as 10 years old. One of the most controversial aspects of ASBOs is the fact that the breach of the order is punishable up to five years imprisonment, although the original act was non-imprisonable.[77] "It has been estimated that around 42% of ASBOs made against juveniles are breached and 46% of those breaches receive a custodial sentence – with some 50 children a month imprisoned under ASBO."[78]

The UN Committee on the Rights of the Child produced a report pursuant to the observations concerning the legal regulations and implementations of the youth justice system of the UK of Great Britain and Northern Ireland in 2008. The Committee declared its concerns about the application to children of the ASBOs and the restrictions posed by ASBOs on children's gatherings.[79] "The Committee is further concerned:

(a) At the ease of issuing such orders, the broad range of prohibited behaviour and the fact that the breach of an order is a criminal offence with potentially serious consequences;

(b) That ASBOs, instead of being a measure in the best interests of children, may in practice contribute to their entry into contact with the criminal justice system;

(c) That most children subject to them are from disadvantaged backgrounds."[80]

The following event is an indicator of Committee's concern. In *Castle v Commissioner of Police of the Metropolis* case, eleven children from different age groups took part in a demonstration in central London to protest tuition fees in London and they were contained by the Metropolitan Police without food and with little water during approximately 8 hours. They claimed that their kettling was contrary to section 11 of the 2004 Children Act, section 60 of the 1994 Criminal Justice and Public Order Act and Articles 5,8,10 and 11

75 Crime and Disorder Act, 1998, s. 1 (7)
76 Anti-social Behaviour Act, 2003,
77 Carrabine, 2010, p. 17
78 Muncie and Goldson, 2006, pp. 37-38
79 The United Nations Committee on the Rights of the Child (Report), 2008, p. 20
80 The United Nations Committee on the Rights of the Child (Report), 2008, p. 20

of the ECHR.[81] However, the Court dismissed the claims and held that there was no violation of the conventional rights of the children. Although the Court did not find any violation, one of the demonstrators said that children cannot vote, so the best way to voice their opinion is to protest. This right should not be breached and bereaved.[82] Thus, the act of the police can be accepted as a breach of Article 5 and 11 of the ECHR..

According to the statistics on the number of ASBOs issued from 1999 to 2012, the total number of children aged between 10 and 17 issued with an ASBO was 8.433. Among the three age groups, which are 10-11, 12-14 and 15-17, the third group had been given the most ASBOs with the total number of 6,322. The middle age group received 1,961 ASBOs, whereas 150 ASBOs were issued for the youngest age group. As seen, one out of four of the total number of children is between the ages of 10 and 14, which is quite low to be held responsible. Therefore, as with criminal responsibility, the age of responsibility for ASBOs should also be increased.[83]

Furthermore, as mentioned, the minimum length of an ASBO is 2 years,[84] and this time period is exorbitantly punitive for a child, considering the age limit of imposition of ASBOs. As a consequence, it is reasonable to say that ASBOs make the UK Youth Justice System more punitive.

In other respects, an ASBO may give rise to a breach of the right to private life due to the fact that it might prohibit the person of concern from going to a particular place or drinking on the street. This is not in compliance with the right to respect for private life unless it is issued "…in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."[85]

2.5. An overview to the Case of James Bulger

The ECHR provides a protection for children, which, even though, is deemed inadequate by some commentators. According to Kilkelly, the ECHR, without its additional protocols, includes no specific provision for vulnerable people;

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81 *Castle v Commissioner of Police of the Metropolis* [2011] EWHC 2317
82 BBC, 2011
83 Great Britain. Home Office and Ministry of Justice, 2012
84 Crime and Disorder Act, 1998, Art. 1
85 ECHR, 1950, Art. 8 (2)

just Articles 5 and 6 touch on the rights of the child in a criminal proceeding.[86] Within the scope of Article 5 (1) (d), a minor can be detained to be brought before the competent legal authority or for educational supervision.[87] Also, if the interest of the child so requires, the press and public might be excluded from a trial in accordance with Article 6.[88]

T. and V. v. United Kingdom case, known as the James Bulger case, is a black mark in British criminal justice in which the rights of children were disregarded. James Bulger, a two-year-old boy, was abducted and battered to death by two ten-year-old boys in 1993.[89] The accused children were tried in the Crown Court in accordance with the Magistrates' Court Act.[90] In spite of the fact that the Crown Court took some special measures to modify the trial proceeding, the ECtHR stated that these measures left a lot to be desired, and the trial was conducted with the formality of adult courts. The ritual and formality of the Crown Court were found severely intimidating for eleven-year-old children, and particularly raising the dock caused the children to feel exposed to the scrutiny of the media.[91] Furthermore, according to psychiatric evidence, the applicants felt post-traumatic stress during the criminal proceeding, as the trial was extremely distressing and frightening for them, which made them unable to concentrate.[92] The ECtHR held that "it is highly unlikely that the applicant would have felt sufficiently uninhibited, in the tense courtroom and under public scrutiny, to have consulted with them during the trial or, indeed, that, given his immaturity and his disturbed emotional state, he would have been capable outside the courtroom of cooperating with his lawyers and giving them information for the purposes of his defence."[93] Therefore, the ECtHR found a violation of the fair trial rights of the children and ordered the UK to pay indemnification to the applicants. Conversely, the Court dismissed the alleged violations of Articles 3, 5 and 14 of the ECHR.

Judges Pastor Rudruejo, Ress, Makarczyk, Tulkens and Butkevych expressed their partly dissenting opinions since they believed that the trial and sentence of the applicants amounted to degrading and inhuman treatment, which is

86 Kilkely, 2011, p. 247
87 ECHR, 1950, Art. 5 (1-d)
88 ECHR, 1950, Art. 6
89 *V. v United Kingdom* [2000] 30 E.H.R.R. 121 para. 7
90 The Magistrates' Court Act, 1980, s. 24
91 *V. v United Kingdom* [2000] 30 E.H.R.R. 121 para. 86
92 *V. v United Kingdom* [2000] 30 E.H.R.R. 121 para. 11
93 *V. v United Kingdom* [2000] 30 E.H.R.R. 121 para. 88

contrary to Article 3.[94] "The combination in this case of (i) treating children of ten years of age as criminally responsible, (ii) prosecuting them at the age of eleven in an adult court, and (iii) subjecting them to an indeterminate sentence, reached a substantial level of mental and physical suffering. Bringing the whole weight of the adult criminal processes to bear on children as young as eleven is, in our view, a relic of times where the effect of the trial process and sentencing on a child's physical and psychological condition and development as a human being was scarcely considered, if at all."[95]

Consequently, despite the gravity of the crime that they committed, they also have a life to lead. Besides, as they had been punished by the criminal authorities, it is unfair to punish them for the second time by exposing them to the scrutiny of the public and press, which constitutes a breach of the right to a fair trial. Today, their names, photographs and the details of the offence are known by anyone interested in the case. Finally, unless people are subjected to capital punishment, which is not an option in the UK, states have a positive obligation to protect the rights of people including those who break the law. These two people also deserve to be protected as they are members of the society. Therefore, concerning this case, it is possible to argue that the UK failed to fairly prosecute these children and breached their right not to be subjected to inhuman or degrading treatment or punishment and the right to a fair trial.

CONCLUSION

The UK has not got a good reputation in the context of the juvenile justice system. It falls behind the average of other European Countries, while it was one of the leading countries recognising the fact that children accused of crimes should be tried in separate juvenile courts at the beginning of the 20th century. The lowness of the age of criminal responsibility is one of the most substantial indicators. It is self-evident that it has an effect on the right to a fair trial and makes the system excessively punitive. When considering the number of sentenced children, who commit suicide, suffer from assault and self-harm in secure estates, the punitive character of the United Kingdom juvenile justice system becomes more apparent. Although the number of children who died and who are in prison has a decreasing trend by the effect of necessary supportive measures introduced, it is still quite high compared with the other European Countries.

94 *V. v United Kingdom* [2000] 30 E.H.R.R. 121
95 *V. v United Kingdom* [2000] 30 E.H.R.R. 121

The Youth Justice System of the UK has been criticised by both national and international authorities for being punitive. As Bradley points out "When looking at the problem of youth crime in the early 21st century, we are confronted with a highly punitive discourse which talks of 'clamping down' on youth crime, of 'zero tolerance' of 'anti-social behaviour'."[96]

Although international instruments on the rights of the child aim to protect children's rights, prevent states from violating their rights and encourage them to introduce law in order to improve the legal system in favour of children, breaches do not attract deterrent formal sanctions.

Particularly, the UN Convention on the Rights of the Child, which is one of the most ratified international human rights instruments but also the most violated, attracts no formal sanction. Hence, states have not incorporated the Convention provisions into their domestic law.[97]

Consequently, the low age of criminal responsibility, the victimisation of children tried in adult courts, the implementation of Anti-Social Behaviour Orders to children as young as 10 years old and deprivation of liberty of children and correspondingly the deaths of children in custody contribute to the Youth Justice System of the UK being punitive. Although the level of punitiveness is lessened by the effect of measures taken to improve the juvenile system, such as the adoption of the Children's Act 2004 and the Childcare Act 2006, the introduction of Youth Justice Board and Youth Offending Teams, it could be claimed that the juvenile justice in the UK needs to be improved in favour of children by following the principle of 'the best interest of children' in every area of the criminal justice. In order to improve child offenders' rights and rebuild its reputation, the UK should fulfil the recommendations of the UN Committee. Furthermore, breaches of international rules by states should be punished with more deterrent sanctions rather than ordering just compensation.

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96 Bradley, K, n.d.
97 Muncie, 2008, p. 114

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AN EXAMINATION AND EVALUATION OF THE VALUE ADDED TAX FRAUDS IN THE EUROPEAN UNION UPON LEADING CASES

Avrupa Birliğinde Katma Değer Vergisi Kaçakçılığı Üzerine Emsal Kararların İncelenmesi ve Değerlendirilmesi

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ABSTRACT

This article is limited to value added tax and main types of value added tax frauds, the proportionality of measures taken by European Union Member States to prevent potential value added tax frauds scope of the basis of the case law. The article gives an overview on background of value added tax and main types of the value added tax fraud especially the Missing Trader Intra-Community (MTIC) Fraud or carousel fraud, as well as the main value added tax directives are used. The scheme of tax fraud is presented. However the study will give an outline of the deduction system and the rules about taxable persons. The author also gives review over the case law of the European Court of Justice and European Court of Human Rights. Finally, some research results, discussions, conclusions and comments are left to the end of the article.

Beyond explaining it in a basic manner, the study will elaborate on the issue with examples and diagram. Thus, this article will able to be an important resource for anyone who needs information on the types of VAT frauds and who has encountered problems in its practice.

Keywords: European Union, Value Added Tax Fraud, Missing Trader Intra-community Fraud/Carousel Fraud, Missing Trader Extra-community Fraud, Tax Credits, the Case Laws of the European Court of Justice and European Court of Human Rights.

ÖZET

Makale, katma değer vergisi ve başlıca katma değer vergisi kaçakçılığının türleri ile potansiyel katma değer vergisi kaçakçılığını engellemek için Avrupa Birliği Üye Devletlerinin almış olduğu orantılı önlemleri ve bu konudaki içtihatların kapsamı ile sınırlıdır. Çalışmada, katma değer vergisinin altyapısı ile birlikte Topluluk İçi Kayıp Tüccar (TİKT) Kaçakçılığı veya Döngüsel kaçakçılık gibi başlıca katma değer vergisi kaçakçılığı türleri ele alınmakta, önemli katma değer vergisi Direktifleri belirtilmekte ve vergi kaçakçılığının hangi yollarla yapıldığı anlatılmaktadır. Bununla birlikte çalışmada, vergi indirimi sistemi ve vergi yükümlüleri ile ilgili kurallardan genel hatlarıyla bahsedilmektedir. Yazar ayrıca, Avrupa Adalet Divanı ve Avrupa İnsan

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Hakları Mahkemesinin içtihatlarını değerlendirmektedir. Nihayetinde, bazı araştırma sonuçları, tartışmalar, çıkarımlar ve yorumlar makalenin bitiminde yer almaktadır.

Çalışma, konuyla ilgili temel bilgilerle sınırlı kalmayıp, şema ve örneklerin de bulunduğu ayrıntılı açıklamalar içermektedir. Dolayısıyla, bu makale katma değer vergisi kaçakçılığı türleri hakkında bilgiye ihtiyacı olan ve uygulamada sorunlarla karşılaşan herkes için önemli bir kaynak niteliği taşımaktadır.

Anahtar Kelimeler: Avrupa Birliği, Katma Değer Vergisi Kaçakçılığı, Topluluk İçi Kayıp Tüccar (Mükellef) Kaçakçılığı/Döngüsel Kaçakçılık, Topluluk Dışı Kayıp Tüccar Kaçakçılığı, Vergi İndirimi, Avrupa Adalet Divanı ve Avrupa İnsan Hakları Mahkemesi İçtihatları.

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1. Introduction

Value Added Tax (VAT) is almost recognized as the equivalent of contemporary taxation all over the world today. The VAT is the method of tax consumption of a product through the different stages of its production and distribution paid by the consumer (buyer) to the seller. In other words, even though the legal taxpayers are any individual, partnership, company or whatever which supplies taxable goods and services in the course of business at these stages, since the tax is being hidden within the price, legal taxpayers become intermediary tax subject and those actually liable aside from the consumer only undertake the procedural liability of the tax. The final tax bearer ends up being the end consumer. Thus, a triangular relationship forms between the seller, the buyer and the exchequer, in other words, a triangular diagram is established.

Moreover, the seller (taxable person) obtains the opportunity to deduct tax, levy on the values added at each stage, from the tax paid during purchase. The tax credit opportunity in question, has been believed to stop the tax from being a cost factor, preventing tax frauds and contributing to the economic development level. This situation separates VAT from other types of tax, and it has been recognized as the basic feature that makes it different and superior.[1]

Yet in time, due to changing economic conditions and circumstances, there has been some problems in practice about difficulty in voluntary compliance, false or misleading invoices and lack of auditing. And unfortunately, they cause various types of VAT fraud.

[1] Amand, Christian- Bocquez, Kris, "A New Defence for Victims of EU Missing-Trader Fraud?", International VAT Monitor, IBFD, Vol: 22, Issue: 4, 2011, p.234.

2. The Background of the European Value Added Tax System

The history of imposing VAT on goods and services bought has its roots in the European Union (EU) in 1967, can be applied to all goods and services as a rule in the EU, and relies on the generality, proportionality, collect from consumption, fractionally and tax credit rights. Its main aim was to bring all the factors of VAT among all Member States at the same level in the form of Directives so as to ease trade and improve the profit margins.[2] The main ones are these:

2.1. First and Second Council Directives

The First Council Directive 67/227/EEC, of 11 April 1967 to safeguard the interests of the Member States by coordinating the regulations of disclosure and the nullity of limited liability companies regarding legal information and the amount of subscribed capital.[3]

The Second Council Directive 67/228/EEC, of 11 April 1967 provided the details for the new VAT system like framework and operating procedure.[4]

2.2. Third, Fourth and Fifth Council Directives

Third Council Directive 69/463/EEC, of 9 December 1969 on the Harmonisation of Legislation of Member States Concerning Turnover Taxes Introduction of Value Added Tax in Member States was indicated the date of 1 January 1972 shall be substituted for that of 1 January 1970 laid down in Article 1 of the First Directive of 11 April 1967.[5]

Fourth Council Directive 71/401/EEC, of 20 December 1971 on the Harmonization of the Laws of the Member States Relating to Turnover Taxes - Introduction of Value Added Tax in Italy[6] and the Fifth Council Directive 72/250/EEC, of 4 July 1972 extended due date of from July 1st, 1972 to January 1st, 1973 for Italy.[7]

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2 Wolf, Redmar A., "VAT Carousel Fraud: A European Problem from a Dutch Perspective", Intertax, Vol: 39, Issue: 1, 2011, p.26.

3 First Council Directive 67/227/EEC, of 11 April 1967 on the Harmonisation of Legislation of Member States Concerning Turnover Taxes, OJ L71.

4 Second Council Directive 67/228/EEC, of 11 April 1967 on the Harmonisation of Legislation of Member States Concerning Turnover Taxes – Structure and Procedures for Application of The Common System of Value Added Tax, OJ L71.

5 Third Council Directive 78/855/EEC, of 9 October 1978 Based on Article 54 (3) (g) of The Treaty Concerning Mergers of Public Limited Liability Companies, OJ L295.

6 Fourth Council Directive 71/401/EEC, of 20 December 1971 on The Harmonization of the Laws of the Member States Relating to Turnover Taxes - Introduction of Value Added Tax in Italy, OJ L283.

7 Fifth Council Directive 72/250/EEC, of 04 July 1972 Relativo Alla Vendita Mediante Gara Di

2.3. Sixth Council Directive

The Sixth Directive 77/388/EEC, was adopted on May 17, 1977. The purpose of this Directive was being harmonized the different VAT regimes of the Member States' general tax on the consumption of goods and services relating to turnover taxes. This Directive applied to supply of goods and services, proportioned the price, whatever the number of transactions and made fractional payment with right of deduction.[8]

2.4. The White Paper from the Commission to the European Commission

These are documents contained the proposals for EU's actions in a specific area (The Removal of Physical Barriers, The Removal of Technical Barriers, The Removal of Fiscal Barriers). If the EU Council receives it, they are inclined to act in the area concerned.[9]

2.5. Council Directive 2006/112/EC, of 28 November 2006 on the Common System of Value Added Tax (Recast VAT Directive)

This amendment, implemented on November 28, 2006 by the EU coded the provisions that applied the common VAT system to apply to the production and distribution of goods and services bought and sold within the European Community.[10]

3. Main Types of the Value Added Tax Frauds

As is known, taxes have an enormous impact on the budget of revenues. Since the share of the VAT, a significant share of the indirect taxes and considered an economic intervention tool, within the budget of revenues increases from year to year, the need to closely examine the VAT application has arisen.

The complexity of VAT has made fraud to exist in many forms that are divided into different categories which further get divided into other different groups. The Missing Trader Intra-Community (MTIC) Fraud, commonly known

Burro a Prezzo Ridotto per L'esportazione di Talune Miscele di Grassi, OJ L162.

8 Sixth Council Directive 77/388/EEC, of 17 May 1977 on the Harmonization of The Laws of The Member States Relating to Turnover Taxes –Common System of Value Added Tax: Uniform Basis of Assessment, OJ L145.

9 White Paper from the Commission to The European Commission, 1985, http://europa.eu/documents/comm/white_papers/pdf/com1985_0310_f_en.pdf, Date Accessed: 20.03.2016.

10 Council Directive 2006/112/EC of 28 November 2006 on the Common System of Value Added Tax, OJ L347.

as the carousel fraud is one of the most important among all types of VAT frauds, which is an issue that should be examined within the scope of VAT and one that gets more complicated day by day, shows us that the belief that accounting records and documentation system could prevent tax fraud today remains antiquated, and manifests that the tax collected in the interim stages is being eradicated by the VAT credit mechanism.

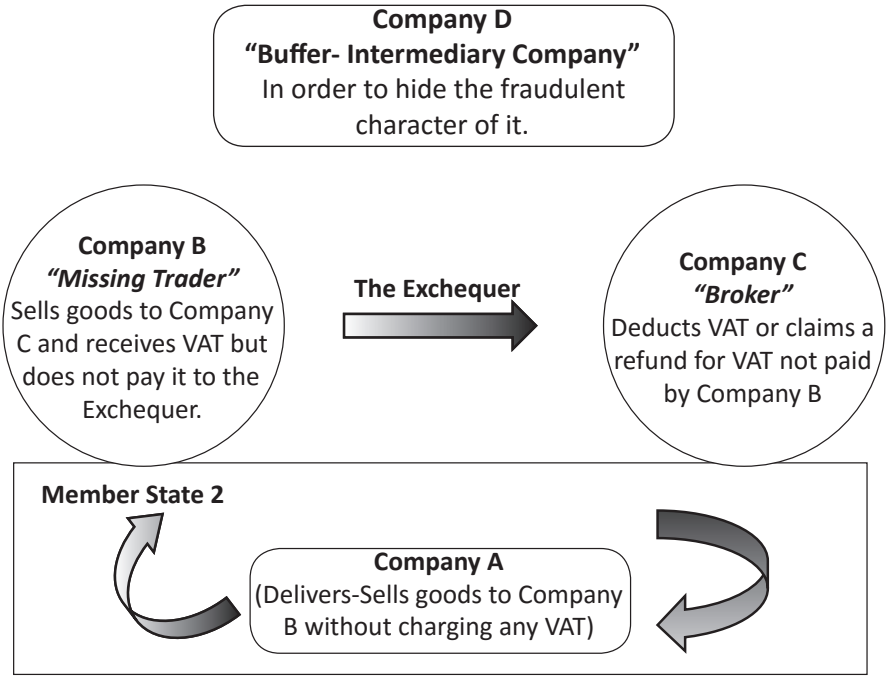
The removal of customs borders and controls in the EU Member States in 1993 facilitated this type of fraud, and it has led to unfair competition that has negatively impacted the functioning of the EU internal market and trade,[11] and it has been turning into an industry entrenched in the EU, also adversely impacting Turkey that is in the EU process within the framework of globalized trade.

3.1. Missing Trader Intra-Community (MTIC) Carousels/Carousel Fraud

This type of fraud occurs when the missing trader buys goods from a supplier in the EU, sells them to a business where (s)he will charge VAT for them and vanish without paying to the exchequer. The buying company sells the products to a second business where it charges VAT on the goods. A broker then buys the goods from the second business and sells than to an EU Member State and, therefore, does not have to pay for VAT. In brief, this cycle is repeated many times before trader goes missing and the fraud is found out. Eventually, it breaks VAT chain.[12]

[11] Aujean, Michel, "Harmonization of VAT in the EU: Back to the Future", EC Tax Review, Vol: 21, Issue: 3, 2012, p.136-137.

[12] European Commission, EU Coherent Strategy against Fiscal Fraud – Frequently Asked Questions, (MEMO/06/221), Bruxelles, 31 May 2006, http://europa.eu/rapid/press-release_MEMO-06-221_en.htm?locale=en, Date Accessed: 23.03.2016.



Source: EU Coherent Strategy against Fiscal Fraud – Frequently Asked Questions, (MEMO/06/221).

3.2. Missing Trader Extra-Community (MTEC)/Worldwide Carousels

MTEC are the frauds unique to tradable services between the EU Member States and other countries that are not Member States and between two third countries that have adopted the EU VAT system as a model.[13] To elaborate it more, the following should be put into consideration:

3.2.1. MTIC/MTEC Fraud in Carbon Carousels

These are the laws imposed to regulate carbon gas emissions (CO2) by the European Community to fulfill the Kyoto obligations put into place by the United Nations. The VAT fraud schemes reached the EU carbon market during the 2009 spring.[14] It is a one of step in the fight against carousel fraud and it is an international trade that fraudulent traders, making use of stolen

[13] Ainsworth, Richard T., "VAT Fraud: MTIC&MTEC- the Tradable Services Problem", Boston University School of Law Working Paper, Issue: 10-39, 2010, p.4-6.

[14] http://unfccc.int/kyoto_protocol/items/2830.php, Date Accessed: 23.03.2016.

VAT identification numbers, buy carbon credits tax-free in one EU Member State, sell them in another Member State, charge VAT for them and then after one or more transactions to local customers with VAT, quickly disappear or vanish without having paid the VAT to the exchequer, and there is no records or address on the trader.[15]

3.2.2. MTIC/MTEC Fraud in VoIP

MTIC/MTEC fraud in VoIP services is just like the carbon carousels above. These are service-based tax frauds that take place on the cloud or internet. When a business buys its VoIP connection duration without VAT, it leaves a leeway for committing a missing trader fraud through selling connection minutes domestically then failing to give the VAT returns.[16]

3.3. Other Types of VAT Frauds

Since the concept of tax fraud cannot be confined due to changing economic conditions and circumstances, it is also not possible to classify types of tax fraud with certainty. Even though the focus is primarily on two types of VAT fraud, as referred to in practice, it seems impossible to identify VAT fraud based on a single element. For this reason, below are mentioned some other types of VAT fraud that can be considered important:[17]

• Invalid deductions of input tax: False input tax invoices, or goods/services obtained for non-business use. There are many variants of this type of fraud.

• Nonpayment of output tax; including sales at lower than normal values. Once again there are many types.

• Acquisition fraud: Actually this type of fraud can be also categorized in MTIC fraud. The EU defines acquisition fraud as an unpaid taxes process that occurs when a "missing trader" purchases goods from a dealer in the EU. Because it is an international trade, the dealer who is an EU member does not

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15 Wolf, ibid., p.30; Please See for More Information: Ainsworth, Richard T., "CO2 MTIC Fraud -Technologically Exploiting the EU VAT (Again)", Boston University School of Law Working Paper, Issue: 10-01, 2010; Wolf, Redmar A., "The Sad History of Carbon Carousels", International VAT Monitor, Vol: 21, Issue: 6, 2010. http://online.ibfd.org/kbase/#topic=doc&url=/highlight/collections/ivm/html/ivm_2010_06_e2_3.html&q=carbon+carousel+carbons+carousels&WT.z_nav=Search&colid=4947, Date Accessed: 23.03.2016.

16 Ainsworth, Richard T., "VoIP MTIC-The Italian Job (Operazione "Phuncards-Broker")", Boston University School of Law Working Paper Nr. 10-09, 2010.

17 International VAT Association, Combating VAT Fraud in the EU – the Way Forward, Bruxelles, 2007.

have to pay for taxing and the buyer then fails to render tax returns on the goods acquired to exchequer, therefore, disappearing because there was no records or address on the trader.

4. Case Laws of the Value Added Tax Frauds

4.1. Case Laws of the European Court of Justice

Ever since the European Court of Justice was established in 1952, it has been called upon to preside over various cases and present judgments on the interpretation and application of the treaties establishing the European Union between national governments, individuals, companies or organizations and EU institutions.[18]

However, this judicial body was formed so as to restrict the possibilities of Member States to implement measures withstanding VAT. It regards all transactions in a transaction chain on an individual basis as in the "Optigen and others" case law[19] and applies legislation for the joint and several liabilities as in the case of "Federation of Technological Industries and Others"[20], so they do not interfere with the main principles of law. Companies are considered liable for fraud if they do not exercise good faith and innocence in their transaction chain as in the case of "Axel Kittel and Recolta Recycling"[21].

4.2. Case Laws of the European Court of Human Rights

The European Court of Human Rights was an international court established in 1949 and set up in 1959. The Convention for the Protection of Human Rights and Fundamental Freedoms, best known as "European Convention on Human Rights", which was signed in 1950, entered in force in 1953. It rules on individual or State applications alleging violations of the civil and political rights set out in the European Convention on Human Rights. "The protection of property" is one of the most important right in the Convention.[22]

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18 http://curia.europa.eu/jcms/jcms/Jo2_6999/, Date Accessed: 23.03.2016.

19 In Joined Cases Optigen Ltd (C-354/03), Fulcrum Electronics Ltd (C-355/03) and Bond House Systems Ltd (C-484/03), Judgment of the Court (Third Chamber), 12 January 2006.

20 Federation of Technological Industries and Others (C-384/04) Judgment of the Court (Third Chamber) 11 May 2006.

21 In Joined Cases Axel Kittel (C-439/04) and Recolta Recycling SPRL (C-440/04) Judgment of the Court (Third Chamber), 6 July 2006.

22 http://www.echr.coe.int/Pages/home.aspx?p=court&c=#newComponent_1346149514608_pointer, Date Accessed: 23.03.2016.

4.2.1. Case of "Bulves" Ad v. Bulgaria

The European Court of Human Rights disclosed that a VAT payer should not be liable for the VAT frauds committed by its suppliers if it has no idea of the frauds or the means through which the fraud is committed. The court held that "there has been a violation of Article 1 of Protocol No.1 to the Convention". So Bulgaria was found innocent of violating the sixth council derivative.[23]

4.2.2. Case of Business Support Centre v. Bulgaria

In the case of Case of Business Support Centre v. Bulgaria, it was a reaffirmation of the findings and ruling on Case of "Bulves" Ad v. Bulgaria by the European Court of Human Right Case Law.

The European Court of Human Rights declared admissible the complaint under Article 1 of Protocol No. 1 to the Convention and ruled Bulgaria innocent of violating the sixth derivative of it was not aware of the frauds committed by the Business Support Center in providing its services.[24]

5. Research Results

5.1. Results of Background of the European Value Added Tax System, Regulations and Main Types of the Value Added Tax Fraud

The VAT has been adopted as an indirect tax based on the consumption model and levy at each stage from production to consumption, for each value added to the goods or services making it an alternative to new taxing all over the world, and protect the interests of limited liability companies within the Member States. The discourse concerning VAT regulation and their implication for the welfare of businesses has caught the eye of policy makers and researchers throughout the globe. More interestingly, current reports highlight the state of the scenario in the Member States, where micro-businesses have officially protested against the VAT laws, which they say could compel them to reconsider conduction their business activities within Europe. In a nutshell, VAT delineates a consumption tax charged by the national government on business activities that take place within the EU.

It should not be undermined that VAT is a compulsory provision augmented by the objective law of the country. This charge is legally imposed on both

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[23] European Court of Human Right, Case of "Bulves" Ad v. Bulgaria, Application Nr: 3991/03, 22 April 2009.

[24] European Court of Human Right, Case of Business Support Centre v. Bulgaria, Application Nr. 6689/03, 18 March 2010.

goods and services handled by registered merchandises and those imported from destinations that fall out of the EU. There are multifaceted regulations for goods and services imported from the states within the EU.

It is well founded that not all business and dealing observe the VAT rule within the EU. The scenario becomes more prominent bearing in mind recent reports that demonstrate how the EU loses billions of earning because of VAT frauds, tax evasions, and tax avoidances.

Considering that the current VAT system in the EU is susceptible to fraud, while it can be observed that the "tax losses- tax gap" in the EU can be up to 100 billion Euros per annum, in particular, according to the EU Commission, VAT fraud is unheard of and accounts for 193 billion Euros in losses incurred by the EU in trading. However, it is also noted that this assessment is a highly speculative estimate based on a limited range of country-specific studies, and it is not possible to know the exact magnitude of the VAT losses.[25]

The theory finds its statistical backing in findings that highlight that, the fraudsters have turned it into a lucrative business venture, and it covers approximately 40% of these are considered to be a particular type of fraud, "Missing Trader Intra-Community" or "Carousel Fraud".[26] While the EU's losses and damages due to carousel fraud can be an annual 100 billion Euros according to the best estimates, it is expressed as 127 million Euros per day. For example, according to the latest study conducted in 2013-2014 in the UK, VAT losses arising from fraud are 13.1 billion Pounds per annum, and the losses caused by carousel fraud varies around 0.5 to 1.0 billion Pounds.[27]

It should not go unnoticed that the principal contributor to this loss is often due to tax fraud, which occurs in many ways. The first form of fraud occurs where registered businesses pay lesser VAT than they should. The next, which is illegal too, occurs when businesses overstate purchases or understate sales. Businesses that fail to charge VAT on goods and services that should be charged as well as cash in hand jobs also contribute to the increasing rate of VAT fraud.

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[25] Griffioen, Menno - van Dijk RA, Lisette van der Hel, "New European Approach to Combat VAT Fraud?", Intertax, Vol: 42, Issue: 5, 2014, p.298.

[26] Ainsworth, Richard T., "American VAT-The Carousel Fraud Threat: Will the EU Show the Us the Way Forward", Boston University School of Law Working Paper, Issue: 13-37, 2013, p.1.

[27] HM Revenue & Customs, "Measuring Tax Gaps 2015 Edition Tax Gap Estimatesfor2013-14", https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/470540/HMRC-measuring-tax-gaps-2015-1.pdf, Date Accessed: 03.12.2015.

More prominently is the increasing rate of carousel frauds in the EU. This type of fraud, otherwise termed as Missing Trader Intra-Community fraud, happens when criminal culprits trade products such as mobile phones, computer chips in countries throughout the EU.[28] Such goods are excepted from VAT bearing in mind that all EU produced are excluded. The fraud, however, occurs when such individuals sell the products with VAT within the EU but fail to surrender the VAT to the tax administration. These products are traditionally taken through recurrent shipments throughout the EU by networks of gangs, hence the term 'carousel fraud.'

5.2. Results of Case Laws of the Value Added Tax Frauds

5.2.1. Case Laws of the European Court of Justice

5.2.1.1. Knowledge Test

Among cases of carousel fraud cases handled by the European Court of Justice include Optigen Ltd., Bond House Systems Ltd., and Fulcrum Electronics Ltd. versus Customs and Excise Commissioner, Axel Kittel versus Belgium State, and Belgium State versus Recolta Recycling. These cases differ in facts. However, all of them represent scenarios where the court concluded that tax authorities have the mandate to claim repayments of deducted sums retrospectively where they realize that the right to deduct has been executed fraudulently. For example, the grudges of the first case concluded that the mandate to reduce the input value VAT of the taxable entity which implements such dealings cannot be affected by the notion that in the supply chain of which the transaction constitute another subsequent or prior transaction is vitiated by VAT fraud, without the taxable entity knowing or having any way of knowing. The right to reduce, as provided in Article 17 et seq. (Sixth Directive) was noted to be a notable part of the VAT system and that it may not be limited in principle.

5.2.1.2. Joint and Several Liabilities (Commissioners of Customs & Excise and Attorney General versus Federation of Technological Industries and Others)

The ruling of this case implies that the implementing recovery includes another group of debtors (other than the generic tax debtor) that is based on joint liability, subsidiary liability, or co-debtor liability limited to any entity as

[28] Brederode, Robert F. van- Pfeiffer, Sebastian, "Combating Carousel Fraud: The General Reverse Charge VAT", International VAT Monitor, IBFD, Vol: 26, Issue: 3, 2015, p. 146.

stipulated by the applicant states legislation for the resolution of tax litigations. For instance, the European Court of Justice translated community directives in the VAT area and concluded that a taxable entity (to whom the supply of service or good has been made) who had reasonable grounds for suspicion or knows that the VAT payable to the supply or any subsequent or previous supply would have gone unpaid may be made severally or jointly liable with the entity who is liable for the VAT payment.[29]

5.2.2. Case Laws of the European Court of Human Right

Meanwhile, it is arguable that VAT payers are not entitled to a tax credit and VAT refund where their suppliers fail to declare their tax liability of seemingly fictitious companies. Business Support Centre v. Bulgaria represents a scenario where the European Court of Human Rights argued that the VAT payer was not to be held responsible for the violations of its suppliers in cases where it lacks knowledge of this violation or ways to gain such information.

6. Conclusions and Comments

Tax fraud is a problem that extends beyond the Member States' legislation and national boundaries. There are different ways to classify VAT frauds. The VAT fraud can be miscellaneous but it is helpful to categorise them into three broad categories: Missing Trader Intra-Community (MTIC) Carousels/Carousel Fraud, Missing Trader Extra-Community (MTEC)/ Worldwide Carousels and other types of VAT Frauds.

Carousel fraud consists of contrived circular chains of transactions most commonly involving small, high value goods that are easy to transport such as mobile telephones and computer chips, etc. There are many variations on the series of transactions possible in a carousel fraud. The problem for the tax authorities however fundamentally remains the same: large unpaid VAT liabilities and corresponding VAT repayment claims.

The possibility of trading with an MTIC/MTEC Fraud in Carbon Carousels, in other words, carbon emission (CO2) allowances is essential for the EU's fulfillment of its Kyoto obligations. However, the obstacles of stopping VAT fraud are not easily solved. Before the EU Directive 2010/23/EU[30] allowing

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[29] Podlipnik, Jernej, "Missing Trader Intra-Community and Carousel VAT Frauds- ECJ and ECtHR Case Law", Croatian Yearbook of European Law and Policy, Vol: 8, 2012, p.469-470.

[30] Council Directive 2010/23/EU of 16 March 2010 amending Directive 2006/112/EC on the common system of value added tax, as regards an optional and temporary application of the reverse charge mechanism in relation to supplies of certain services susceptible to

the reverse charge as a temporary solution, Member States chose several different approaches to solving the problem. It is clear that simple solutions do not exist. However, there are other possible means to address the problem of VAT fraud on EU Emission Allowance.

It is possible to view missing trader fraud in intra-community "export-import" and extra-community transactions about VoIP services the same way as it is with CO2 permits. If a business can buy its VoIP connection durations "without VAT" creates a shortcut for committing missing trader fraud. A potential fraudster acquires its VoIP connection minutes without VAT in agreement with the rules of the relevant supplier. The only thing that the buyer (VoIP agent) has to do is resell the connection minutes domestically and abscond, taking the VAT with him, to complete the fraud.

So far discussed in the cases from the European Court of Justice, the Court restricts the Member States possibilities to implement measures to withstand VAT fraud. According to Optigen and Others Case Law, all transactions in a transaction chain are regarded individually with the VAT. Implementing legislation for joint and liability cannot interfere with the fundamental principles of law, especially legal certainty and proportionality (Federation of Technological Industries and Others Case Law). As long as companies are in good faith and innocent, they are not liable for fraud within their transaction chains (Axel Kittel and Recolta Recycling Case Law).

However, it is important to note that once the court proves that the parties involved in the case are "innocent parties" that they did not have information and could not have known that they are being involved in a carousel fraud; the European Court of Justice will act according to the "proven fact." Nevertheless, it is not explicitly clear what the court case implies by the term "innocent". The term may imply that the offence cannot be imputed to the concerned party but in this case, this does not mean that the interested party did not know that it was involved in "extraordinary" transactions. Nevertheless, it can still be said in conclusion that what is implied but not clearly highlighted by the European Court of Justice is that only the party. Therefore, any taxpayer deliberately involved in carousel fraud will not benefit from input VAT deduction. Moreover, the right of taxpayers to defend themselves strongly in the carousel cases is considered a significant achievement.

In summary, it is observed that the European Court of Justice's

fraud, OJ L72.

understanding is based on a "test of knowledge". Accordingly, a taxpayer who is known for certain to be involved in fraud or who has tacit knowledge of the fraud shall either be deprived of his right to an input VAT deduction or shall be jointly and severally liable to pay to the exchequer the amount of VAT that has been evaded. The European Court of Human Rights, whose interpretations are parallel to the opinion of the European Court of Justice, has essentially stated the same thing in cases brought before it. Accordingly, if the taxpayer does not in any way have the opportunity or means to obtain information and view the VAT observance or guarantee methods of the person who is evading VAT (tacit knowledge) or such information does not exist about that person (factual knowledge), his right to an input VAT deduction will remain.[31]

Thus, in accordance with the rules that apply to EU Member States and State Parties to the European Court of Human Rights; taxpayers must act cautiously, rigorously and prudently in commercial transactions in which VAT must be paid just as required from a prudent trader. They should take all kinds of sensible precautions concerning VAT fraud within the normal course of trade. Only as long as they behave this way will they be exempt from VAT and not be deprived of their right to input VAT deduction. On the other hand, this solution creating a restriction mostly on tax administrations will not be sufficient in preventing MTIC fraud or carousel fraud because they will not be able to make innocent and well-intentioned taxpayers who are only a part of this type of chain of transactions pay the evaded VAT. Sooner or later, a more permanent solution must be put in place, what is implied with the term "innocent" must be fully clarified and it must be determined clearly whether or not an offence can be legally attributed to the party who is referred to using the term in question.

Within this period, fraudsters have always shown an ability to find new ways of defrauding once a new measure is introduced to reduce or eliminate their activity. Especially, carousel fraud is a community problem. The act of any Member State alone will not be able to enough to fight the fraud effectively. There is need for administrative changes within the framework of the existing VAT system. To fight the VAT fraud efficiently, the instruments and the legal framework in the field of administrative cooperation between Member States must be reinforced, improved and complemented.

These cases will of course affect the way the EU and different Member States work towards a solution to the problem of MTIC/Carousel Fraud. Because the scale of carousel fraud grows every day, VAT loss of the Member

[31] Podlipnik, ibid., p.471-472.

States grows accordingly. It will be beneficial to reconsider this situation within the scope of the taxation of intra-community supply because a financial crisis that is likely to be faced any moment can already decrease the VAT income of the Member States.

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THE ICRC'S FORMULATION OF THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES: A CRITICAL LEGAL ANALYSIS

Uluslararası Kızılhaç Komitesi'nin Çatışmalara Doğrudan Katılım Kavramına İlişkin Ortaya Koyduğu Çerçeve: Eleştirel Bir Hukuki İnceleme

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ABSTRACT

The International Committee of the Red Cross (ICRC) invited a group of experts to The Hague to clarify the meaning and scope of the notion of "direct participation in hostilities" (DPH) in 2003.[1] This attempt took more time than expected and produced the ICRC's Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (the Interpretative Guidance) in May 2009.[2] However, the outcome of this entire process lacks consensus among the experts who participated in the working group meetings[3] as a significant number of them are of the opinion that the Interpretative Guidance does not correctly maintain the balance between military necessity and humanitarian concerns.[4] Because the ICRC's formulation of DPH is not in accordance with this generally accepted balance, which reflects the spirit of all international humanitarian law (IHL) norms, the Interpretative Guidance has been widely criticized by legal experts and scholars as will be discussed in this essay.

Keywords: the International Committee of the Red Cross, Direct Participation in Hostilities, International Armed Conflicts, Non-international Armed Conflicts.

ÖZET

Uluslararası Kızılhaç Komitesi, "çatışmalara doğrudan katılım" kavramının anlam ve kapsamını netleştirmek için 2003 yılında, uzmanlardan oluşan bir grubu Lahey'e davet etti. Bu teşebbüs, beklenenden uzun bir zaman aldı ve 2009 yılının Mayıs ayında

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1 ICRC, Overview of the ICRC's Expert Process (2003-2008), at 3, available at https://www.icrc.org/eng/assets/files/other/overview-of-the-icrcs-expert-process-icrc.pdf (last visited 30 December 2015).

2 ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (Nils Melzer ed., 2009), available at https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf (last visited 30 December 2015).

3 ICRC, *Overview, supra* note 1, at 4.

4 Schmitt, "The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis", 1 *Harv. Nat'l Sec. J.* (2010) 5, at 6.

Uluslararası Kızılhaç Komitesi, "Uluslararası İnsancıl Hukuk'ta Çatışmalara Doğrudan Katılım Kavramına İlişkin Yorumlayıcı Kılavuz"u yayınladı. Ancak çalışma toplantılarına katılan uzmanların büyük bir bölümünün, Yorumlayıcı Kılavuz'un askeri gereksinim ve insani kaygı arasındaki dengeyi doğru şekilde kuramadığı düşüncesinde oldukları ve bütün bu süreç boyunca uzmanlar arasında fikir birliği sağlanamadığı görüldü. Uluslararası Kızılhaç Komitesi'nin çatışmalara doğrudan katılıma ilişkin ortaya koyduğu çerçevenin Uluslararası İnsancıl Hukuk kurallarının ruhunu yansıtan bu genel kabul görmüş dengeye uygun olmaması, Yorumlayıcı Kılavuz'un, bu makalede ele alındığı üzere, hukukçular ve akademisyenler tarafından ciddi bir biçimde eleştirilmesine neden oldu.

Anahtar Kelimeler: Uluslararası Kızılhaç Komitesi, Çatışmalara Doğrudan Katılım, Uluslararası Silahlı Çatışmalar, Uluslararası Olmayan Silahlı Çatışmalar.

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I. Concept of "civilian" in the context of direct participation in hostilities: membership approach vs. functional criteria

The principle of distinction is enshrined in Articles 48, 51(2) and 52(2) of Additional Protocol I (AP I)[5] and requires parties to a conflict to distinguish peaceful civilians from members of organized armed groups and those taking a direct part in hostilities. Although Additional Protocol II (AP II)[6] includes a prohibition on making civilians the object of attack in Article 13(2), it does not directly refer to the principle of distinction. However, the jurisprudence of the International Court of Justice, of the Inter-American Commission on Human Rights, and of the International Criminal Tribunal for the former Yugoslavia clearly reveals that the principle of distinction is of customary character in both international and non-international armed conflicts and is one of the cardinal principles of IHL.[7]

Determining who qualifies as a civilian is not only important in terms of the principle of distinction, but also necessary for DPH as this only applies to civilians. This will be explained separately in relation to international armed conflicts and non-international armed conflicts.

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5 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 12 December 1977, 1125 *UNTS* 3.

6 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, 8 June 1977, 1125 *UNTS* 609.

7 International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, paras. 78-79; Inter-American Commission on Human Rights, Case 11.137 (Argentina), Report, 18 November, 1997, para. 177; International Criminal Tribunal for the former Yugoslavia, Prosecutor v. *Blaškić,* Case No. IT-95-14-T, Judgement, 3 March 2000, para. 180.

A. International armed conflicts

According to Article 50 (2) AP I, civilians are defined negatively under the membership approach as those who are not members of regular armed forces of State or irregular armed forces such as militia, voluntary corps, and paramilitary armed forces integrated into State armed forces, or *levée en masse* (resistance movements) belonging to a party to the conflict. According to this approach, civilians can be determined by simply distinguishing them negatively from members of listed groups. However, as required in non-international armed conflicts, the Interpretative Guidance proposes the same functional criteria used to determine the members of irregular armed forces (discussed below) also be applied to international armed conflicts.

B. Non-international armed conflicts

Civilians in non-international armed conflicts can also simply be defined as all those who are not members of organized armed groups whether State or non-State in character. Although the ICRC accepted this approach at the first meeting in 2003 and in its Customary International Law Study,[8] it then came to a different conclusion in its Interpretative Guidance. The Interpretative Guidance provides a distinction between State armed forces and non-State organized armed groups when establishing membership. According to this, as domestic laws generally do not regulate the membership to non-State organized armed groups and such membership occasionally hinges on an act of official integration or identification, only those individuals performing a "continuous combat function" should be considered as members of non-State organized armed groups.[9] Therefore individuals who do not continuously participate in hostilities and individuals who exercise non-combat function such as political and administrative personnel, recruiters, trainers, financiers, propagandists, weapon suppliers, manufacturers, smugglers, and intelligence collectors are not qualified as members of non-State organized armed groups and remain civilians.[10]

First of all, since the above listed persons who performed the same function would still be targetable as members of State armed forces, States will never accept such a higher threshold that benefits non-State organized armed groups. It is also illogical to introduce such a double standard that asks what functions members of non-State organized armed groups are performing, but does not ask the same question for members of State armed forces. Why

8 ICRC, Customary International Humanitarian Law, Vol. 1 (Henckaerts & Doswald-Beck eds., 4th ed. 2005) at 19.

9 ICRC, *Interpretative Guidance*, *supra* note 2, at 34-35.

10 *Idem*, at 31, 36.

should the cook of a non-State organized armed group be treated differently from the cook of a State armed force based on the function criterion? It should always be kept in mind that IHL must be applicable to parties to a conflict equally; otherwise no commander will be able to convince his fighters to comply with the rules. Secondly, the function criterion does not satisfactorily define civilians. For instance, when you see someone preparing a meal, does it mean that this person is doing this 24/7? It is almost impossible to distinguish the respective function someone has in a group. Thirdly, the Interpretative Guidance has inaccurate qualification of *levée en masse* as neither civilians nor members of the armed forces that does not based on any treaty or customary rule.[11] In conclusion, the ICRC seems to be trying to establish a new rule by introducing the term "continuous combat function", which is not even found in treaty law, rather than correctly reflecting customary law in the determination of who is a civilian. Therefore, the distinctive criterion in the definition of civilians should be non-membership of both organized armed groups whether State or non-State in character and *levée en masse* regardless of any functional criteria that is proposed by the ICRC for non-State organized armed groups.

II. Constitutive elements of direct participation in hostilities

It should be noted from the beginning that as long as there is no sufficient reliable information on whether a specific civilian's conduct qualifies as DPH, the conduct must be presumed as not amounting to DPH in accordance with the rule of doubt.[12] Therefore an individual enjoys protection as a civilian unless his conduct amounts to DPH without doubt.

The Interpretative Guidance requires the following three criteria to be met cumulatively in order for the conduct of an individual to qualify as DPH.

A. Threshold of harm

The threshold of harm required for conduct to qualify as DPH in hostilities would not only be reached by inflicting damage, destruction, killing, or injury, but also by adversely affecting the military operations or military capacity of a party to the conflict by, for example, depriving of the military use of certain objects, equipment or territory.[13] However, merely inconveniencing the enemy does not meet the threshold. The likely consequence of an act must be of sufficiently severe in order to reach the required threshold. However, this

11 *Idem*, at 25.
12 *Idem*, at 75.
13 *Idem*, at 48.

ambiguous threshold is criticized by Bosch[14] due to the fact that it is under-inclusive and unduly difficult to satisfy.

The Interpretative Guidance states that if a specific act is designed to, or capable of, inflicting harm that meets the threshold, then it is irrelevant whether the harm materializes or not.[15] Therefore, the consideration of the first criterion should be the objective likelihood of the act to result in such harm.

B. Direct causation

It is correctly stated in the Interpretative Guidance that "there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part."[16] The term "likely" means that which can be reasonably expected to result from an act in the prevailing circumstances.[17] Contrary to the position taken in the Interpretative Guidance, the term "direct" should be understood as a sufficiently close causal relation.[18] However, the ICRC took this concept a step further and interpreted the direct causal link quite narrowly by introducing the concept of "one causal step" [19] and by excluding all uninterrupted causal chains of events.[20] According to this, there is no direct causal link between the act of assembling improvised explosive devices (IEDs) and the harm likely to result from that act.[21] It is clear that the ICRC in its Interpretative Guidance strived to limit the scope of DPH, but has not reflected reality. Although the ICRC's notion of one causal step may make sense in theory, as has been indicated by Boothby,[22] it is difficult to apply this notion in practice because attacks in modern conflicts are achieved through a multiplicity of integrated steps. The ICRC's approach has also been rightly criticized by Watkin[23] as such a narrow interpretation of the rule creates a

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14 Bosch, "The International Humanitarian Law Notion of Direct Participation in Hostilities - A Review of the ICRC Interpretive Guide and Subsequent Debate" 17 *Potchefstroom Elec. L.J.* (2014) 998, at 1011.

15 ICRC, *Interpretative Guidance*, *supra* note 2, at 47.

16 *Idem*, at 51.

17 *Idem*, at 47.

18 Van Der Toorn, "'Direct Participation in Hostilities': A Legal and Practical Road Test of the International Committee of the Red Cross's Guidance through Afghanistan" 17 *Austl. Int'l L.J.* (2010) 7, at 24.

19 ICRC, *Interpretative Guidance*, *supra* note 2, at 53.

20 *Idem*, at 54.

21 *Ibid.*

22 Boothby, "Direct Participation in Hostilities - A Discussion of the ICRC Interpretive Guidance" 1 *J. Int'l Human. Legal Stud.* (2010) 143, at 159.

23 Watkin, "Opportunity Lost: Organized Armed Groups and The ICRC 'Direct Participation in

major threat against both civilians and security forces. As has been stated by Dinstein,[24] equipping the enemy with specific means of harm, such as assembling IEDs or transporting certain equipment not too remotely from combat operations to persons who plan to attack somewhere, may also qualify as DPH. Therefore, direct causality should not be limited to the notion of "one causal step". However, it does not mean that indirect causalities should be included. As has been rightly stated by Van Der Toorn,[25] the term "direct" should be understood as sufficiently close causal relations according to the facts on the ground.

Before passing on to the issue of human shields, one more controversial thing needs to be clarified about the assembly of IEDs. One may ask what distinguishes the person who assembles IEDs from the munitions factory worker. As has been indicated by Dinstein,[26] the worker does not specifically know when, where, and against whom the munitions will be used, but the person who assembles IEDs is much more closely linked to the actual delivery of the device to the objective.

The issue of human shields was another point that led to disagreement during the expert meetings.[27] In the context of human shields, the ICRC says that acting voluntarily and deliberately as a human shield in order to create a physical obstacle to military operations of the adversary can satisfy the direct causation criterion,[28] but, if the shield amounts only to a legal obstacle to military operations of the adversary, it is not causally direct.[29] However, there is no rule under IHL that requires such distinction. Schmitt criticizes[30] the ICRC's view and indicates that the legal obstacle is often even more effective than the physical one. He further states that this allowance of intentional misuse of the law's protective provisions creates a great risk that respect for IHL will

Hostilities' Interpretive Guidance" 42 *International Law and Politics* (2010) 641, at 680.

24 Dinstein, "Direct Participation in Hostilities" 18 *Tilburg L. Rev.* (2013) 3, at 9, 11.

25 Van Der Toorn, *supra* note 18, at 24.

26 Dinstein, *supra* note 24, at 11.

27 ICRC, Summary Report of the Second Expert Meeting on the Notion of Direct Participation in Hostilities (25 / 26 October 2004), at 6, available at https://www.icrc.org/eng/assets/files/other/2004-07-report-dph-2004-icrc.pdf (last visited 30 December 2015); ICRC, Summary Report of the Fourth Expert Meeting on the Notion of Direct Participation in Hostilities (27 / 28 November 2006), at 44, available at https://www.icrc.org/eng/assets/files/other/2006-03-report-dph-2006-icrc.pdf (last visited 30 December 2015); ICRC, Summary Report of the Fifth Expert Meeting on the Notion of Direct Participation in Hostilities (5 / 6 February 2008), at 70, available at https://www.icrc.org/eng/assets/files/other/2008-05-report-dph-2008-icrc.pdf (last visited 30 December 2015).

28 ICRC, *Interpretative Guidance*, *supra* note 2, at 56.

29 *Idem,* at 57.

30 Schmitt, *supra* note 4, at 32.

be undermined.[31] Therefore, if a party to the conflict can determine that persons are posing as human shields voluntarily, their act should be deemed qualifying as DPH regardless of the physical or legal character of the obstacle. Attention should be paid to whether there is a sufficient reasonable ground indicating the voluntariness of human shields. In cases of doubt, participants must be treated as involuntary human shields and remain protected civilians. Therefore, an attack on a military objective that is shielded involuntarily by civilians would only be possible if incidental loss (in other words collateral damage) would not exceed the anticipated military advantage. According to the author, the threshold of excessive collateral damage should be higher in this situation as involuntary human shields are resorted in order to take military advantage via violating IHL.[32] It should lastly be noted that the term 'excessive' implies a higher threshold than 'extensive' or 'disproportionate'.

C. Belligerent nexus

According to the Interpretative Guidance, the belligerent nexus requirement would be satisfied if an act, which meets the first two criteria, was "specifically designed in support of a party to an armed conflict and to the detriment of another".[33] First of all, as Schmitt indicates,[34] the term "and" used in the statement of the ICRC should be altered to the term "or" because it is possible to conduct an attack against one party without intending to assist its opponent. Secondly, although it is stated in the Interpretative Guidance that the determination of the belligerent nexus is related to the objective purpose of the act, it would still be not expectable from a reasonable commander in practice as has been indicated in the Interpretative Guidance.[35] The focus, therefore, should be on whether the conduct is objectively capable of inflicting harm either depriving a party to the conflict of certain advantages or promoting the military efforts of another. Consequently, the criterion should be interpreted widely and from the perspective of the person called on to make the determination of the belligerent nexus by considering information reasonably available to him.

III. Duration of direct participation in hostilities

According to the Interpretative Guidance, the duration of DPH covers

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31 *Idem,* at 33.

32 For an in-depth analysis on voluntary human shields, see Lyall, "Voluntary Human Shields, Direct Participation in Hostilities and the International Humanitarian Law Obligations of States", 9 *Melb. J. Int'l L.* (2008) 313.

33 ICRC, *Interpretative Guidance*, *supra* note 2, at 58.

34 Schmitt, *supra* note 4, at 34.

35 ICRC, *Interpretative Guidance*, *supra* note 2, at 63.

the entire period of a specific act that is beyond the phase of its immediate execution. It starts with preparatory measures and lasts during the deployment to, and the return from, the location of its execution.[36] For instance, a farmer will be directly participating in hostilities while he is on his way to plant an IED and is returning from doing so.

According to Article 51 (3) AP I and Article 13 (3) AP II, civilians enjoy full immunity from direct attacks unless (material aspect) and for such time (temporal aspect) they directly participate in hostilities. However, the Interpretative Guidance was not content with this customary rule and introduced the new concept of the "revolving door".[37] According to this, an individual will enjoy protection after each specific act even though he commits the same act on a regular basis.[38] For instance, if the farmer goes to plant IED every single night, the Interpretative Guidance says that he still enjoys protection after completing each specific act. However, the conduct should be considered as a whole, rather than specific acts. Otherwise, as Von Der Toorn rightly stated,[39] the farmer in our example would be in the privileged position of being able to continually change his status in a manner that is not in accordance with the spirit of IHL. Consequently, as has been indicated by Boothby,[40] an individual who commits specific attacks on a recurring basis loses protection not only during the entire period of the specific act, but also on a continuous basis unless there is an overt renunciation of participation in hostilities. The form of renunciation may vary depending on the circumstances and it may appear as unambiguous opting out, an affirmative act of withdrawal or extended nonparticipation. In conclusion, the revolving door approach that is introduced in the Interpretative Guidance is not in accordance with treaty law and customary IHL.

IV. Conclusion

The Interpretative Guidance itself provides that the notion of DPH must be understood in accordance with interpretation rule found in Article 31 (1) Vienna Convention on the Law of Treaties[41], as the concept is not clearly defined in treaty law or clarified through state practice and international jurisprudence.[42] Contrary to this, the ICRC seems to be endeavoring to create law in its Interpretative Guidance by introducing new concepts such

36 *Idem,* at 65.
37 *Idem,* at 70.
38 *Idem,* at 71.
39 Van Der Toorn, *supra* note 18, at 15.
40 Boothby, *supra* note 22, at 162.
41 1155 *UNTS* 331.
42 ICRC, *Interpretative Guidance*, *supra* note 2, at 27.

as "continuous combat function", "one causal step", and "revolving door" which do not exist in treaty law or customary IHL. In addition, its treatment of some specific issues such as voluntary human shields and the assembly of IEDs will most probably be rejected by States that engage in conflict on a frequent or intense scale. Therefore, the Interpretative Guidance interprets the notion of DPH in favor of non-State organized armed groups in a manner that States will never agree to. One may claim that the Interpretative Guidance strives to interpret the notion of DPH from the perspective of equity and therefore benefits non-State organized armed groups. However, as has been indicated by Pirim,[43] since the scope and consequences of equity is ambiguous, it cannot be seen as a source of international law. Furthermore, the Interpretative Guidance does not correctly maintain the balance between military necessity and humanitarian concerns. Therefore, as has been explained above in the light of scholarly critiques, it can be concluded that the Interpretative Guidance does not correctly reflect treaty law and customary IHL in the matter of DPH.

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[43] Pirim, "The Normative Character of Equity in International Law" 26 *Turkish Justice Academy Journal* (2016) 169, at 195.

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DAS TÜRKISCHE MEDIATIONSSYSTEM BEI DER SCHLICHTUNG DER RECHTSSTREITIGKEITEN

Hukuk Uyuşmazlıklarında Türk Arabuluculuk Sistemi

Priv. Doz. Dr. Murat ERDEM[1]

ZUSAMMENFASSUNG

In seinem Kernbereich stellt die Mediation einen Lösungsweg in die Richtung auf die Beilegung von Rechtsstreiten dar. Die Mediation-Tätigkeit wird als einen Beruf von den Juristen übernommen. In diesem Sinne wird derer Kompetenz ausschließlich dem Mediator anerkannt. Die Rechten und Pflichten von Mediatoren, genauso die Methoden und die Maximen vermitteln uns Information über den Zweck und Verlauf der Mediation**.**

Schlüsselwörter: Mediation, Mediator, Verlauf Der Mediation, Maximen in Der Mediation.

ÖZET

Türk Hukukunda Arabuluculuk; temelde hukuk uyuşmazlıklarının çözümüne yönelik bir başvuru yöntemidir. Arabuluculuk faaliyeti hukukçulara özgülenen bir meslek olarak arabulucu tarafından yerine getirilebilir. Bu anlamda yetki tekel olarak arabulucuya tanınmıştır. Arabulucunun hak ve yükümlülükleri ve sürecin ilerlemesindeki yöntem ve ilkeler kurumun amaç ve işleyişi hakkında bilgi vermektedir.

Anahtar Kelimeler: Arabuluculuk, Arabulucu, Arabuluculuğun İşleyişi, Arabuluculukta İlkeler.

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I-EINFÜHRUNG

Es liegen das Gesetz Nummer 6352 über das Türkische Mediationssystem bei Rechtsfragen[2], die vom Justizministerium in Anlehnung an das Gesetz

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2 Gesetzblatt vom 22.06.2012/28331 (Geltungsdatum); **Zur ausführlichen Informationen siehe Yıldırım, Kamil**: Hukuk Uyuşmazlıklarında Arabuluculuk Tasarısına İlişkin Görüş ve Eleştiriler, Arabuluculuk Yasa Tasarısı- Eleştiri ve Öneriler- Sempozyum Notları, İstanbul Barosu Yayınları, İstanbul 2008, s. 35 vd.; **Tanrıver, Süha**: Hukuk Uyuşmazlıklarında Arabuluculuk Kanunu Tasarısı'nın Getirdikleri ve Değerlendirilmesi, Makalelerim-II (2006-2010), Ankara 2011, s. 183-206.

verabschiedete Verordnung [3] sowie "das zusätzlich zum Mediationslohntarif [4] von 2013 und 2014 vom Vermittlungsausschuss ratifizierte und seit März 2013 geltende Türkische Mediationssystem und Modelethik- und Praxisregeln für die Mediatoren[5]" vor.

II- Begriff der Mediation

Mediaton ist ein spezielles Verfahren der Konfliktlösung, bei dem eine unabhängige Drittperson die Kommunikation und Verhandlungen zwischen den Parteien erleichtert und die Parteien dazu anregt, über die Konflikte freiwillig eine Entscheidung zu treffen [6]. Mediation ist unter den friedlichen[7] Lösungswegen, die zur Lösung der Konflikte im privatrechtlichen Bereich[8] herangezogen werden, eine meist verbreitete Konfliktschlichtungsmethode[9]. Mediation dient zu verschiedenen Zwecken wie die Feststellung und Klärung bestimmter Sachverhalte, das Begreifen unterschiedlicher Blickwinkel, Beschreibung ihrer Interessen, Darlegung und Bewertung möglicher Lösungen und Erreichung beidseitig zufriedenstellender Abreden[10]. Mit anderen Worten ist Mediation ein Konfliktschlichtungsverfahren, welches durch Anwendung systematischer Techniken die Parteien zwecks der Verhandlung zusammenkommen lässt, die Herstellung des Kommunikationsprozesses zur gegenseitigen Verständigung und somit die Findung der Lösung durch die Parteien selbst gewährleistet, und unter Mitwirkung einer entsprechend ausgebildeten neutralen und unabhängigen Drittperson auf freiwilliger Grundlage geführt wird [11].

III- Umfang und Zweck von Gesetz und Verordnung

Das Gesetz findet auf die Schlichtung der privatrechtlichen Streitigkeiten,

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3 Gesetzblatt vom 26.01.2013/28540 (Geltungsdatum)

4 Gesetzblatt, Mediationsmindestlohntarif für das Jahr 2013 vom 03.05.2013/28636; Mediationsmindestlohntarif für das Jahr 2014 vom 28.12.2013/28865 (Geltungsdatum)

5 http: //www.adb.adalet.gov.tr/Sayfalar/mevzuat/etik_kod.htlm

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11 Art. 2/b Türkisches Mediationsgesetz bei Rechtsstreitigkeiten (Türk. Abk. HUAK Art.2/b)

welche auf die Geschäfte und Handlungen zurückzuführen sind, über die die Parteien frei verfügen können. Streitigkeiten, die sich auf die familiären Gewalttaten beziehen, fallen nicht unter dieses Gesetz[12]. Der Zweck der bezogen auf dieses Gesetz in Kraft gesetzten Verordnung liegt darin, bei der Schlichtung der Konflikte anzuwendende Verfahren und Grundlagen, die Aufsicht der Mediationsausbildung erteilenden Einrichtungen, die Dauer, den Inhalt und Standarten der Ausbildung, Grundsätze und Regeln der anzuwendenden schriftlichen und praxisorientierten Prüfungen, die Führung des Mediatorenregisters, die Anforderungen an die Mediatoren, die Aufsicht der Mediatoren sowie Arbeitsverfahren – und grundlagen von Mediationspräsidium und Vermittlungsausschuss zu reglementieren [13].

IV- Ausbildung und Zertifikate der Mediatoren

Die Ausbildung der Mediatoren enthält die nach Abschluss des Jurastudiums erworbenen, sich auf die Durchführung der Mediationstätigkeit beziehenden Grundkenntnisse, Kommunikationstechniken, Konfliktschlichtungsverfahren, Kenntnisse in der Verhaltungspsychologie sowie sonstige bei der Verordnung genannten theoretischen und praktischen Kenntnisse[14].

Nach Art. 26/1-6- der Mediationsverordnung bei Rechtsstreitigkeiten (Türkische Abkürzung: HUAKY. m.26/1-6) drückt die Ausbildung der Mediatoren in Bezug auf die Mediation die Grundkenntnisse, Kommunikationsfertigkeiten, Verhandlungs- und Konfliktschlichtungsverfahren, welche von Absolventen der juristischen Fakultät mit fünfjähriger Berufserfahrung erworben werden, sowie die Ausbildung, die den Erwerb der theoretischen und praktischen Kenntnisse in der Psychologie und der für die Ausübung der Mediation nötigen Kenntnisse und Fertigkeiten beabsichtigt. Den Personen, die für Mediatoren kandidieren, wird insgesamt eine Ausbildung von 48 Stunden, davon mindestens 36 Stunden für Theorie und 12 Stunden für Praxis, erteilt. Der sechsstündige Teil der Theorieausbildung besteht aus den für die Mediation nötigen grundlegenden Jurakenntnissen und der dreißigstündige Teil hingegen aus den für die Mediation nötigen technischen Kenntnissen und Fertigkeiten. Die Ausbildung für die Juragrundkenntnisse umfasst die für die Mediation geeigneten Bereiche, die bei der Heranziehung der Mediation zu berücksichtigenden Umstände, die am Ende der Mediation durchzuführenden Geschäfte sowie den Abschluss einer Vereinbarung und deren Rechtsnatur im Falle des Zustandekommens einer Vereinbarung. Die Ausbildung für

[12] Art. 1 Mediationsgesetz bei Rechtsstreitigkeiten (Türk. Abk. HUAK Art.1)
[13] Art. 1 Türkisches Mediationsverordnung bei Rechtsstreitigkeiten (Türk. Abk. HUAKY Art.1)
[14] Art.22 Mediationsgesetz bei Rechtsstreitigkeiten (Türk. Abk. HUAK Art.22)

technische Kenntnisse zielt auf den Erwerb der mediationsrelevanten Kenntnisse und Fertigkeiten im Hinblick auf Kommunikationsfertigkeiten, Körpersprache, Verhandlungsmethoden, Versammlungsmanagment, Psychologie, Entwicklungspsychologie, Identitäts- und Verhaltensstörungen, Selbstkontrolle, Sozialpsychologie, Konfliktschlichtungsfertigkeiten, die bei der Konfliktanalyse und Konfliktlösung anzuwenden Verfahren sowie die beim Mediationsprozess einzuhaltenden Ethikregeln.

Die Praxisausbildung bezieht sich auf die Modellierung der Konfliktschlichtung, die den Kandidaten individuell und auch in Gruppen die Fertigkeiten der Anwendung ihrer systematischen Techniken fördern soll, sowie auf die Tätigkeiten der Praxisaufsicht. In diesem Zusammenhang wird von den Auszubildenden erwartet, dass sie ein Musterkonfliktszenario aufstellen und eine Konfliktlösung unter Anwendung der Mediationsmethoden herbeiführen sowie anschließend zusammen mit den Ausbildern eine gemeinsame Bewertung durchführen. Den Mediatoren wird jährlich durch die Mediationsausbildungseinrichtungen insgesamt nicht weniger als acht Stunden eine Fortbildung angeboten. Mediatoren müssen an dieser Ausbildung teilnehmen. Durch die Ausbildungseinrichtungen wird ein Formular ausgestellt, in dem die regelmäßige Teilnahme der Kandidaten vermerkt ist und werden diejenigen, die 1/12 der Vorlesungen ohne einen annehmbaren gerechtfertigten Grund nicht mitmachten, von der Ausbildung ausgeschlossen [15].

Die Mediationsausbildung wird von den juristischen Fakultäten der Universitäten, der Vereinigung der Türkischen Rechtsanwaltschaftskammern sowie der Türkischen Gerechtigkeitsakademie angeboten. Diese Einrichtungen dürfen nur eine Ausbildung anbieten, wenn sie vom Justizministerium eine entsprechende Erlaubnis einholen[16]. Der Antrag kann sich nur auf die Erteilung der Mediationsausbildung im Hinblick auf Konflikte in bestimmten Bereichen wie Familienrecht, Handelsrecht sowie Arbeitsrecht beziehen[17]. Die Ausbildungseinrichtungen erteilen spätestens innerhalb eines Monats nach Abschluss der Ausbildung den ihre Ausbildung erfolgreich abschließenden Personen ein Mediationszertifikat [18].

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[15] Art. 26/1-6 der Mediationsverordnung bei Rechtsstreitigkeiten (Abk. HUAKY-Hukuk Uyuşmazlıklarında Arabuluculuk Kanunu Yönetmeliği Art. 26/1-6)

[16] Art. 23 des Mediationsgesetzes bei Rechtsstreitigkeiten (Abk. HUAK-Hukuk Uyuşmazlıklarında Arabuluculuk Kanunu Art. 23)

[17] Art. 28/1-2 der Mediationsverordnung bei Rechtsstreitigkeiten (Abk. HUAKY Art. 28/1-2)

[18] Art. 25/1 des Mediationsgesetzes bei Rechtsstreitigkeiten (Abk. HUAK Art. 25/1); Art. 27/1 der Mediationsverordnung bei Rechtsstreitigkeiten (Abk. HUAKY Art. 27/1)

V- Prüfung und Register für Mediatoren

1- Prüfung für Mediatoren

Nach Art. 32/1-2 der Mediationsverordnung bei Rechtsstreitigkeiten (Abk.HUAKY Art. 32/1-2) müssen die Absolventen der Mediationsausbildung die dieser Verordnung entsprechende durchzuführenden schriftlichen und praktischen Prüfungen bestehen, damit sie im Register eingetragen werden können. Die Prüfungsergebnisse der erfolgreichen Kandidaten bewahren bis zur Beendigung der Eintragung im Register ihre Geltung auf.

Die schriftliche Prüfung erfolgt in klassischer Weise oder in Form von Multiple-Choice-Fragen. Die praxisorientierte Prüfung findet in Anwesenheit des Prüfungsausschusses unter Beobachtung der Konfliktlösungs- und Mediationsanstrengungen der Prüflinge bei den durch sie vorbereiteten Konfliktszenarien statt (Art. 39/1-3 der Mediationsverordnung bei Rechtsstreitigkeiten (Abk.HUAKY Art. 39/1-3). Diejenigen, die bei den jeweiligen schriftlichen und praktischen Prüfungen mindestens 75 von 100 Punkten erreicht haben, gelten als erfolgreich. Um bei der praktischen Prüfung erfolgreich sein zu können, müssen die Prüflinge mindestens 75 Punkte des arithmetischen Durchschnitts der von den Prüfungsausschussmitgliedern über 100 Punkte erteilten Punkte erreichen[19].

2- Register für Mediatoren

Das Mediationspräsidium des Justizministeriums führt Register für die Personen, die eine Mediatorenbefugnis bei privatrechtlichen Konflikten erhalten haben. Die in diesem Register befindlichen personenbezogenen Informationen werden vom Mediationspräsidium des Justizministeriums auch im elektronischen Medium bekannt gegeben. Eintragung im Register erfolgt auf einen schriftlichen Antrag des Betreffenden an das betreffende Präsidium. Um im Register des Ministeriums eingetragen werden zu können, muss man a) ein türkischer Staatsbürger, b) ein Absolvent der juristischen Fakultät mit fünfjähriger Berufserfahrung, c) handlungs- und urteilsfähig, c) kein Verurteilter wegen eines vorsätzlich begangenen Delikts, d) ein Absolvent der Mediationsausbildung und bei der vom Ministerium durchzuführenden schriftlichen und praktischen Prüfung erfolgreich sein. Ein Mediator darf mit seiner Tätigkeit erst ab Eintragung im Register beginnen. Das Mediationspräsidium des Justizministeriums löscht die Eintragung des Mediators, der im Register eingetragen wurde, obwohl er den für die Mediation nötigen Anforderungen nicht entspricht, oder der diese Anforderungen nachher nicht erfülle kann. Ein Mediator kann die Löschung

[19] Art. 40/1-2 der Mediationsverordnung bei Rechtsstreitigkeiten (Abk.HUAKY Art. 40/1-2)

seiner Eintragung im Register jederzeit verlangen (Art. 19/1, Art. 20/1-3 und Art.21 von Mediationsgesetz bei Rechtsstreitigkeiten (Abk.HUAK Art. 19/1, Art. 20/1-3 und Art.21).

VI- Die Mediationstätigkeit, die Grundsätze der Mediation, Rechte und Befugnisse der Mediatoren

1. Die Mediationstätigkeit

Soweit kein anderes Verfahren vereinbart wurde, werden Mediator oder Mediatoren durch die Parteien gewählt[20]. Die Parteien können sich vor Prozesserhebung oder im Laufe des Prozesses über die Einbeziehung eines Mediators in den Prozess einigen. Auch das Gericht kann die Parteien diesbezüglich aufklären und fördern. Soweit nichts anderes vereinbart wurde, gilt das Angebot als abgelehnt, wenn auf Antrag eines Parteiteils im Hinblick auf die Einbeziehung eines Mediators in den Prozess innerhalb von drei Monaten nicht positiv erwidert wird (Art. 13/1-2 Mediationsgesetz bei Rechtsstreitigkeiten Abk. HUAK Art. 13/1-2). Nach Art. 15/1-6 des Mediationsgesetzes bei Rechtsstreitigkeiten Abk. HUAK Art. 15/1-6 lädt der Mediator nach seiner Wahl als solcher die Parteien zum ersten Zusammentreffen in kürzester Zeit ein. Die Parteien können Mediationsverfahren frei beschließen, wenn sie nicht entgegen den zwingenden rechtlichen Regeln sind. Soweit sie nicht von den Parteien beschlossen sind, führt der Mediator die Mediationstätigkeit, indem er die Natur des Konflikts, die Begehren der Parteien und die zur unverzüglichen Lösung des Konflikts nötigen Verfahren und Grundlagen berücksichtigt. Der Mediator darf solche Tätigkeiten nicht ausüben, welche als Anwendung einer gerichtlichen Befugnis ihrer Natur halber nur vom Richter ausgeübt werden dürfen. Wenn die Parteien nach Prozesserhebung gemeinsam erklären, dass sie sich an einen Mediator wenden wollen, wird die Gerichtsbarkeit durch das Gericht für nicht länger als drei Monate verschoben. Diese Frist kann auf gemeinsamen Antrag der Parteien bis zu drei Monate verlängert werden. Die Parteien können sich an den Mediationsverhandlungen persönlich oder durch ihre Vertreter beteiligen. Die Frist der Mediation beginnt im Falle des Rückgriffs auf den Mediator vor Klageerhebung ab dem Zeitpunkt zu laufen, in dem sich die Parteien und der Mediator über die Einladung zum ersten Zusammentreffen und die Fortsetzung des Mediationsprozesses einigen und diese Einigung in einem Protokoll dokumentiert worden ist. Bei dem Rückgriff auf den Mediator nach Klageerhebung beginnt diese Frist ab dem Zeitpunkt zu laufen, in dem die Parteien die Einladung des Gerichts zur Mediation angenommen haben

[20] Art. 14 des Mediationsgesetzes bei Rechtsstreitigkeiten (Abk.HUAK Art. 14); Art. 17/1 der Mediationsverordnung bei Rechtsstreitigkeiten (Abk.HUAKY Art. 17/1)

oder eine Einigung in der Sache der Mediation erzielt haben und dies außer der Gerichtsverhandlung an das Gericht schriftlich erklärt haben oder bei der Gerichtsverhandlung diese Erklärungen schriftlich niedergelegt worden sind. Der Frist zwischen dem Beginn und Ende des Mediationsprozesses wird bei der Feststellung von Verjährung und Rechtsausfall keine Rechnung getragen[21].

2. Die Grundsätze der Mediation [22]

Im Gesetz und in der Verordnung sind die Grundsätze Eigenwilligkeit, Gleichheit, Verschwiegenheit und Nichtnutzung der Erklärungen und Urkunden gezählt. Es steht den Parteien frei, sich an einen Mediator zu wenden, den Mediationsprozess fortzusetzen, zu beendigen oder darauf zu verzichten. Vielmehr sollen sie sich darin einigen, den Konflikt im Wege der Mediation zu lösen. Sie dürfen keineswegs zwanghaft in diesen Prozess einbezogen werden sowie sie dürfen in irgendeinem Stadium darauf verzichten, den Konflikt im Wege der Mediation zu lösen.

Sie haben sowohl bei der Wendung an den Mediator als auch bei diesem Prozess gleiche Rechte. Ein Parteiteil darf nicht vom Mediationsprozess ausgeschlossen werden und sein Mitspracherecht dem anderen gegenüber nicht beeinträchtigt werden.

Soweit die Parteien nicht anderes beschlossen haben, ist der Mediator verpflichtet, die ihm im Rahmen der Mediationstätigkeit vorgelegten oder von ihm anderweitig erzielten Kenntnisse und Urkunden sowie weitere Informationen geheim zu halten. Während der Mediationstätigkeit darf keine Fotos sowie Bild- und Tonaufnahmen gemacht werden. Für einen Mediator, der gegen die Regel der Verschwiegenheit verstoßen, ist rechtliche und strafrechtliche Verantwortung vorbehalten [23] und kann zugleich die Löschung seiner Eintragung vom Register beschlossen werden. Die Parteien, der Mediator und die an der Mediation teilnehmenden Dritten können die folgenden Erklärungen und Urkunden nicht als Beweismittel geltend machen

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21 Art. 16/1-2 des Mediationsgesetzes bei Rechtsstreitigkeiten (Abk.HUAK Art. 16/1-2); Art. 20/2 der Mediationsverordnung bei Rechtsstreitigkeiten (Abk.HUAKY Art. 20/2)

22 Art. 3/1-2, 4/1-2,5/1-5 des Mediationsgesetzes bei Rechtsstreitigkeiten (Abk.HUAK Art. 3/1-2, 4/1-2,5/1-5); Art. 5/1-2, 6/1-5, 7/1-5 der Mediationsverordnung bei Rechtsstreitigkeiten (Abk.HUAKY Art. 5/1-2, 6/1-5, 7/1-5);); **Zur ausführlichen Informationen siehe zum Özbek, Mustafa**: Anayasal Hak ve Hürriyetler ile Yargılamaya Hakim olan İlkeler Işığında Arabuluculuk, Medeni Usul ve İcra-İflas Hukuçuları Toplantısı-IX- Hukuk Uyuşmazlıklarında Arabuluculuk, Ankara 15-16 Ekim 2010, s. 107-154.

23 Wer durch Verletzung der Verschwiegenheitspflicht verursacht, dass die rechtlich geschützten Interessen eines anderen beeinträchtigt werden, wird mit einer Freiheitsstrafe bis zu 6 Monate bestraft. Die Untersuchung und Verfolgung dieser Delikte hängt von einem entsprechenden Antrag ab. (Art. 33/1-2 des Mediationsgesetzes bei Rechtsstreitigkeiten (Abk.HUAK Art. 33/1-2)

und darüber nicht als Zeugen auftreten, wenn eine Klage über den Konflikt erhoben oder das Schiedsgericht angerufen wird: a) Verlangen nach Teilnahme an der Einladung durch die Parteien oder an der Mediationstätigkeit eines Parteiteils, b) die durch die Parteien zur Schlichtung des Konflikts im Wege der Mediation geltend gemachten Auffassungen und Angebote, c) die durch die Parteien während der Mediationstätigkeit gemachten Vorschläge oder die Annahme eines Falles oder einer Behauptung und d) die nur aufgrund der Mediationstätigkeit bereitgestellten Urkunden. Die Bekanntmachung von all diesen darf kein Gericht, kein Schiedsrichter oder keine administrative Behörde verlangen. Auf diese Erklärungen und Urkunden können bei der Verurteilung nicht abgestellt werden, auch wenn entgegen der Regelung im ersten Absatz als Beweismittel vorgelegt würden. Die betreffenden Informationen können bekannt gegeben werden, soweit dies durch eine Gesetzesbestimmung angeordnet wird oder sich für die Umsetzung und die Vollstreckung der am Ende des Mediationsprozesses erzielten Vereinigung als notwendig erweist [24].

3. Rechte und Pflichten des Mediators

A- Rechte

- Nutzung des Mediatortitels: Mediatoren, die im Register eingetragen sind, haben Recht, einen Mediatortitel zu nutzen und die durch diesen Titel erzielten Befugnisse auszuüben. Der Mediator muss während der Mediationstätigkeit diesen Titel anführen [25].

- Anspruch auf Lohn und Aufwand: Der Mediator hat Anspruch auf Lohn und Aufwand gegen seine Mediationstätigkeit. Er kann auch Vorschuss für Lohn und Kosten beanspruchen. Soweit nichts anderes vereinbart wurde, richtet sich der Lohn des Mediators nach dem geltenden Mediationsmindestlohntarif im Zeitpunkt des Abschlusses seiner Mediationstätigkeit und Lohn und Aufwand werden durch die Parteien gleichermaßen bestreitet. Der Mediator darf gegen seine Mediationstätigkeit im Laufe der Mediation im Namen bestimmter Personen oder gegen die Empfehlung bestimmter Personen kein Entgelt bekommen. Die dieses Verbot verletzenden Handlungen sind richtig[26].

- Führung der Gespräche und Kontaktaufnahme mit den Parteien: Der Mediator kann mit jedem Parteiteil getrennt oder zusammen besprechen und kommunizieren. Die Parteien können auch durch ihre Vertreter an diesen Gesprächen teilnehmen[27].

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[24] Art. 5/1-3 des Mediationsgesetzes bei Rechtsstreitigkeiten (Abk.HUAK Art. 5/1-3)
[25] Art. 6/1-2 des Mediationsgesetzes bei Rechtsstreitigkeiten (Abk.HUAK Art. 6/1-2)
[26] Art. 7/1-3 des Mediationsgesetzes bei Rechtsstreitigkeiten (Abk.HUAK Art. 7/1-3)
[27] Art. 8 des Mediationsgesetzes bei Rechtsstreitigkeiten (Abk.HUAK Art. 8)

B- Pflichten

- Sorgfältige und neutrale Erfüllung des Auftrags: Der Mediator erfüllt seinen Auftrag mit Sorgfalt, in Neutralität und persönlich. Eine als Mediator beauftragte Person muss die Parteien bei Vorliegen wichtiger Umstände, die auf einen Zweifel an seiner Neutralität schließen lassen, diesbezüglich informieren. Wenn die Parteien trotz dieser Erklärung gemeinsam verlangen, kann der Mediator diesen Auftrag übernehmen oder den ohnehin übernommenen Auftrag fortsetzen. Er muss die Gleichheit zwischen Parteien wahren. Er darf bei einer Klage, die den Konflikt betrifft, bei dem er als Mediator tätig geworden ist, nachher keinen Auftrag als Rechtsanwalt für einen Parteiteil übernehmen [28].

- Werbungsverbot: Es ist verboten, dass die Mediatoren zum Auftragbekommen jegliche als Werbung zu betrachtende Handlungen zeigen und keine andere Titel als Mediator, Rechtsanwalt und akademische Titel auf ihren Schildern und Druckpapieren führen [29].

- Aufklärung der Parteien: Der Mediator ist verpflichtet, zu Beginn seiner Mediationstätigkeit über die Grundlagen, den Prozess und Folgen der Mediation aufzuklären[30].

- Beitragszahlung: Der Mediator zahlt bei der Eintragung im Register Eintrittsbeitrag und jährlich Jahresbeitrag [31].

VII- Erlöschen der Mediationstätigkeit und deren Vollstreckbarkeit

A- Erlöschen der Mediationstätigkeit

Nach Art. 21/1 der Mediationsverordnung bei Rechtsstreitigkeiten und Art. 17/1 des Mediationsgesetzes bei Rechtsstreitigkeiten erlischt die Mediationstätigkeit, wenn

a) sich die Parteien in der Sache des Konflikts einigen,

b) der Mediator nach Besprechung der Parteien feststellt, dass für die Mediation nicht mehr Anstrengungen angestellt werden sollen,

c) eine der Parteien dem anderen Parteiteil oder dem Mediator anzeigt, dass sie am Mediationsverfahren nicht mehr teilnehmen will,

d) die Parteien durch Einigung untereinander die Mediationstätigkeit beendigen

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28 Art. 9/1-4 des Mediationsgesetzes bei Rechtsstreitigkeiten (Abk.HUAK Art. 9/1-4)
29 Art. 10 des Mediationsgesetzes bei Rechtsstreitigkeiten (Abk.HUAK Art. 10)
30 Art. 11 des Mediationsgesetzes bei Rechtsstreitigkeiten (Abk.HUAK Art. 11)
31 Art. 12/1 des Mediationsgesetzes bei Rechtsstreitigkeiten (Abk.HUAK Art. 12/1)

e) oder festgestellt wird, dass sich der Konflikt für die Mediation nicht eignet oder es sich dabei um ein nach der Strafprozessordnung vom 4/12/2004/5271 den Vergleich nicht betreffendes Delikt handelt.

Am Ende der Mediationstätigkeit wird mit einem Protokoll dokumentiert, ob die Parteien zu einer Einigung gelangten oder nicht und zu was für einem Ergebnis es beim Abschluss der Mediationstätigkeit kam. Dieses vom Mediator ausgestelltes Protokoll wird vom Mediator, den Parteien oder deren Vertretern unterzeichnet. Wenn es von den Parteien oder deren Vertretern nicht unterzeichnet wird, wird es nur vom Mediator unterzeichnet, indem der Grund für die Nichtunterzeichnung angeführt wird. Die Parteien beschließen, welche anderen Umstände außer der Beendigung der Tätigkeit in diesem Protokoll vermerkt werden sollen. Der Mediator setzt die Parteien über dieses Protokoll und seine Folgen in Kenntnis. Im Falle der Beendigung der Mediationstätigkeit muss der Mediator die ihm in Bezug auf diese Tätigkeit angezeigten Informationen, die ihm ausgehändigten und in seiner Hand befindlichen Urkunden sowie das Protokoll für fünf Jahre aufbewahren. Er liefert den jeweiligen Parteien ein Exemplar des letzten Protokolls, das er am Ende der Mediationstätigkeit ausgestellt hat. Er muss ein Exemplar dieses Protokolls innerhalb eines Monats ab Beendigung der Mediationstätigkeit an das Generaldirektorat schicken. Wenn er im Laufe der Mediationstätigkeit aus rechtlichen und tatsächlichen Gründe nicht mehr imstande ist, seinen Auftrag auszuüben, kann der Prozess mit einem neuen Mediator, über den sich die Parteien einigen, fortgesetzt werden. Die vorher durchgeführten Geschäfte bleiben bestehen. Durch den Tod eines Parteiteils im Laufe der Mediation erlischt die Mediationstätigkeit[32].

B- Die Vollstreckbarkeit der am Ende der Mediationstätigkeit erzielten Vereinbarung

Der Umfang der am Ende der Mediationstätigkeit erzielten Vereinbarung wird durch die Parteien bestimmt. Wenn es dabei zu einem Vereinbarungstext kommt, wird er von den Parteien und dem Mediator unterzeichnet. Wenn die Parteien am Ende der Mediationstätigkeit zu einer Vereinbarung gelangen, können sie einen Vormerkung in Bezug auf die Vollstreckbarkeit dieser Vereinbarung geltend machen. Wenn sich die Parteien an einen Mediator vor Klageerhebung wenden, können sie diesen Vorbehalt in Bezug auf die Vollstreckbarkeit dieser Vereinbarung von dem nach Örtlichen- und Sachlichen Zuständigkeitsregeln über den Hauptstreitgegenstand zu bestimmenden Gericht verlangen. Die diesen Vorbehalt enthaltende Vereinbarung gilt eine

[32] Art. 21/2-6 der Mediationsverordnung bei Rechtsstreitigkeiten und Art. 17/2-4 des Mediationsgesetzes bei Rechtsstreitigkeiten.

Urkunde, die eine Titelqualität aufweist. Ein Vorbehalt in Bezug auf die Vollstreckbarkeit ist eine Sache der nichtstreitigen Gerichtsbarkeit und eine diesbezügliche Einsichtnahme auch über die Akte vorzunehmen. Bei den sich für die Mediation eignenden Streiten im Familienrecht wird die Einsichtnahme jedoch durch die Gerichtsverhandlung vorgenommen. Der Umfang dieser Einsichtnahme beschränkt sich auf die Einigung des Inhalts der Vereinbarung für die Mediation und die Zwangsvollstreckung[33] .

ERGEBNIS

Die Mediation wurde kürzlich dem türkischen Recht einbezogen. Die im türkischen Recht kontinuierliche Verbesserung erfahrende Mediation wird als eine ganz neue Institution in der türkischen Praxis oft bevorzugt. Zur Zeit stellt sie einen Beruf dar, Mehrzahl von denen aus Rechtsanwälte besteht. Die Freiwillige Bewerbung an den Mediatoren in der Rechtsstreitigkeiten verlangsamt zwar die Anzahl der Erhöhung von Beworbenen. Die Anerkennung der Mediation als eine Voraussetzung für die Schlichtung mancher Rechtstreitigkeiten aktiviert als eine Institution seine Funktion.

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DELIVERY AND PAYMENT OBLIGATIONS IN CONNECTION WITH THE SALE AND PURCHASE OF GOODS UNDER THE SGA,CISG AND CESL

İngiliz Ticari Mal Satım Kanunu, Birleşmiş Milletler Uluslararası Satım Sözleşmesi ve Avrupa Ortak Satım Yasasına Göre Ticari Malların Alım Satımınında Ödeme ve Teslim Borcu

Mehmet ÇOĞALAN*

ABSTRACT

Globalization has increased the trade volume for all around the world, therefore, trade-related regulations, codes and conventions have become vital for countries and traders. These three legal codes which take place in topic of the study have different approaches as to delivery and payment obligation. Hence, all these differences and similarities will be compared and contrast during the study. Also it will be evaluated to what extent any of those legal codes can be said to fulfil the legitimate expectations of businesses selling and/or buying goods across international legal border pursuant to standard trade terms.

Keywords: SGA, CESL, CISG, Delivery, Payment, Obligation, Goods, Purchase, Sell

ÖZET

Küreselleşme ile birlikte dünyadaki ticaret hacmide artmaya başladı, bu sebepten dolayı ticaretle ilgili olan düzenlemeler, kanunlar, konvansyonlar, ülkeler ve tüccarlar açısından hayati önem taşımaya başladı. Başlıkta yer alan üç hukuki düzenlemenin, malların teslimi ve ödemeyle ilgili olarak farklı farklı yaklaşımları mevcuttur. Bundan dolayı bu benzerlikler ve farklılıklar çalışma boyunca karşılaştırılıp kıyaslanacaktır. Aynı zamanda bu düzenlemelerin dünya çapındaki işadamlarının kanuni beklentilerinin ne derece karşıladığı da standart ticari terimler dikkate alınarak değerlendirilecektir.

Anahtar Kelimeler: SGA, CESL, CISG, Teslim, Ödeme, Borç, Ticari mal, Alım, Satım

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1) INTRODUCTION

In conjunction with the development of technology and transportation, the international sale of goods is becoming more significant for traders day by day all around the world, and this situation has the potential to cause various problems during the sale process, such as delivery and payment of the goods. However, there are international and domestic regulations as

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to the sale of goods in order to set barriers to these kind of difficulties; for example, The United Nations Convention on Contracts for the International Sale of Goods[1] (CISG), Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law[2] (CESL) and The Sale of Goods Act[3] (SGA). These three legal codes have differences and similarities on the recognition and enforcement of delivery and payment obligation. This study will compare, contrast and examine these differences and similarities by taking the legal codes individually. The SGA will be examined firstly and then it will be taken as a route for the other legal codes' examination. The study will also evaluate how the CISG satisfies businesses' legal expectations all over the world in connection with sale and purchase of goods pursuant to free on board (FOB) and cost insurance freight (CIF) trade terms. CISG was chosen for this evaluation because, this legal code has a wider application in respect of region; therefore, more businesses involved with this regulation.

2) THE SALE OF GOODS ACT 1979

SGA 1979, which repealed the 1983 SGA and amending legislation, is a pure consolidation measure. The 1979 SGA applied to agreements that property in 'goods' were transferred or agreed to be transferred for a financial consideration in other words: where property in personal possessions was sold. For the purpose of the act 'contract of sale' includes an agreement to sell as well as a sale[4]. The latter is not merely a contract but a conveyance, operating to transfer the property in the goods to the buyer; the former is a mere agreement, some further act or event being necessary before the property can vest in the buyer under the contract[5].

2.1) Delivery Obligation

Delivery means something in law is different from the popular meaning. According to Adams and Macqueen "In law delivery means the 'voluntarily transfer of possession', which is a different thing from dispatch of the goods."[6] According to s. 61 of SGA, delivery means "voluntary transfer of possession from one person to another".[7] It is clear to say that the seller should transfer

1 The United Nations Convention on Contracts for the International Sale of Goods, 1980
2 Council Regulation EC/0284/2011
3 1979 c.54
4 1979 c.61(1)
5 Mckendrick, E., 2010. *Goode on Commercial law.* 4th ed. London: LexisNexis UK and Penguin Books, p.212
6 Adams, J. N., and Macqueen H., 2010. *Atiyah's Sale of Goods*. 12thed. Essex: Pearson Education Limited, p.119
7 Sale of Goods Act 1979 c.54, Section 61

the possession of goods to the buyer voluntarily. However, there is an exception to this definition under the same section "… except that in relation to section 20A and 20B above it includes such appropriation of goods to the contract as results in property in the goods being transferred to the buyer."[8]

The goods can also be delivered to the buyer's agent. In *E Reynolds & Sons (Chingford) Ltd v Hendry Bros. (London) Ltd*[9], it states that the goods are delivered, when a buyer or his agent obtains custody of goods or is allowed to exercise control over the goods. There is a similar statement in section 32 of SGA, where it says that "… the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier for the purpose of transmission to the buyer is prima facie deemed to be a delivery of the goods to the buyer."[10] Therefore, it is possible to say that the buyer is not the only person who has to take delivery, the goods might be delivered to another person instead of the buyer.

As was mentioned above, unless otherwise agreed, dispatching of the goods is not the duty of the seller; the seller's obligation is to deliver the goods. Under s. 27 of SGA, "It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale."[11] It is clear to say that the delivery of the good is the duty of the seller, and this Section does not refer to dispatching. In relation to this section, it would be worth mentioning s. 29 of SGA, as this Section states the express and implied terms in a contract determining whether it is the seller's obligation to send the goods to the buyer or not and, apart from express and implied terms, the place of delivery is the seller's place of business or his residence.[12] When both sections are considered together, it is possible to say that the contract's provisions are quite important as to the selling of the goods, and also the default rule for delivery place of the goods under SGA is the seller's place of business of his residence.

Delivery and payment are crucial factors in the sale of goods, and making arrangements for these two duties are also important for trade. It is clear to say that under the SGA delivery and payments are concurrent conditions when s. 28 of SGA is considered, as it states that "Unless otherwise agreed, deliver of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the

8 Sale of Goods Act 1979 c.54, Section 61
9 [1955] 1 Lloyd's Rep. 258
10 Sale of Goods Act 1979 c.54, Section 32
11 Sale of Goods Act 1979 c.54 Section 27
12 Sale of Goods Act 1979 c.54 Section29

goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods."[13] It might be said that delivery and payment should be made at the same time. However, s. 28 of SGA does not propose that tender of the price or payment is a condition precedent to the obligation for delivering the goods. Both parties do not necessarily perform their duty before being entitled to sue for their rights, it is enough that they are ready and willing to do so. According to Adams and Macqueen, "a buyer need not formally tender the price before becoming entitled to sue for non-delivery provided that he was ready and willing to do so."[14] Similarly, if a buyer refused to accept the goods, it is not required for the seller to deliver goods before becoming entitled to sue for damages or the price.[15] At that point, the important thing is to become ready and willing to perform the obligation. In *Morton v Lamb*, it was held that to become ready and willing to receive goods is not the point; the point is the buyer ought to be ready and willing to pay the price.[16]It would be worth saying that in this context, if parties agree about delivery and payment conditions contract, this will be applied to their relationship as to sale of goods.

2.2) Payment Obligation

Under English law, it is the buyer's duty to pay the price for the goods according to s.27 of SGA. Also s. 2(1) of SGA provides that "A contract of sale of goods is a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called price."[17] It is possible to say that payment for the goods is one of the important factors for the sale of goods when both sections are considered.

According to s.8 of SGA, "The price in a contract may be fixed of sale may be fixed by the contract, or may be left to be fixed in a manner agreed by the contract, or maybe determined by the course of dealing between the parties, where price is not determined as mentioned in sub-section (1) above the buyer must pay a reasonable price."[18] Therefore, it can be claimed that the determination of price is not essential for the contract, and if parties do not determine price for goods, the contract does not become invalid. This is because, price can be determined later according to reasonable aspects. In *May and Butcher v King* it was stated that if price is not determined by one of

13 Sale of Goods Act 1979 c. 54 Section 28
14 Adams and Macqueen, 2010, p.120
15 *Levey & Co Ltd. v Goldberg* [1922] 1 K.B. 688
16 [1797] 101 E.R. 890
17 Sale of Goods Act 1979 c. 54 Section 2
18 Sale of Goods Act 1979 c.54 Section 8

the listed methods, the contract will be void.[19]

Provided that the seller is ready and willing to pay for the goods, if there is no agreement as to the time for payment, the buyer should pay the price immediately on the conclusion of the contract. There is a conditionality in English law on payment for the goods under s. 28 of SGA, as was mentioned in the previous section, the seller's and the buyer's obligations are concurrent as to sale of goods. At that point, the seller's obligation to deliver the goods as to time should be examined, and it is reasonable time. Therefore, there are two obligations when a contract is made: the seller has an obligation to deliver the goods and the buyer has the obligation to make payment. But it is not actually payable at the moment, that obligation becomes payable at the moment when the seller ready and willing to delivery. When this issued is considered from another aspect, unless otherwise agreed, the buyer is not entitled to claim possession of the goods unless the buyer is ready and willing to pay the price for the goods.[20]

Regarding to the stipulations about time, s. 10(1) of SGA says that "Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not of the essence of a contract of sale."[21] This section resolutely says that payment time presumptively is not of the essence. Unless otherwise agreed, a contract stipulation about the payment date or time cannot be a condition of an agreement and the seller is not entitled to treat the contract as repudiated because of late payment. In *Payzu Ltd. v Saunders*[22] it was stated that the seller is not entitled to repudiate the contract and sell the goods to another person because of the buyer's failure to pay. Also Griffiths and Griffiths claim, "… a failure by the buyer to provide payment is not a breach that would justify repudiation by the seller."[23] However, the seller of course has a right to decline to deliver the good and wait for payment.[24] It is also possible that the seller and the buyer can agree that immediate payment is the essence of the agreement, in which case, failure of payment might be treated as a repudiation.[25]

Apart from general concepts as to payment obligation, there is nothing in SGA as to the form in which the money consideration has to be paid. It is

19 [1934] 2 K.B. 17
20 Sale of Goods Act 1979 c.54 Section 28
21 Sale of Goods Act 1979 c. 54 Section 10(1)
22 [1919] 2 K.B. 581
23 Griffiths, M., Griffiths, I., 2002. *Law for Purchasing and Supply*. 3rded. Edinburgh: Pearson Education Limited, p.134
24 Sale of Goods Act c.54 Section 41
25 *Lombard North Central Plc. v Butterworth* [1987] Q.B. 527

possible that the form of payment might be stated in the contract. According to common law, payment for goods should be made in coin or bank notes.[26] Therefore, it is possible to say that the seller does not have to accept anything but cash, and the seller has a right to retain the goods until the bill is honoured, if he accepts the payment by other ways such as bill exchange or cheque.[27] But cash is not always an option to perform the duty and the buyer may choose other ways. According to Bridge, "Despite the legal tender rule, payment is commonly made by cheque."[28] Where the seller accepts payment by cheque or bill, payment is treated in absence of a contrary intention as a conditional payment only. [29] Apart from a cheque or bill of exchange sometimes payment can be made by means other than the legal tender rule, such as a credit card, and it is regarded as absolute payment. The retailer has no recourse against the credit card user in case of non-payment by the credit card company.[30] Adams and Macqueen also claim that "…failure of the credit card company to pay the retailer does not mean that the retailer has any residuary claim against the customer."[31] At that point it will be worth giving some differences between cheque and credit card to clarify the function of those two instruments. Firstly, regarding a cheque there is no relationship between seller and bank, therefore, if the cheque is not met, the seller has no rights against the bank. However, in a credit card transaction, there is a relationship between the seller and the bank and the credit card company accepts liability in this case. Secondly, in the credit card process, a buyer does not give his address information to the seller, so it is not reasonable for the seller pursue for buyer as to the price. Thirdly, if the buyer pays money to the seller, it means he pays twice for both the seller and credit card company.

3) THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

The United Nations Convention on Contracts for the International Sale of Goods was developed by the United Nations Commission on International Trade Law and concluded at Vienna in 1980. CISG is a regulation that is consist of uniform international sales law. As of 2016, it has been ratified by 85 states and Azerbaijan was the most recent state to ratify the Convention. CISG has become a reference point for subsequent international commercial law instruments, including the UNIDROIT Principles of European Contract

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26 *Gordon v Strange* [1847] 154 E.R. 203

27 Sale of Goods Act 1979 c.54 Section 41(1)

28 Bridge, M., 2009. *The Sale of Goods.*2nded. Oxford: Oxford University Press, p.368

29 *Bolt and Nut Co. (Tipton) Ltd. v Rowlands Nicholls and Co Ltd*. [1964] 2 Q.B. 10

30 *In Re Charge Card Services Ltd.* [1989] Ch. 497

31 Adams and Macqueen, 2010, p.298

Law prepared by the Commission on European Contract Law, which can, in appropriate case, be used to some of the less detailed rules in CISG.

3.1) Delivery Obligation

English law has different regulations as to the international sale of goods when it is compared to the rest of the world, with common law and the SGA. The rest of the world have got CISG, because it is incorporated into their own law.

The obligations of the seller starts from Article 30 of CISG and, unlike SGA, this article deals with documents: "The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this convention."[32] This Article states the main obligations for the seller and it says that it is the contract which outlines the defining of the scope of these duties.

Regarding delivery of goods and handing over the documents under Article 31 of CISG, there are great similarities between SGA and CISG. This Article states, in absence of an express or implied contract by the seller and buyer in respect of that point, both content of delivery place and delivery duty. According to Article 31(c) other cases (other than Article 31(a) (b)) delivery place is the seller's place of business,[33] which is similar to s.29 of SGA. Also Article 31(c) states that when a contract of sale contains carriage, the seller's delivery obligation consists of passing on the goods to the carrier[34] which is similar to s. 32(1) as was stated above.

Another important subject is that CISG does not relate to the passing of title of the goods and this situation causes an impossible comparison between these two legal regulations on this point.

Regarding time of delivery of the goods, there are some similarities between CISG and SGA. According to Article 33 of CISG, if there is a fixed or determinable day in the contract, the seller must deliver the goods on that date.[35] SGA also says, "Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller

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32 The United Nations Convention on Contracts for the International Sale of Goods, 1980, Article 30

33 The United Nations Convention on Contracts for the International Sale of Goods, 1980, Article 31(c)

34 The United Nations Convention on Contracts for the International Sale of Goods, 1980, Article 31(a)

35 The United Nations Convention on Contracts for the International Sale of Goods, 1980, Article 33(a)

is bound to send them within a reasonable time."[36] Therefore, it is possible to claim that the fixed time has precedence in both legislations as to the delivery of the goods. However, in SGA, there is no determinable factor when it is compared to CISG, so for SGA it can be said that the date for delivery time for the goods should be fixed exactly without doubt. The delivery date can also be chosen in a period of time such as between 5 January and 15 February, and in that situation delivery of goods can be made any time in this period.[37] In principle, the seller has the right to choose delivery in between this period.[38] It is possible to say that the seller's determination as to delivery of goods in this specific period is more valuable for this Article. However, parties may agree that the buyer can choose the date of delivery, such as 'delivery of the goods in March after call off by the buyer'.

In the case of silence as to the date of delivery, after conclusion of the contract, the seller should deliver the goods within a reasonable time.[39] This Article has great similarity with s.29 of SGA which states the seller is bound to send goods within a reasonable time. At that point, it can be claimed that reasonable time has an ambiguous meaning. Widmer claims that "what is reasonable time depends on the circumstances of the individual case, on what is usual in comparable circumstances, and finally also on fairness.[40] Both parties' interests should be considered but the seller's interest generally cannot become more important than the buyer's. This claim is supported by Article 33(b) of CISG where an exact period of time for delivery of goods has been decided, because, in this Article, the seller's interest and choice of time has more importance. The goods situation is also important at this point, whether the goods are in stock or rather the goods are yet to be manufactured, and also whether the goods are under the possession of the seller or a third party.

CISG also states provision as to time, place, and form of the handing over of the documents during the sale of goods process. According to Article 34, if the seller has an obligation to hand over the documents in connection with the goods, he should hand over these documents in accordance with the contract as to time, place and form.[41] This Article also gives the seller an obligation

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36 Sale of Goods Act 1979 c.54 Section 29

37 The United Nations Convention on Contracts for the International Sale of Goods, 1980 , Article 33(b)

38 Schlechtriem, P. and Thomas, G., 1998. *Commentary on The Un Convention on The International Sale of Goods (CISG).*Oxford: Oxford University Press, p.263

39 The United Nations Convention on Contracts for the International Sale of Goods, 1980, Article 33(c)

40 Schwenzer, I.and Fountoulakis, C. eds. 2012. International Sales Law. Oxon: Routledge-Cavendish, p. 557

41 The United Nations Convention on Contracts for the International Sale of Goods, 1980,

other than delivery of goods. There is no form, place and time rules of the convention about the hand over the documents but the convention refers to the contract as to handing over the documents. This approach is different from delivery of goods, as the convention gives some rules about the delivery time, form and place. If there is no rule as to time, place or form of handing over the documents in the contract, general provisions of the convention might be used, such as Article 8, 7(2) and 9. The rest of the Article 34 says "if the seller has handed over the documents before that time, he may up to that time, cure any lack of conformity in the documents, if the exercise of this right does not cause the buyer unreasonable inconvenience unreasonable expense. However, the buyer retains any right to claim damages as provided for in this convention."[42] It can be said for this Article that the seller has the right to cure any lack of conformity in case of the early delivery of documents. Schwenzer and Fountoulakis also say that "Art. 34 CISG clarifies that a seller who has handed over non-conforming documents 'early' has the right to cure the lack of conformity until the time for handing over agreed upon in contract."[43] Finally, the last sentence of this Article gives a guarantee to the buyer as to right to the claim damages.

3.2) Payment Obligation

The payment of price obligation is stated under Article 53 of CISG and Article 54 gives some steps associated with payment. It says "The buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made." There are some other duties and formalities in conjunction with the payment obligation under CISG. The buyer should do some preparation for payment specified in and law, regulation and in the contract. Hence, it can be said that the buyer has to deal with governmental and banking procedures such as currency exchange regulations or common price payment mechanisms.

If there is no determination of price expressly or implicitly in the contract, comparable circumstances in the trade approach are taken as to the determination of price of the goods.[44] However, in the same case, SGA states, reasonable price approach should be taken as mentioned above.

Article 34

42 The United Nations Convention on Contracts for the International Sale of Goods, 1980, Article 34

43 Schwenzer and Fountoulakis, 2006, p.235

44 The United Nations Convention on Contracts for the International Sale of Goods, 1980, Article 55

Another point is the place of payment that CISG involves which is also important for jurisdiction, and this subject is regulated at Article 57. Priority is given to the parties, so they can arrange the payment place in the contract. When there is no statement in the contract as to place of payment, the buyer should pay the price at the seller's place or if payment is related with handing over the goods, the buyer pays the price at the place where the document is handed over.[45] Apart from payment place, there is no any detailed provision as to means of payment; therefore, the buyer is obliged to pay money in cash in general. However, parties may agree another type of payment in the contract.[46] There is also no provision as to means of payment in SGA.

4) THE PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON COMMON EUROPEAN SALES LAW

The European Commission announced a regulation on 11 October 2011, about Common European Sales Law that is proposed to operate as an optional supplement to national law for the sale of goods and related services, and the provision of digital content[47]. The regulation contains, 186 article autonomous code which is intended to operate in parallel to current national laws. According to Commission, this regulation is for consumers, and small and medium-sized enterprises. It is stated that on commission website *"Traders who are dissuaded from cross-border transactions due to contract law obstacles forgo at least EUR 26 billion in intra-EU trade every year. Meanwhile, 500 million consumers in Europe lose out on greater choice and lower prices because fewer firms make cross-border offers, particularly in smaller national markets."* This rules can be used in traders to consumer agreements and traders to traders agreements, however consumers cannot use it in agreements made between their selves.

4.1) Delivery Obligation

Before giving information about the delivery obligation, it would be worth giving briefly the general differences between those three laws to understand more effectively the obligation of the seller. There are significant differences between CISG, CESL and SGA in different parts of the legislation. For example, regarding the regional scope of application, CESL applies only in Europe, CISG applies all over the world, SGA applies in the UK. However,

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45 The United Nations Convention on Contracts for the International Sale of Goods, 1980, Article 57

46 The United Nations Convention on Contracts for the International Sale of Goods, 1980, Article 6

47 Allen & Overy LPP, A Common European Sales of Law. [online]. Available at: http://www.allenovery.com/SiteCollectionDocuments/CESL.pdf

Ortiz and Viscasillas claim that CESL can be characterised both as regional and international because when only one party is an EU country, CESL can apply.[48] CESL has digital content concept and it also deals with consumers. However, CISG and SGA do not have digital content concept and CISG regulates relations between businessmen. Fogt also states that "they differ with respect to the type of formal instrument of harmonisation, the material, personal, and territorial scope of application…"[49] However, parties have the right to change the applicable law in their contract.

The obligations of the seller are set out between Article 91 and 97 in CESL. Under Article 91 of CESL, the seller is obliged to deliver the goods and documents that the agreement may require, and transmission of ownership of the goods, and also this Article orders that the goods must be in conformity with the agreement.[50] It is possible to say that both CESL and CISG deal with documents, unlike SGA, and this Article not only states provisions for delivery of the goods but also supplies the digital content in line with the internet age.

The place of delivery regulation in Article 93 gives different options depending upon the type of contract and transportation arrangement. If there is consumer sale contract or contract for digital content supply which distance or off-premises, or the seller is obliged to make arrangement of carriage to the buyer, then place of delivery is the buyer's residence.[51] Another option has great similarity with SGA and CISG. In the other cases, if the contract of sale involves carriage, the place of delivery is the collection point of first carrier, and if the contract does not involve carriage, the delivery place is the seller's place of business.

Article 94 gives three possibilities as to the way of delivery: firstly, by physical possession or control of the goods; secondly by handing over the goods to the carrier and by handing over the documents to the buyer; and finally by making the documents or goods representing them available to the buyer.[52]

Regarding time of delivery, Article 95 of CESL gives default rules. The goods or digital content must be delivered after the conclusion of the agreement deprived of unnecessary delay.[53] If there is a contract between a businessmen

48 Ortiz and Viscasillas , 2012

49 Fogt, M. M., 2012. Private International Law Issues in Opt-Out and Opt-In Instruments of Harmonization: The Cisg and the Proposal for a Common European Sales Law. *Columbia Journal of European Law,* 19, pp. 83-142., 2013

50 Council Regulation EC/0284/2011, Article 91

51 Council Regulation EC/0284/2011, Article 93

52 Council Regulation EC/0284/2011, Article 94

53 Council Regulation EC/0284/2011, Article 95(1)

and a consumer, the goods or digital content should be delivered within 30 days after conclusion of the contract.[54] Article 95(1) is not intended to apply to the circumstances covered in Article 95(2), because in Article 95(2) it states that 'the time of delivery cannot be otherwise determined'. There are some differences between this Article and CISG, SGA. CISG and SGA do not cover consumers and do not give any limit of time such as 30 days. Dannemann and Vogenauer also claim that "The rule differs from Article 33 CISG in so far as there is (1) no distinction made between business and consumers and (2) no mention of statutory deadline."[55]

4.2) Payment Obligation

In common with both CESL and SGA (s.29), it is for the buyer to pay for the goods and take delivery of them. The buyer's obligations as to delivery of the good, taking over the documents and payment are separated in Article 123 of CESL

Differently from CISG and SGA, means of payment is regulated in CESL. Payment can be made by the means of the payment which is agreed in the contract. Those three legal codes have this approach which, is consistent with freedom of parties. If there is no indication in the contract as to means of payment, ordinary business practices should be considered.[56] CESL takes into account conditional payment done by cheque or other order or promise, and it also governs absolute payment forms of third party promises such as credit card.[57]

Payment place is at the seller's place of business, if place of payment cannot otherwise be determined.[58] This approach is similar to CISG, as mentioned above. Payment and delivery obligation should be performed at the same moment.[59] If there is a legitimate interest, the seller has the right to reject payment before the payment is due.[60]

5) EVALUATION OF CISG FROM THE POINT OF VIEW TO FULFIL THE LEGITIMATE EXPECTATIONS OF BUSINESSES

To earn money in legal, safe and quick ways is the important aim for

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54 Council Regulation EC/0284/2011, Article 95(2)

55 Dannemann, G. and Vogenauer, S. eds. 2013. *The Common European Sales Law in Context Interactions with English and German Law*. Oxford: Oxford University Press, 2012, p.593

56 Council Regulation EC/0284/2011, Article 124(1)

57 Council Regulation EC/0284/2011, Article 124(2)

58 Council Regulation EC/0284/2011, Article 125(1)

59 Council Regulation EC/0284/2011,Article 125(2)

60 Council Regulation EC/0284/2011,Article 126(2)

traders all over the world. Hence, they generally search for legislation which can meet these expectations in the process of business. CISG can fulfil these aims in some aspects, but sometimes it does not has enough regulation for expectations. Cook also says that "Business people like to conduct business without restrains imposed by formalistic requirements that divert attention and effort from their main goal: the conduct of business."[61]

It would be worth to give definitions of FOB and CIF standard trade terms under both common law and the International Chamber of Commerce (ICC) before evaluation of CISG. ICC published the incoterms rules that are used in international trade transaction. Definition of CIF is "Cost, Insurance and Freight: Risk passes to buyer when delivered on board the ship, seller arranges and pays cost, freight and insurance to destination port."[62] The definition of FOB is "Free on Board: Risk passes to buyer, including payment of all transportation and insurance costs, once delivered on board the ship by the seller."[63] There also other definitions about these trade terms under English law. Lord Porter indicated general characteristic of CIF: "the property may pass either on shipment or on tender, the risk generally passes on shipment or as from shipment, but possession does not pass until the documents which represent the goods are handed over in exchange for the price."[64] And also Scrutton J. states that a CIF is not an agreement that goods will arrive, but an agreement to supply goods that meet with the agreement of sale, and get an agreement for carriage and agreement of insurance.[65] In *The El Amira v The El Minia*[66] case, three different types of FOB contract definitions were given. In classic type, firstly, the buyer nominates the ship and the seller delivers the goods on board for the account of the buyer, procuring a bill of lading; secondly, the seller organizes the ship, but legal proceedings are the same; thirdly, the seller delivers the goods to the board and takes the mate's receipt and sends this to the buyer, and the buyer is a party of contract. There is no regulation about FOB in SGA and the definition is given in common law, and it does not reflect international practice usage of FOB, because international practice (incoterms) reflect strict FOB when FOB is considered.

CISG gives importance to parties' freedom and mentions about

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61 Cook, S. V., 1998. CISG: The Perspective of the practitioner. *Journal of Law Commerce*. 17(0733-2491), pp.343-353, p.345

62 International Chamber of Commerce, 2010

63 International Chamber of Commerce, 2010

64 *Comptoir d' Achat et de Vente du Boerenbond Belge SA v Luis De Ridder Limitada (The Julia)* [1949] A.C. 293, p.309

65 Arnhold Karberg v Blythe, Green,Jourdain and Co [1915] 2 K.B. 379

66 [1982] 2 Lloys's Rep. 28

documentary to make more safe trade for businesses. Under the CISG "The seller must deliver the goods, hand over any documents relation to them and transfer the property in the goods, as required by the contract and this convention."[67] This convention gives respects parties' freedom to define their obligations and rights.

CISG does not have specifically have any clauses dealing with standard trade terms. When Articles 30 to 34 (the seller's obligation) of CISG are considered, it can be seen CISG does not only relate to the goods but also relates to the documents, and that is strongly in keeping with the context of FOB and CIF types of contract.

Article 31(b) of CISG reflects to FOB contract for incoterms and strict FOB for English law because, it says if contract involves with carriage of the goods, the seller obliged to deliver the goods to the first carrier.[68] Which is sometimes might be better for the buyer who does not want to take the goods from the seller's business place.

Article 34 also makes trade life easier for businesses and reflects to the CIF type of standard term because, it allows cure any lack of conformity when documents hand over before required time. From the business point of view, it has been said that the purpose of the CIF contract is not a sale of goods themselves but a sale of the documents relating to the goods.[69] According to incoterms the buyer pays cost, freight and insurance, and documents related to these payment and arrangements need to be sent to the seller.

Apart from delivery, for payment obligation CISG also gives parties freedom to arrange formalities for payment at Article 54 which is make easier trade life businesses.

Article 58 is an important regulation for business, it basically states that delivery and payment are concurrent conditions which similar with SGA (s.28), but also this Article regulates crucial relations between the seller and the buyer that makes trade more safe for them. Article 58 is a subsidiary regulation for Article 31 and also reflects standard trade terms. Article 31 states two things which relates to Article 58; documents and the goods are located at the buyer's disposal (Article31(b)(c)), and also when agreement deals with carriage of the goods that can be varied by the buyer and the seller(

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67 The United Nations Convention on Contracts for the International Sale of Goods, 1980, Article 30

68 The United Nations Convention on Contracts for the International Sale of Goods, 1980,,Article 31

69 Murray, C., Holloway, D. and Timson-Hunt, D., 2007. *Export Trade: The law and Practice of International Trade.* 11th ed. London: Sweet & Maxwell, p.34

Article 31(a)). According to Article 58(2) "If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price."[70] Therefore, buyer has right to wait to hand over the goods before payment which is safe way for business. The seller can arrange transportation, and also pays to varying extents the in connection with costs, and the level of this arrangement and payment depends on the terms of delivery agreed which can be CIF contract or FOB one. According to Article 58 (1) "The seller may make such payment a condition for handing over the goods or documents." This Article also gives businesses a kind of guarantee for their payment.

Means of payment is an important issue for businesses, however, CISG does not take into account this subject which is a deficiency for legal expectations of traders.

CONCLUSION

In first part of the study three different legal codes were examined in relation to recognise and enforce the mutuality inherent in delivery and payment duty. Similarities and differences were also given between these three legal codes that some of them take into account some subjects whereas others does not. For example; SGA does not cover delivery obligation of documents whereas CISG does, and also SGA, CISG does not cover means of payment factor whereas CESL does. In second part of the study some Articles of CISG as to delivery and payment obligations were evaluated in connection with the legal expectations of businesses pursuant to CIF and FOB type of trade terms. CISG has important regulations for safe and easier trade, but it does not cover some important issues such as means of payment.

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[70] The United Nations Convention on Contracts for the International Sale of Goods, 1980, Article 58(2)

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Lombard North Central Plc. v Butterworth [1987] Q.B. 527

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The El Amira v The El Minia [1982] 2 Lloys's Rep. 28

A LAWFUL RESPONSE TO CYBER ATTACKS

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ABSTRACT

Cyberwar discussions become an interesting and crucial research area for not only academics but also for soldiers who works in the field. Understanding of the international humanitarian law/law of armed conflict (LOAC) rules is one of the biggest issue on Cyberwarfare because of its characteristic. While some academics believe that cyberwarfare can be considered as a fifth domain of warfare, others claim that it is not a real domain of warfare. Therefore, there has to be clear distinction between Cyber warfare, Cyber Attack and Armed attack for finding a lawful response to Cyber Attacks. Therefore, this article will start with the explanation of their differences. Then, there will be a conflict classification of a Cyber Attack for providing deeply understanding the issue. When it comes to the possible response to cyber attack, belligerent reprisals will be an answer than other possible responses. After definition of belligerent reprisals, there will be some historical examples of it. Also, conclusion will simply summary all arguments about cyberwar and a lawful response to cyber attack.

Keywords: Cyberwarfare, Cyber Attack, Law of War, Armed Attack, Belligerent Reprisals, Geneva Conventions, Tallinn Manual, the Naulilaa Incident, the Einsatzgruppen Case, the Falkenhausen Case, Problem of Attribution, Problem of Distinction, Problem of Proportionality.

ÖZET

Siber Savaşlarla ilgili tartışmalar sadece akademisyenler açısından değil, alanda birebir çalışan askerler açısından da giderek önem kazanmaya başlamıştır. Siber Savaşların değerlendirilmesi konusunda Uluslararası İnsancıl Hukuk/Savaş Hukuku kurallarının anlaşılması hususu büyük sorunlardn birini oluşturmaktadır.Bazı akademisyenler siber savaşın da artık beşinci savaş alanı olarak değerlendirilebileceğini düşünürken, diğerleri hala siber savaşın gerçek bir savaş sahası yaratmadığını düşünmektedir.Bu nedenle, siber saldırılara yasal karşılık belirlenmeden önce, siber savaş, siber saldırı ve silahlı saldırı arasındaki kesin çizgi belirlenmelidir.Söz konusu makale bu konuda açıklama ile başlayacak olup, siber saldırı ile ilgili olarak çatışma çeşitlerinin sınıflandırılması ile devam edecektir.Siber saldırılara verilecek yasal karşılık

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ile ilgili olarak da savaşan taraf misillemesi muhtemel çözüm olarak sunulmuştur.

Anahtar Kelimeler: Siber Savaş, Siber Saldırı, Savaş Hukuku, Silahlı Saldırı, Cenevre Sözleşmesi, Tallinn Kılavuzu, Naulilaa Davası, Einsatzgruppen Davası, Falkenhausen Davası, İsnat Problemi, Ayırt Etme Problemi, Orantılılık Problemi.

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I. Introduction

Cyberwar has become an increasingly crucial topic for academics and soldiers who are closely related to international humanitarian law/law of armed conflict (LOAC). A great amount of discussion circles around the concept of cyberwarfare. While some academics believe that cyberwarfare can be considered as a fifth domain of warfare[1], others claim that it is not a real domain of warfare.[2] Indeed, land and sea warfare has occurred throughout the history of war, air and space were brought by new developments of the technology. Now, cyberwar is the last link of the chain in the meaning of "battlefield". With the development of the internet, cyberwarfare, "the only domain which is entirely man-made"[3], has gained recognition as a fifth domain. Regardless of whether it is a fifth domain or not, cyberwarfare is a crucial problem for armed conflict not only for the future but also for today. Because the law of armed conflict, the Geneva Conventions and its additional protocols, have been designed in accordance with other battlefields such as land, and sea. For example, Geneva Convention II sets out rules for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. This situation raises new questions, such as whether there will be a new regulation or Geneva Convention for cyberwarfare. If yes,

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1 Nils Melzer, *Cyberwarfare and International Law*, UNIDIR RESOURCES, 2011, at 1, 3 http://unidir.org/files/publications/pdfs/cyberwarfare-and-international-law-382.pdf; Matt Murphy, *War in the Fifth Domain*, The Economist, (Jul. 1, 2010), http://www.economist.com/node/16478792.; http://www.aiv-advies.nl/ContentSuite/upload/aiv/doc/webversie__AIV77CAVV_22_ENG.pdf; Karin Kosina, *Wargames in the Fifth Domain* (June, 15, 2012) (unpublished Master Thesis, Diplomatic Academy of Vienna) http://kyrah.net/da/wargames.pdf; Kristin Bergtora Sandvik, Cyberwar as an Issue of International law, PRIO POLICY BRIEF, 04 2012, http://file.prio.no/Publication_files/Prio/Sandvik-Cyberwar-PRIO-Policy-Brief-4-2012.pdf; Paul Cornish, David Livingstone, Dave Clemente & Claire Yorke, On Cyber Warfare, A Chatham House Report, November 2010; Richard Clarke, 'War from cyberspace', The National Interest (November–December 2009), http://nationalinterest.org/article/war-from-cyberspace-3278.

2 Thomas Rid, *What War in the Fifth Domain?*, Kings of War (Aug. 9, 2012), http://kingsofwar.org.uk/2012/08/what-war-in-the-fifth-domain/.
Peter Dombrowski & Chris C. Demchak, Cyber War, Cybered Conflict, and the Maritime Domain, Naval War College Press 71,75 (2014)

3 Melzer, *supra* note 1, at 5.

what kinds of regulation should be designed? If not, adaptation of current rules will be another problem for scholars and fighters who are interested in cyberwarfare.

There could be confusion made about the relation between cybercrime and cyberwarfare. Cybercrime has existed since the invention of internet because of vandals and criminals. There is no strict definition of cybercrime in any statute or act, or in the 2001 Convention on Cybercrime, which is the only multinational treaty related to cybercrime. Generally, it can be described as "an unlawful act wherein the computer is either a tool or target or both".[4] In practice, many states have created their own criminal offenses which are included in the concept of cybercrime. Therefore, cybercrime is generally related to violation of domestic law rather than international law.[5] However, types of cyber crimes such as hacking, cyber pornography, money laundering have changed dramatically in recent years and they have become more sophisticated. For example, according to Pentagon reports[6] 6 million hacking attempts have increased to 360 million attempts from 2006 to last year. These can be explained as being cyber intrusions, which differ from cyber attacks. Contrary to what is believed, espionage, collecting information about other governments, does not constitutean IHL violationbecause cyber intrusions do not constitute a violation of the law of armed conflict.Thus, it is important to distinguish the two terms to determine whether or not a violation of IHL has occurred. Cyberattack, which is related to cyberwarfare, has become a significant issue though it is not a new concept. Especially, it has started to be on politician's and policymaker's agendas because of its importance. For example, in 2011, US Defense Secretary Leon Panetta referred to cyber threats as a "cyber Pearl Harbor"[7], highlighting that the next Pearl Harbor could be a cyberattack.[8]

Cyberwarfare has also brought new humanitarian concerns to the law of

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4 Arpana & Meenal Chauhan, *Preventing Cyber Crime: A Study Regarding Awareness of Cybercrime in Tricity*, 2, Intl'i j. Enterprise Computing And Business Systems (Jan. 1, 2012), http://www.ijecbs.com/January2012/35.pdf

5 United Nations Office on Drugs and Crime, *Comprehensive Study on Cybercrime*, (2013), http://www.unodc.org/documents/organized-crime/UNODC_CCPCJ_EG.4_2013/CYBERCRIME_STUDY_210213.pdf

6 Randy James, Cybercrime, June 02, 2009, Time, http://content.time.com/time/nation/article/0,8599,1902073,00.html

7 Jeremy A. Rabkin and Ariel Rabkin, "Why the Current Law of Armed Conflict Should Not Fetter U.S. Cyber Strategy (2012)," in *Emerging Threats in National Security and Law*, edited by Peter Berkowitz, http://www.emergingthreats essays.com

8 Anna Mulrine, CIA Chief Leon Panetta: The next Pearl Harbor could be a cyberattack, The Christian Science Monitor, June 9, 2011, http://www.csmonitor.com/USA/Military/2011/0609/CIA-chief-Leon-Panetta-The-next-Pearl-Harbor-could-be-a-cyberattack

armed conflict. Although there is no clear example of cyber attacks which severely affect the civilian population, they have risks due to the relationship between civilians and cyber systems. Hence, the International Committee of Red Cross (ICRC) has humanitarian concerns about cyber warfare's impact on civilians. For instance, if there is an attack on airport systems or air traffic control systems, transportation or banks, civilians will be directly affected. In addition, civilians can be faced with being deprived of basic essentials such as electricity, drinking water, or medical care when computers or networks are attacked.[9]

Besides, it is a remarkable topic for understanding the impact of cyberwarfare for international law experts. For example, there is a non-binding study, the Tallinn Manual on the International Law Applicable to Cyber Warfare, which clarifies how international law applies to cyber conflicts and cyberwarfare. It was prepared by an International Group of Experts at the Invitation of the NATO Cooperative Cyber Defence Centre of Excellence. However, cyber warfare is not an easy issue to which answers have already been accepted.Adopting current LOAC rules to cyberwarfare is the one of the most important issues in humanitarian law. Because there is neither a treaty which directly defines "cyber warfare"[10], nor is "cyber" in the 1949 Geneva Conventions or 1977 Additional Protocols.[11] However, that does not mean that these attacks are not subject of the IHL/LOAC. Especially Additional Protocol I Article 36, that applies new weapons,[12] shows that the rules of IHL are applicable to new technology.[13] However, the problem is how IHL/LOAC rules can be applicable to cyber issues. Determining parties to the conflict, applying the principle of distinction, and finding who initiated the attack, for instance, are controversial parts of cyberwarfare law.[14]

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9 ICRC Resourse Centre, http://www.icrc.org/eng/resources/documents/faq/130628-cyber-warfare-q-and-a-eng.htm(last visited, Nov. 8, 2013).

10 Tallinn Manual On The International Law Applicable To Cyber Warfare 5 (Michael N. Schmitt ed., 2013).

11 Gary Solis, Cyberwarfare 1 (unpublished manuscript) (on file with author).

12 Article 36 New weapons In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.

13 Cordula Droege, *Get Off My Cloud Cyber Warfare İnternational Humanitarian Law And The Protection of Civilians* 94 Int'l Rev. ICRC 533, 540 (2012).

14 *Id*. at 541.

II. A BRIEF HISTORY OF CYBER INCIDENTS

a. Estonia vs.?

In 2007, Estonia's critical national infrastructure was hacked after Estonia removed a bronze World War II era statute which is honored a Soviet soldier. A cyber technique known as a distributed denial-of-service attack was used for the assault. The internet has a critical importance for Estonia because it is used for most parts of everyday life such as banking, shopping and voting. After these attacks, Estonia claimed that the internet address of the originator of the attack referred to an official who worked for Russia's president, Vladimir V. Putin. However, the Russian government denied any connection in the attacks. Because of the attribution problem in cyber attacks, Estonia has not been able to identify the source of attack with certainty. Therefore, even though there are plausible indications about the responsibility of the Russian government, the source of the attack could not be determined. In other words, there is no certain information which indicated the culprits of the Estonia attacks.[15] The attack on Estonia can be given as an example of the importance of cyber attacks. It demonstrates how cyber attacks can be powerful and dangerous for entire nations.

b. Georgia vs. Russia

Although the Russian-Georgian War officially started in 2008, there was a long history of geostrategic conflict between them. One of the problems was the future of the South Ossetia. However, the war was not long because aftera week, the parties had signed a ceasefire agreement. This case is the first known cyber attack which concurred with a kinetic war in the other domains. Attackers had started their cyber attack three weeks before the shooting war between Georgia and Russia began.[16]While tanks and troops were crossing the border, online attackers were assaulting Georgia's websites and civilians could not access them for information and instruction.[17] It was clear that Russia used cyber attacks as a separate domain: cyberwarfare. This attack was successful because Russia attacked 54 critical web sites and shut down the ability of Estonia to function as a state.[18]

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15 Mark Landler & John Markoff, *Digital Fears Emerge After Data Siege in Estonia*, N.Y. Times, May 29, 2007, at 1.

16 Noah Shachtman, *Top Georgian Official: Moscow Cyber Attacked Us – We Just Can't Prove It*, WIRED (Nov. 03, 2009), http://www.wired.com/dangerroom/2009/03/georgia-blames/

17 Jon Oltsik, *Russian Cyber Attack on Georgia: Lessons Learned?*, NETWORKWORLD (Aug. 17, 2009), http://www.networkworld.com/community/node/44448

18 David Hollis, *Cyberwar Case Study: Georgia 2008*, Small War J. 1, 1-3 (2010).

III. DEFINITION OF TERMS

a. Cyber warfare:

There is no multi-national treaty which refers to cyberwarfare so cyberwarfare has many definitions. It can be defined as "warfare conducted in cyberspace through cyber means and methods"[19] for purposes of cyber attacks which focus on military and government entities.[20]Cyberspace is a broad term which includes every network in the world. Computer Network Attacks (CNAs) which include disruption, denial, degradation, or destruction of systems have been the most prevalent type of cyberwarfare.[21]

b. Cyber attack:

As mentioned before, cyber warfare is different than traditional warfare. There is no doubt that aerial bombing, or gunfire, will be an attack under the traditional definition. However, the problem is when a cyber event will be considered an attack.

In Article 49 (1) of Additional Protocol I, attacks are defined as "acts of violence against the adversary, whether in offence or in defence". First, although violence is not necessarily the means of the attack, any attack must be an act of violence.[22] For example, use of aerial bombing, or chemical, biological weapons, constitute an attack without doubt.[23] The ICTY has additional criteria for determining what an attack must be. In the Kunarac case, the ICTY found that "the attack must be either "widespread" or "systematic".[24] The ICTY states that "the phrase "widespread" refers to the large-scale nature of the attack and the number of victims, while the phrase "systematic" refers to "the organised nature of the acts of violence and the improbability of their random occurrence"."[25] However, defining cyber attack is not easy under these definitions. For example, when do humanitarian law principals apply to computer network attacks?How are traditional kinetic attacks associated with cyber attacks? According to the Professor Michael Schmitt, cyber attacks can be defined as "... more than merely sporadic and isolated incidents and are either intended to cause injury, death, damage or destruction (and analogous

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19 Melzer, *supra* note 1, at 4.

20 *Supra* note 11, at 1.

21 Herbert S. Lin, *Offensive Cyber Operations and the Use of Force*, 4 J. NAT'L SEC.& POL'Y 63, 63 (2010).

22 *Supra* note 13, at 557.

23 *Supra* note 11, at 10; *Supra* note 13, at 557.

24 Prosecutor v. Kunarac, Kovac and Vukovic, Case No. IT-96-23 & 23/1, Judgment , ¶ 410 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001

25 *Id*. at ¶ 429.

effects), or such consequences are foreseeable."[26]There is another definition in The Tallinn Manual, Rule 30. It defines a cyber attack as "A cyber operation, whether offensive or defensive, that is reasonably expected to cause injury or death to persons or damage or destruction to objects."[27] Herein, damage means physical damages. For example, "the destruction of one house by bombing would be an attack, but the disruption of an electrical grid supplying thousands or millions of people would not."[28] However, the Tallinn experts did not agree about what "damage" means.[29] Therefore, some commentators assert that an attack may include events that disrupt the functioning of civilian objects even though there is no physical damage.[30] As a result, a cyber event which injures, kills, damages or destroys, would constitute an attack in the same way as kinetic weapons causing such results.[31]

c. Armed attack

The right of self-defense and armed attack have a close relation because of Article 51 of the UN Charter[32]. Article 51 says that the "...Charter shall not impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations..." It is clearly highlighted that there must be an armed attack for raising the right to self-defense. However, armed attack is not defined by the Charter. Although the Nicaragua case hinted some information, it does not clearly define armed attack.[33] Instead, the International Court of Justice has held "scale and effects" as a threshold of armed attack.[34] According to the Nicaragua case, the use of force and armed attack do not have same meaning.[35] Therefore, every use of force does not rise to the level of armed attack. However, another problem is what conditions will provide the threshold of an armed attack and when cyber attacks can be considered as an armed attack under Article 51.

Jean Pictet's useful criteria for determining the existence of an international armed conflict under Common Article 2 of the 1949 Geneva Conventions can

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26 Michael N. Schmitt, *Wired Warfare: Computer Network Attack in Jus in Bello 84* Int'l Rev. of the Red Cross 365, 374 (2002).
27 *Supra* note 10, at 106.
28 *Supra* note 13, at 558-559.
29 *Supra* note 10, at 107-108.
30 *Supra* note 13, at 559.
31 *Supra* note 11, at 12.
32 U.N. Charter art. 51.
33 Heather Harrison Dinniss, Cyber Warfare And The Laws Of War 78 (2012).
34 Military and Paramilitary Activities in and Against Nicaragua (Nicar. V. U.S.), 1986 I.C.J. 14 (June 24) ¶ 195.
35 *Supra* note 33, at 77.

be deemed a guide for determining when there is armed attack. According to Pictet, when the armed force meets "sufficient scope, duration, and intensity" criteria, a use of force constitutes an armed attack.[36] The application of those criteria has evolved by state practice and scholar's writings over the years.[37] After all, there are three distinct approaches – theinstrument based, the target based (strict liability) and the effects based approaches[38] – analyzing the application of Pictet's use of force criteria which includes cyber attacks.[39]

The instrument based approach claims that the armed force which is required to constitute an armed attack can be constituted only by traditional weapons.[40] This approach would not include offensive cyber operations such as those involved in the cyber attack against Estonia.

The target based (strict liability) approach holds that "the nature of the target is vital in determining whether a CNA rises to the level of a use of force or armed attack."[41] According to the defenders of this approach, the target is more important than the instrument or the effects of cyber attacks. If the target of a cyber attack is "critical" national infrastructure it may constitute an armed attack regardless of its severity such targets require special protection.[42] Under these conditions which national infrastructure can be deemed critical will be next question. The US has executive order 13010 which is related to Critical Infrastructure protection of the United States. The order highlights that "... critical infrastructures include telecommunications, electrical power systems, gas and oil storage and transportation, banking and finance, transportation, water supply systems, emergency services (including medical, police, fire, and rescue), and continuity of government. Threats to these critical infrastructures fall into two categories: physical threats to tangible property ("physical threats"), and threats of electronic, radio-frequency, or computer-based attacks on the information or communications components that control critical infrastructures ("cyber threats")."[43]

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36 Commentary To Geneva Convention III Relative To The Treatment Of Prisoners Of War 23 (Jean Pictet ed., 1960).

37 David E. Graham, *Cyber Threats and the Law of War*, 4 J. Nat. Sec. L.&Pol'y 87, 90-91 (2010).

38 *Id*. at 91; Sheng Li, *When Does Internet Denial Trigger the Right of Armed Self-Defense?*, 38 Yale L.J. 179, 186-187 (2013).

39 *Supra* note 37, at 90-91.

40 Daniel B. Silver, *Computer Network Attack as a Use of Force under Article 2(4) of the United Nations Charter*, 76 Int'l L. Stud. 73, 88 (2002).

41 Eric Talbot Jensen, *Computer Attacks on Critical National Infrastructure: A Use of Force Invoking the Right to Self-Defense*, 38 Stan. J. Int'l L. 207, 226 (2002).

42 walter g. Sharp sr., cyberspace and the use of force 129-131 (1999).

43 Executive Order EO 13010 Critical Infrastructure Protection (July 15, 1996) http://www.fas.org/irp/offdocs/eo13010.htm

However, the target based (strict liability) approach's point of view can be criticized because of its all-inclusive nature. For instance, if cyber espionage occurs against critical infrastructure systems, it will be considered an armed attack which triggers the right to self-defense because of the importance of target, regardless of the attack's dimension or results.[44] TheICJ's "scale and effect" threshold of armed attack is ignored by the target based approach.

The last approach, the effect based approach, is the most prominent approach. If the effect of the cyber attack brings the same results, or the effects of an armed attackperformed by physical weapons, the cyber-attack can be considered as an armed attack.[45] Indeed, cyber attacks have the ability to kill and wound, as well as to damage and destroy civilian and military objectives without the use of traditional weapons.[46] Therefore, it is reasonably clear that the term, "armed", in the Article 51 includes kinetic or electronic attack, both having the capability of generating the same results.

IV. DOES LOAC APPLY TO CYBER ATTACKS?

a. Is there an armed conflict?

There must be armed conflict for implementing IHL. The 1949 Geneva Convention's Common Article 2 explains the Application of the Convention as follows: "Convention shall apply to all cases of *declared war* or of *any other armed conflict* which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."[47] It must be decided whether either international armed conflict or non-international armed conflict can be triggered by a computer attack. There is already a standard for armed conflict: "an armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups."[48]According to the ICTY, the intervention of armed forces is a requirement for constituting armed conflict. However, if there is a different kind of force than traditional force, how should it be considered as compared to a traditional resort to armed force? The issue is whether traditional physical assault is required for an armed attack or not. To answer this question, the core meaning of armed conflict has to be understood. According to Professor Schmitt, "Cyber operations can

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44 *Supra* note 38 at 187.

45 *Supra* note 11 at 14.

46 *Id.*

47 1949 Geneva Convention, Common Article 2. http://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument& documentId=C5031F972DD7E216C12563CD0051B998.

48 Prosecutor v. Tadic, Case No. IT-94-1-AR72, ¶ 70 (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Oct. 2, 1995).

unquestionably generate such consequences even though they launch no physical force themselves."[49] In other words, there is no physical force needed for initiating armed conflict via cyber operations. He gives an example of a cyber operation against an air traffic control system which should qualify as an attack because of its violent consequences.[50]

It is clear that this kind of attack could likely result in physical danger to aircraft and lead to death or injury. Also, the release of dam waters via cyber operation can cause massive downstream destruction, and therefore qualify as an attack. Logically, if there were an operation like bombing a dam, it would be considered an attack without hesitation. There is hence no reasonable explanation for having a different conclusion in cyber operations having the same or similar results.[51]

Indeed, examples of 9/11 and biological, chemical, or radiological weapons demonstrate that no physical attack is needed for triggering an armed attack. Because "acts of violence," which are referred to in Article 49(1) of Additional Protocol I, should not be limited to the release of kinetic force. To put it another way, although these types of attacks do not generally have a kinetic effect, there is no doubt they do qualify as attacks. Therefore, some claim that although a cyber attack is different from others, if it has the same physical effects, it will likely trigger an armed conflict.[52] In addition, Cordula Droege claims that if there are large scale consequences, there can be reason to treat these attacks differently than other equal forms of attack, despite the fact that the effects are not equivalent to physical effects.[53] For example, even though there is no death or injury, attacking an electrical grid or water supply may be considered armed force because of its severe consequences from which IHL seeks to protect civilian populations.[54] Nevertheless, having severe consequences alone is not enough to constitute armed force; the effects of the cyber attack should bring the same results of an armed attack performed by physical weapons, physical damage and destruction.

When it comes to the damage and destruction part, there is no bright line test of what constitutes damage or destruction. The International Group

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49 Michael N. Schmitt, C*yber Operations and the Jus in Bello: Key Issues,* Naval War College – Int'l Law Department; University of Exeter Law School 1, 6 (2011).

50 *Id.*

51 *Supra* note 26, at 94.

52 Michael N. Schmitt, *Classification Of Cyber Conflict* 17 J. Conf. Sec. L. 245, 252 (2012).; Knut Dörmann, *Applicability of the Additional Protocols to Computer Network Attacks*, ICRC Resource Center, 1, 3 (2004); *Supra* note 33, at 132.

53 *Supra* note 13, at 546, 549.

54 *Id*. at 549.

of Experts of the Tallin Manual has a discussion about whether or not "the functionality of an object" can constitute damage or destruction for the purposes of a cyber attack. The majority of experts believe that if "restoration of functionality requires replacement of physical components" it can qualify as damage. They claim that if there is a cyber operation against the computer-based control system of electrical grid, for instance, this operation will be an attack because the control system or its vital components must be replaced for restoring distribution.[55]

A few experts also suggest that if a system needs data restoration, like blocking internet connection in a whole country, without any physical replacement of components, it should nonetheless be treated as an attack. The majority of experts, however, agree that the applicability of the law of armed conflict should not be extended this far.[56] Additionally, the ICRC claims that a cyber operation which "disables" an object constitutes an attack even when there is no physical damage.[57] According to Schmitt, this extension of repair of the cyber infrastructure can be reasonable.[58] He and liked-minded experts agree that a *de minimis standard* should be considered. For example, if there is only a single computer which has non-essential functions disabled, it does not meet the threshold of harm,similar to when a soldier throws a rock across the border.[59] It should not be forgotten that determination of attack in cyberwarfare is not only important for initiating armed conflict but also in responding to armed conflict. It is clear that if there is an attack in the meaning of Article 51 of the UN Charter, states have a right to respond to this attack. Therefore, decreasing the threshold of what constitutes an attack can result in war although there is no real casus belli. Therefore, the experts who consider the *de minimis standard*to be significant seem reasonable.

b. Is a cyber attack an "armed attack"?

It is a given that there must be an armed attack toexercise the right of self-defense under UN Charter Article 51. Armed conflict can be initiated by cyber attacks. Therefore, the law of armed conflict's principles are applicable to computer network attacks. As we mentioned earlier, an results criterion is argued by Schmitt. The criterion is that "A cyber operation, like any other operation, is an attack when resulting in death or injury of individuals, whether

55 *Supra* note 10, at 108.
56 *Supra* note 10, at 109.
57 31st ICRC Conference 37 available at http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf
58 *Supra* note 52, at 252.
59 *Id*.

civilians or combatants, or damage to or destruction of objects, whether military objectives or civilian objects."[60] Attacks should be "more than merely sporadic and isolated incidents and are either intended to cause injury, death, damage or destruction…. or such consequences are foreseeable."[61] Professor Yoram Dinstein states that "From a legal perspective, there is no reason to differentiate between kinetic and electronic means of attack. A premeditated destructive [computer network attack] can qualify as an armed attack just as much as a kinetic attack bringing about the same ... results. The crux of the matter is not the medium at hand (a computer server in lieu of, say, an artillery battery), but the violent consequences of the action"[62]In other words, although there is no attack in the traditional sense, if there are deaths or injuries of individuals or damaging or destroying of objects, it is a cyber attack and also constitutes an armed attack. Therefore, cyber espionage, such as the downloading of classified information,it cannot be subject to International Humanitarian Law because it does not meet the requirements of the results test.

V. CONFLICT CLASSIFICATION OF A CYBER ATTACK

As mentioned above, a cyber attack can trigger an armed conflict just as with a kinetic attack. After finding that LOAC does apply to cyber attacks, we will address the determination of a conflict's status under the law of armed conflict.

The conflict classification of a cyber attack is important for determining the right of self-defense. There can be three different scenarios for determining the right of self-defense. The first one is that one state can attack another state. The second is that a non-state actor who is under a state's control can attack a state. The third one is that a non-state actor can attack a state without state sponsorship or control.

a. If state attacks state

Common Article 2 describes international armed conflict as what will "... arise between two or more of the High Contracting Parties...".[63] It is clear that if there is an attack that emanates from another state, the attacked state has a right to self-defense under the UN Charter Article 51. When it comes to

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60 *Id.*

61 *Supra* note 26, at 374.

62 Yoram Dinstein, *Computer Network Attacks and Self-Defense*, *in* Computer Network Attack And International Law 99 (Michael N. Schmitt & Brian T. O'Donnell eds., 2002) (Vol. 76, U.S. Naval War College Int'l Law Stu.).

63 *Supra* note 47.

cyberattacks, attacks which are conducted by a state or attributable to a state will undoubtedly be considered an international armed conflict. Also, if the cyber attack is conducted via other organs of a state, like intelligence, it will qualify.[64] As noted by the ICTY in the Tadić case, "private individuals acting within the framework of, or in connection with, armed forces, or in collusion with State authorities may be regarded as de facto State organs."[65] There is another rule in the Draft Articles on Responsibility of States for Internationally Wrongful Acts. According to Article 5, "the conduct of a person or entity which is not an organ of the State under Article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State, under international law, provided the person or entity is acting in that capacity in the particular instance."[66]This means that if there is a cyberattack which is conducted by a state, or attributable to a state against another, it can create an international armed conflict.

b. If non-state actor attacks state

IHL is applicable to cyber operations not only in international armed conflicts but also in non-international armed conflicts. However, there is a problem in the non-international armed conflict when considering the distinction between armed opposition groups and government forces. Common Article 3 refers to a non-international armed conflict as "...armed conflict not of an international character occurring in the territory of one of the High Contracting Parties..."[67]Nonetheless, attacks by non-state actors are problematic as far as the right to self-defense is concerned. Although UN Charter 51 does not limit the types of attacks, ICJ has ruled that self-defense is limited to state attacks by other states.[68] However, state practice has ignored this ICJ ruling. One writer points out that "the Court's restrictive approach is increasingly out of touch with state practice."[69] Therefore, arguably, a non-state actor can initiate a cyber attack without being under state control.

1. If non-state actor is under "overall control" of a state (the *Tadić* test)

Similar to the situation of attacks by a state, if an attack by non-state actors is attributable to a sponsoring state, it will invoke the right to self-defense.

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64 ILC, Responsibility of States for Internationally Wrongful Acts UN Doc A/56/10, art 4(1).

65 Prosecutor v. Tadic (Appeal Judgement), Case No. IT-94-1-A, ¶ 144 (International Criminal Tribunal for the Former Yugoslavia Jul. 15 1999).

66 *Supra note* 64.

67 1949 Geneva Convention Common Article 3.

68 *Supra* note 34.

69 Theresa Reinold, *State Weakness, Irregular Warfare, and the Right to Self-Defense Post 9/11*, 105-2 AJIL 244, 261 (APRIL 2011)

Furthermore, the victim state's right of self-defense may be initiated against both the attacker and the harboring state.[70] The ICTY Tadić case employs an "overall control"[71] test as the criterion for attribution of conduct of organized armed groups to a particular state. Cassese notes that "Such 'overall control' reside not only in equipping, financing or training and providing operational support to the group, but also in coordinating or helping in the general planning of its military or paramilitary activity."[72] A state must issue specific instructions or directives to individuals who conduct cyber attacks without being members of an organized armed group. The attacks cannot be attributed to the State lacking of these instructions and directives.[73] For example, if a state gives orders to the group for attacking cyber targets or refraining from attacking specific targets, it provides overall control of the group, which means that the cyber attack is attributable to the harboring state.

2. If non-state actor is not under "overall control" of a state

What will happen if a cyberattack does not involve another state's control, or if the non-state actor does not meet organizational and structural requirements to constitute an armed group? As mentioned above, the state must have directed some specific instructions for attribution. If there is no relationship between the state and an individual, the state may not be held responsible.

Secondly, the International Criminal Tribunal for the former Yugoslavia (ICTY) has noted that "The test applied by the Appeals Chamber to the existence of an armed conflict for the purposes of the rules contained in Common Article 3 focuses on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict. In an armed conflict of an internal character, these closely related criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law."[74] It is clear that there must be minimum level of intensity and a minimum level of organization for determining the existence of a non-international armed conflict.[75]

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70 *Supra* note 11, at 9.

71 *Supra* note 65 ¶ 120.

72 Antonio Cassese, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 Oxford J. 649, 652 (2007).

73 *Supra* note 65 ¶ 132.

74 Prosecutor v. Dusko Tadic a/k/a/ "Dule," IT-94-1-T, Opinion and Judgment, ¶ 562 (Trial Chamber I, May 7, 1997).

75 ICRC, http://www.icrc.org/eng/resources/documents/interview/2012/12-10-niac-non-international-armed-conflict.htm (last visited, Sep. 30, 2013).

According to the ICTY[76], if the unorganized groups lack the organization, this means that they did not meet an armed opposition group requirement. If there is no armed conflict, the law of armed conflict cannot apply. In Estonia, for instance, although some "hacktivists"were involved in the cyber operations, the operations did not qualify as non-international armed conflict because they lacked the requisite degree of organization.[77]

To sum up, if an individual non-state actor initiates a cyberattack against a state, domestic law will be applicable rather than IHL.[78]

VI. CYBER ATTACK SCENARIO

Imagine that one Friday night, we turn on the TV and see that State X has conducted a computer network attack against State Y's air traffic control system. Because of this attack, many planes experienced technical difficulties while two of them crashed and 257 people have died. In this scenario, causing injury or death to persons or damage or destruction to objects is clear. At least, its results are foreseeable. Therefore, the State Y has a self defense right under the United Nation Charter Article 51 against State X.

VII. POSSIBLE RESPONSE(S) TO CYBER ATTACK

When it comes to the lawful response to attack, it is a complex issue. The Security Council has authorized a Chapter VII response, so UN- or US-initiated sanctions, armed self-defense, and belligerent reprisal can be examples of possible lawful responses. Additionally, countermeasures such as such as legal responses, access controls,could be added to these options.

a. Security Council authorize a Chapter VII response

The Charter prescribes the threat or use of force as outlawed and which is recognized universally as being*jus cogens*.[79] According to Article 2 (3) of the Charter of the United Nations, "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."[80] Article 24 of the Charter points to the power of Security Council as a "primary responsibility for the maintenance of international peace and security." Article 2(4)[81] bans the use of force against

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76 *Supra* note 65 ¶ 137.

77 *Supra* note 52, at 256.

78 *Supra* note 11, at 14.

79 LORI F. DAMROSH, LOUIS HENKIN, SEAN D. MURPHY & HANS SMITH, INTERNATIONAL LAW CASES AND MATERIALS1143 (5th ed. 2009).

80 U.N. Charter Art. 2, ¶ 4.

81 All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other

other states. However, there are two exceptions for using force against other state. The first one is the authorization of the Security Council as a measure of collective security, and second one is the exercise of the right of self-defense according to Article 51 of the Charter.[82]

The Security Council has the power to authorize U.N. members to engage in the use of force against another state or states. Getting such an authorization from the Security Council will minimize critics condemning the use of force.[83] Getting this authorization is possible if there is an Article 39 determination about the "existence of any threat to the peace, breach of the peace, or act of aggression."According to David E. Graham, Executive Director of The Judge Advocate General's Legal Center and School, U.S. Army, "Article 39 determinations and resultant use of force recommendations are exceptionally difficult to achieve. Most such decisions are arrived at only after extensive and time consuming deliberations, and even then such decisions are subject to the veto of any permanent Security Council Member."[84] Indeed, the veto power will decrease the possibility of using this option because the permanent members of the Security Council, the US, Russia, France, UK, and China, have used their power of veto in accordance with their national interests since the establishment of the Security Council. Therefore, when a state wishes to respond a cyberattack, one of the five permanent members of the Council can exercise its veto.[85]This means that the answer will be uncertain,regarding whether the Security Council will respond to such attacks in a timely manner or not. Therefore, it is logical to assume that a state will not choose to deal with cyber attacks by possible authorization of a use of force by the UN Security Council.[86]

b. UN- or US-initiated sanctions:

Another option is that of applying pressure on a state without the use of armed force. The Security Council can take enforcement measures to maintain or restore international peace and security under Chapter VII of the Charter. After a threat to the peace, breach of the peace, or act of aggression has been determined under Article 39, the Security Council can call for measures under

manner inconsistent with the Purposes of the United Nations.

82 Said Mahmoudi, *Self-Defence and International Terrorism*, Stockholm Institute for Scandianvian Law, 203, 204 (2010).

83 Richard B. Lillich & John Norton Moore, *Forcible Self Help Under International Law*, 62, I'ntl L. Stu. 129, 130.(1980)

84 *Supra* note 37 at 89.

85 Sahar Okhovat, *The United Nations Security Council: Its Veto Power and Its Reform*, The Centre for Peace and Conflict Studies, 1, 8 (2012).

86 *Supra* note 37 at 89.

Article 41 of the UN Charter. Such measures can be economic or trade, which do not involve the use of armed force,to international military action such as embargoes, travel bans, financial or diplomatic restrictions. The purposes of these sanctions are to apply pressure on a state to respect its obligations under the UN Charter without resorting to the use of force. Although it seems to be a more effective and peaceful way, there is debate among human rights advocates about its limits. Also, states and humanitarian organizations have concerns about the possible negative impact of sanctions on the economy of third countries and their population, as well as the collateral effects on third party states.[87] Sanctions affect ordinary people rather than leaders.For example, it is clear that US sanctions during the 1990s against Iran, North Korea, China, India and Pakistan did not affect these states or their leaders attitudes.[88] However, the civilian populations havebeen adversely affected by these sanctions. Moreover, the United Nations Security Council has to face claims by human rights lawyers because of its use of sanctions of mass destruction.[89]

Additionally, the option of sanctions takes months, perhaps years, to have any effect; however, states do not have time in regard to acts of cyberwarfare because states sometimes have to respond to cyberattacks in a limited time. This makes sanctions an unrealistic response to a cyberattack. Initiating sanctions as a response to cyber attacks seems improbable and impractical,based on this central issue.

c. Armed self-defense

This option is a traditional response to an armed attack. Under Article 51 of the UN Charter,there is an inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations until the Security Council has taken measures necessary to maintain international peace and security. As mentioned above, a cyber attack which causes injury, death, damage, or destruction will meet the definition of an armed attack for invoking the right of self-defense. A military response should be expected, to meet a cyber attack in several respects. For example, if a state wants to protect its military and critical infrastructure against ongoing cyber attacks, the state can exercise an armed response as a preventive use of force. However, an armed response to a cyber attack can bring risks. Lowering legal

87 UN Security Council Sanctions Committees, http://www.un.org/sc/committees/ (Last visited: 11.11.2013).

88 Peter Wallensteen, *A Century of Economic Sanctions: A Field Revisited*, 1 Uppsala Peace Research Papers Department of Peace and Conflict Research, 1, 8 (2000).

89 Mary Ellen O'Connell, *Debating the Law of Sanctions*, 13 EJIL 63, 63 (2002).

barriers to military force can be one of these risks. Indeed, armed attacks triggering self-defense rights under Article 51 could create insecure, unstable, and hostile environments in the international system. Politicians can behave in a different manner when it comes to national issues. They can overreact to a crisis to demonstrate their power to other states in the way of physical force. Thirdly, attribution is one of the most important issues in cyber attack incidents. Identifyingthe undeniable digital fingerprints of cyber attacks is not easy. Attacks can be orientated through many unwitting third parties' computer systems. A response to cyberattacks with armed self-defense can cause political problems between states. Therefore, the threshold of harm should be quite high to justify an armed attack.[90] When we consider the problems which can result from armed self-defense, this option could be considered excessive.

e. Other possible lawful responses to a cyber attack

Countermeasures are significant for preventing cyberattacks. A variety of countermeasures can be used by states such as education, legal responses, patches, access controls, investigation, and prevention. Most especially, electronic preventive countermeasures are helpful because they make networks less vulnerable to attack. States must be able to understand this concept and detect the preparation of a cyber attack as soon as possible to overcome it. For instance, education is one of the most significant countermeasures because it heightens awareness of attacks and their results. Also, investigation by law enforcement is another preventive opportunity for states. Many countries have prohibitions against attacks in their domestic laws. However, prohibitionsseldomwork because finding attackers and applying domestic law is difficult and time-consuming task, requiring the expertise of specially trained technicians who, often are not available to domestic law enforcement agencies. Fixing technological flaws or bugs is important because most attacks are launched after the discovery of major flaws. Therefore, flaws or bugs should searched for and discovered as soon as possible. Patches, security updates, or service packs are forms of preventive software provided by manufacturers. Although motivating the manufacture and use of computer preventive hardware and software systems is important, it is simply not enough.[91]

It is clear that determining who is responsible for an attack is the central

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90 Matthew C. Waxman, *Self-defensive Force against Cyber Attacks: Legal, Strategic and Political Dimensions,* 89 INT'L L. STUD. 109, 119 (2013).

91 Neil C. Rowe, *Cyber-attacks*, (Nov. 22, 2013,10:04 AM), http://faculty.nps.edu/ncrowe/edg_attacks.htm

issue in cyberwarfare. Therefore, attribution should be considered a critical factor in the consideration of countermeasures,because attribution of the source of an attack will be most significant effective in deciding what the response should be.[92] Countermeasures will change in accordance with attacker. Countermeasures are useful for protecting systems despite their weaknesses. However, they are insufficient when used alone.

The Tallinn Manual, Rule 9, discusses the use of countermeasures in cyberspace: "A state injured by an internationally wrongful act may resort to proportionate countermeasures, including cyber countermeasures, against the responsible State."[93] This rule is obtained from International Law Commission's Article's on State Responsibility. Article 49(1) of those Articles states the purpose of countermeasures. "An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two." Part two of the Articles is related tothe content of the international responsibility of a state. In other words, countermeasures which are taken by the victim state must be against the offending state and no others. Otherwise, the countermeasures will be unlawful. Pursuant to Article 49 (1) on State Responsibility, the only legal purpose of countermeasures is to induce that State to comply with international obligations.

If the internationally wrongful act has ceased, or the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties, countermeasures may not be taken. However, if the state found to have acted wrongfully does not implement the dispute settlement procedures in good faith, this rule will not apply.The majority of the Tallin International Group of Experts agree that if the offending state ceases its wrongful action, the victim state cannot insist on countermeasures, including cyber countermeasures, as long as the offending state is acting in good faith. [94] There are responsibilities for a state who is taking countermeasures, including cyber countermeasures, under the International Law Commission's Articles. First, an injured state shall call on the responsible state to comply with Article 43, fulfilling its international obligations. Second, the responsible State shall be notified about any decision related with taking countermeasures and offering negotiation. Urgent countermeasures are an exception to this rule because they may be taken by an injured state if necessary for preserving its rights. Urgent countermeasures are designed to protect a victim state

92 Michael A. Vatis, *Trends in Cyber Vulnerabilities, Threats, and Countermeasures*, in Information Assurance Trends in Vulnerabilities, Threats, and Technologies, 99, 107 (2004).

93 *Supra* note 10, at 36.

94 *Id*. 37.

from a possible attack which may occur within a short time. Cyberattacks, are inherently serious situations. Therefore, a victim state can take urgent countermeasures.

Article 50 regulates obligations which are not affected by countermeasures: "Countermeasures shall not affect:(a) The obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations; (b) Obligations for the protection of fundamental human rights; (c) Obligations of a humanitarian character prohibiting reprisals; (d) Other obligations under peremptory norms of general international law."

Countermeasures as described in The Tallinn Manual, Rule 9,are different from the definition of typical military countermeasures. The latter are used for activities designed for defeating the operation of a weapon. These countermeasures are also different from belligerent reprisals, which are available only during an international armed conflict.

e. Belligerent reprisal

1. Description

Belligerent reprisals are one of the sanctions of the laws of war which have long been used on the battlefield.[95] However, they are a controversial topic because of theirargued legality under international law. Some authorities have opposed reprisals. The ICRC has highlighted that reprisals can be easily misused by parties. There are disadvantages to reprisals, such as limitations, risks and unfairness. On the other hand, reprisals have advantages. For example, they need not be immediate; therefore the victim state has time for positively identifying an attacker.

A definition of reprisal is the "intentional violations of a given rule of the law of armed conflict, committed by a Party to the conflict with the aim of inducing the authorities of the adverse party to discontinue a policy of violation of the same or another rule of that body of law."[96] On the one hand, belligerent reprisals are effective because they allow for violation of the law of armed conflict to ensure compliance with those same laws. On the other hand, they are controversial because the act taken in reprisal has an unlawful nature.

Although modern international humanitarian law aims to restrict the application of belligerent reprisals in response to unlawful activity, it has not

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95 Shane Darcy, *The Evolution Of The Law Of Belligerent Reprisals,* 175Military Law Review, 184, 250 (2003).

96 Frits Kalshoven, Constraints On The Waging Of War 65 (Geneva 1987).

been completely outlawed. In contrast, several states want to apply certain types of reprisals because of their effectiveness.[97]

To understand the concept of belligerent reprisals, we should first look at them under international law in general. It is then necessary to distinguish belligerent reprisals from other similar concepts because there is a close relationship between belligerent reprisals under the laws of armed conflict and reprisals under international law in general. Both have similar characteristics and principles under the law. Kalshoven describes this connection as "belligerent reprisals . . . are a species of the genus reprisals."[98]Reprisals have been defined by international law as "prima facie unlawful measures taken by one State against another in response to a prior violation by the latter and for the purpose of coercing that State to observe the laws in force."[99]

Although acts which constitute reprisals have an inherently unlawful character, they are in the sanctions category of international law because of their law enforcement function. Conditions and limits laid down in international law, objectivity, and proportionality, must be respected when states want to justify their act of reprisal to maintain their legitimacy. [100]

Retaliation and retorsion are concepts closely related to reprisals yet they are different from oneanother. While retaliation is along-standinglegal concept which bears the idea of an eye for an eye, the act of retorsion describes lawful responses to prior unfriendly acts of another state. It should be added that these measures are unfriendly but are not prohibited by international law. In contrast, persuading the other state to cease its unfriendly conduct is the goal of retorsion. For example, a state may utilize the severance of diplomatic relations and shutting of ports to vessels of an unfriendly state or travel restrictions.[101]

2. History of reprisals:

Historically, some principals related to reprisal are found in the Lieber Code of 1863,[102]and the 1880 Oxford Manual on the Laws of War on Land[103].

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97 Shane Darcy, Collective Responsibility And Accountability Under International Law 131 (2006).

98 FRITS KALSHOVEN, BELLIGERENT REPRISALS, 1 (1971).

99 *Supra* note 95 at 185.

100 *Supra* note 98 at 33.

101 *Supra* note 79 at 1132.

102 U.S. Dep't of Army, Gen. Orders No. 100, Instructions for the Government of Armies of the United States in the Field, (Government Printing Office 1898) (1863) reprinted in The Laws Of Armed Conflict: A Collection Of Conventions, Resolutions And Other Documents 3-23 (Dietrich Schindler & Jiří Toman eds., 1988) [hereinafter Lieber Code].

103 the laws of war on land. Oxford, 9 September 1880.

Article 27 of the Liber Code states that "The law of war can no more wholly dispense with retaliation than can the law of nations, of which it is a branch. Yet civilized nations acknowledge retaliation as the sternest feature of war. A reckless enemy often leaves to his opponent no other means of securing himself against the repetition of barbarous outrage." This highlights that the purpose of retaliation cannot merely be revenge.

The Oxford Manual, Article 84,states that "if the injured party deems the misdeed so serious in character as to make it necessary to recall the enemy to a respect for law, no other recourse than a resort to reprisals remains. Reprisals are an exception to the general rule of equity, that an innocent person ought not to suffer for the guilty. They are also at variance with the rule that each belligerent should conform to the rules of war, without reciprocity on the part of the enemy. This necessary rigour, however, is modified to some extent by the following restrictions:" Article 85 notes one of these restrictions as, "Reprisals are formally prohibited in case the injury complained of has been repaired."

Another restriction is that, "In grave cases in which reprisals appear to be absolutely necessary, their nature and scope shall never exceed the measure of the infraction of the laws of war committed by the enemy. They can only be resorted to with the authorization of the commander in chief. They must conform in all cases to the laws of humanity and morality."

The principles of proportionality and humanity are clearly promoted by the drafters of these two historical documents.Also highlighted is that the purpose of resorting to belligerent reprisals must be for law enforcement. These measures must be in response to a prior violation of the laws of war.

Today, the ICRC has mentioned near the unlawfulness of reprisals as a customary rule. Because of the near unlawful nature of acts of reprisals, the ICRC tries to limit their applicability with this rule. The rule claims that "Where not prohibited by international law, belligerent reprisals are subject to stringent conditions."[104] The ICRC has limited the application of reprisals within international armed conflict and established five requirements:the purpose of reprisals, being a last resort, proportionality, decision at the highest level of government, and termination. Most of these requirements have been derived from military manuals. According to the ICRC Customary Law Study, Rule 145, these five conditions are:

The purpose of reprisals: Reprisals should be taken as a reaction to a prior act by an enemy which violated international humanitarian law. Its purpose

[104] ICRC Customary International Humanitarian LawRule 145.

is that of securing compliance of an enemy to LOAC rules. The limitation of purpose of reprisals is explained as follows: "Reprisals may only be taken in reaction to a prior serious violation of international humanitarian law, and only for the purpose of inducing the adversary to comply with the law. This condition is set forth in numerous military manuals, as well as in the legislation of some States."[105]

Measure of last resort: Reprisals should not be the first option for states. Therefore, if there are available lawful measures such as warning, they must be used before a committing a belligerent reprisal.

Proportionality: Belligerent reprisals always must be proportional to the violation of the law of war.

Decision at the highest level of government: Not every official has the authority to apply reprisals. They must be taken by a higher authority. In the Oxford Manual, for instance, only a commander-in-chief may authorize reprisals.

Termination: If the offending state complies with the law of war, the opposing state must cease the belligerent reprisals. This condition was illustrated in the Kupreškić[106] case in 2000. In that case, the International Criminal Tribunal for the former Yugoslavia confirmed that reprisals should be stopped as soon as the unlawful acts have ceased.

The first two conditionsensure that the enemy's act which violated LOAC must be intentional rather than accidental. The third requirement is the most important one because it refers to proportionality, which is one of the core principals of LOAC. Contrary to popular belief, proportionality does not require an equal response to the attacker state. However, it must not be excessive relative to the original breach. According to the fourth rule, the decision to take reprisals must be made by higher authorities because of their significance. The deterrent purpose of belligerent reprisals is highlighted by the fifth condition. In addition, there is no requirement that belligerent reprisals be in kind.

The Article 33 of Geneva Convention IV,specifically prohibits belligerent reprisals against protected persons because they were abused widely in World War II. Belligerent reprisals mustonly be committed against permitted persons and objects. According to the ICRC CustomaryLaw Study, Rule 146, "The Geneva Conventions prohibit the taking of belligerent reprisals against

105 *Id*.

106 Prosecutor v. Kupreskic et al. (Trial Judgement), Case No. IT-95-16-T, Judgement, (Int'l Crim. Trib. for the Former Yugoslavia, Jan. 14, 2000).

persons in the power of a party to the conflict, including the wounded, sick and shipwrecked, medical and religious personnel, captured combatants, civilians in occupied territory and other categories of civilians in the power of an adverse party to the conflict."

Rule 147 of ICRC Customary Law Study describes reprisals against protected objects. Objects which are protected by the Geneva Convention and the Hague Convention, such as medical objects, cultural property and civilian objects, cannot be subject to reprisals.

Consequently, for example, reprisals against civilians, civilian objects, prisoners of war, places of worship, cultural objects, works containing dangerous forces, medical and religious personnel, and the natural environment are prohibited.[107]

3. Historical examples:

a. Portugal v. Germany 1928:

The Naulilaa Incident is an historical example of reprisals. It was a dispute between Portugal and Germany in which a German official and two German officers from German Southwest Africa were mistakenly killed in Naulilaa, on the border of the Portuguese colony of Angola, on October 19, 1914. After that incident, the authorities of German Southwest Africa sent German troops to attack and destroy some forts and posts. Portugal brought a claim for compensation. German authorities justified their actions by claiming a right to exercise reprisals. In the end, there was an obvious disproportion between the incident and the reprisal[108]and the act in reprisal was found unlawful by the court.

b. The Hostages Case:[109]

In this World War II case, hostages were taken by Nazi forces. After the war ended, the case was prosecuted by a United States military tribunal. The defendants were accused of committing war crimes and crimes against humanity under Article 11 of the Control Council Law No. 10. This case involved reprisals. According to the tribunal's judgement, it was found: "That defendants were principals or accessories to the murder of hundreds

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107 First Geneva Convention, Article 46; Second Geneva Convention, Article 47; Third Geneva Convention, Article 13; Fourth Geneva Convention, Article 33.

108 8 Trib. Arb. Mixtes 409 (1928) (Portugal v. Germany), (The Naulilaa Case) 1132-1133.

109 United States of America v. Wilhelm List, *et* al. US Military Tribunal Nuremberg, judgment of 19 February 1948, in, Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Vol. XI/2.

of thousands of persons from the civilian populations of Greece, Yugoslavia, and Albania by troops of the German armed forces; that attacks by lawfully constituted enemy military forces, and attacks by unknown persons, against German troops and installations, were followed by executions of large numbers of the civilian population by hanging or shooting without benefit of investigation or trial; that thousands of noncombatants, arbitrarily designated as 'partisans,''Communists,''Communist suspects,''bandit suspects' were terrorized, tortured, and murdered in retaliation for such attacks by lawfully constituted enemy military forces and attacks by unknown persons; and that defendants issued, distributed, and executed orders for the execution of 100 'hostages' in retaliation for each German soldier killed and 50 'hostages' in retaliation for each German soldier wounded."[110]

The tribunal said that hostage taking and even reprisal killings might be allowed as a last resort, however, certain conditions must exist. The tribunal cited both the British Manual of Military Law and the U.S. Field Manual (Rules of Land Warfare) which included rules allowing reprisals against civilian populations. At the conclusion of the tribunal, it was found that the acts committed by German troops were excessive, and severe punishments were imposed, including confinement for life of 2 of those who were convicted.

c. The Einsatzgruppen Case:[111]

A United State Military Commission had another case at Nuremberg related to reprisals. In the Einsatzgruppen case, the defense attempted to justify their extermination program against Jews and other groups. In its judgement, the tribunal highlighted that the victims of belligerent reprisals are generally innocent of the acts retaliated against, saying that even in lawful reprisals of that period: "there must at least be such close connection between these persons and these acts as to constitute a joint responsibility."[112]

In the incident charged, the tribunal pointed out that, "859 out of 2,100 Jews shot in alleged reprisal for the killing of twenty-one German soldiers near Topola were taken from a concentration camp in Yugoslavia, hundreds of miles away."[113]

The tribunal defined reprisals as "Reprisals in war are the commission of acts which, although illegal in themselves, may, under the specific

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110 *Id*. at ¶ 1233.

111 United States of America v. Otto Ohlendorf *et* al. Case US Military Tribunal Nuremberg, Judgment of September 15, 1947-April 10, 1948, Vol. IX.

112 *Id*. at 493-494.

113 M. Cherif Bassiouni, crimes against humanity: historical evolution and contemporary application, 630 (2011).

circumstances of the given case, become justified because the guilty adversary has himself behaved illegally, and the action is taken in the last resort, in order to prevent the adversary from behaving illegally in the future." The tribunal concluded that killing 2,100 people for 21 deaths was an obvious violation of international law as the number of civilian victims was clearly disproportional.

d. The Falkenhausen Case:

The general Von Falkenhausen and three other German officers were tried by a military commission in Brussels on 9 March 1951.The alleged perpetrators happened to be high-ranking members during the war-time occupation of Belgium.They were accused with murdering people by way of belligerent reprisals during World War II. These executions were conducted because of attacks and sabotages that occurred during the occupation of Belgium. VonFalkenhausen had executed people from among a group of political detainees. The tribunal mentioned that there were Nazi directives which prescribed ratios such as 100:1 and 10:1 civilians for every German killed. Although there is no information about which ratio was actually applied by defendants, it is clear that it was far more than 1:1. There were no specific standards,that is,a maximum of one civilian executed for every German killed. As a result, the defendants were charged under the Belgian criminal code.[114]The courts charged these officials with, among other things, killing 240 people via belligerent reprisals. Also, "Belgian court had sentenced Falkenhausen to twelve years".[115]

4. Requirements for lawfulness under current LOAC

a. Problem of attribution

The attribution of conduct to the attacker state is a hard issue. Although a cyber attack may seemto originate from a state, the apperance can be deceptive because a computer can create a different identity and the results can be directed to another state. The 2007 case in Estonia is a good example of this problem. (See p.4) Although Estonia made an effort to gather all information about the attack, they could not positively identify Russia as the attacker. Estonia found that there was a relationship between IP addresses of specific computers and individuals in the Russian government, but Russia denied the allegation and claimed that IP addresses which were related to the Putin administration may have been hijacked "zombie" computers.[116]Attribution

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114 *Supra* note 98, at 255-259.

115 Ronald Smelser, *The Myth of the Clean Wehrmacht in Cold-War America*, *in*LESSONS AND LEGACIES, 247, 261 (Doris L. Bergen ed., 2008).

116 Kertu Ruus, Cyber War I: Estonia Attacked from Russia, http://www.europeaninstitute.

for cyber attacks is a difficult and lengthy process, which is why belligerent reprisalsare a good solution because they need not be immediate.

b. Problem of distinction

Distinction is one of the core principles of LOAC, and it is applicable to cyber counter attacks. Rule 1 of ICRC Customary Law study stresses the distinction between civilians and combatants. It states that, "The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians."[117]

Article 48 of Additional Protocol I codifies the customary international law principle: "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."[118]

Under the LOAC, distinction has two different aspects. The first is that combatants must distinguish themselves with a uniform or distinctive sign. Secondly, combatants must target only military objectives.[119] Because of a cyber attacks' nature, the latter has importance by requiringthe protection of civilians and civilian property from direct attack.Additionally, Article 51 and Article 52 of 1977 Additional Protocol I prohibits reprisals during international armed conflicts against civilians and civilian objects.

According to the Tallinn Manual's International Group of Experts, "reprisals against the wounded, sick, shipwrecked, medical personnel, medical units, medical establishments, or medical transports, chaplains, prisoners of war and interned civilians and civilians in the hands of an adverse party to the conflict who are protected by Geneva Convention IV, or their property are prohibited."[120] However, distinguishing civilian objects and military objectives can be problematic in cyberwarfare because a counter attack which is oriented against the attacker will probably affect civilian computer networks and servers as well. This raises potential violations of distinction.

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org/2007120267/Winter/Spring-2008/cyber-war-i-estonia-attacked-from-russia.html (Last visited: 11.11.2013).

117 Jean Marie Henckaerts & Louise Doswald Beck, Customary International Humanitarian Law 3 (2009).

118 Additional Protocol I Article 48.

119 Gary Solis, The Law Of Armed Conflict 251 (2010).

120 *Supra* note 10 at 150.

c. Problem of proportionality

Customary international law highlights that reprisals must also respectthe principle of proportionality.[121] While Kalshoven[122] claims the only acceptable legal approach is that acts of reprisals must be proportionate to the unlawful act which initiated the reprisal, McDougal and Feliciano[123]claimthat reprisals should be considered in light of the purpose of that action. They assert that "the kind and amount of permissible reprisal violence is that which is reasonablydesigned so as to affect the enemy's expectations about the costs and gains of reiteration or continuation of his unlawful act so as to induce thetermination of and future abstention from such act."[124]However, both approaches are still applicable.[125]

Proportionality was already laid down in 1880 in the Oxford Manual. While all other customary rules have been met, the principle of proportionality is often violated. Most of the reprisal cases in the Second World Warinclude thosethat were rejected because of their disproportionate acts. The Case of the Ardeatine Caves[126] can be given as an example. In this case, allied aircraft had bombed Rome in July, 1943, in World War II. Although the railway infrastructure was the main target, approximately 3,000 civilians had died during bombing attack.

Despite the fact that the "Grand Council" of the Fascist party deposed Dictator Mussolini on July 25, and after that, Rome declared that the city had no military defenses, the allies did not accept this declaration, and bombed the city. Then, German troops took control of the city. The Nazis discriminated against the Jewish population during this occupation.[127] On March 23, 1944, a bombing attack against German troops had been planned by the resistance group, Gruppi di Azione Patriottica, whichwas connected with the Communist Party.

After this explosion, the survivors were attacked with guns. At the end of this attack, 32 soldiers were killed.The Germans reacted immediately and ordered reprisals. Ten Italian prisoners were ordered executed by Nazi Lieutenant Colonel Kappler, head of the Security Service, for every German killed in the

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121 Yoram Dinstein, War Aggression And Self-Defense, 247 (5th ed. 2011).

122 *Supra* note 115 at 341.

123 myres s. Mcdougal & florentino p. Feliciano, law and minimum world public order: the legal regulation of international coercion, 682 (1961).

124 *Id*.

125 *Supra* note 96 at 194.

126 The United States of America v. Wilhelm von Leeb *et* al, US Military Tribunal Nuremberg, Judgment of 27 October 1948, Vol. X-XI.

127 Giorgio Resta & Vincenzo Zeno-Zencovich, *Judicial "Truth" and Historical "Truth": The Case of the Ardeatine Caves Massacre*, 31 Law and History Review, 843, 851 (2013).

bombing.[128] "What is known, is that 21 hours after the attack, the German commander put into action the reprisal plan: 335 people, held by the German and Italian authorities on account of suspicion of belonging to the Resistance, as well as a few surviving Jews and a few people arrested immediately after the attack in the surroundings of via Rasella, were removed from jail and brought to a quarry near Rome: the Ardeatine Caves. There, they were executed."[129]

Then, "the actions of the resistance movement were directly referable to the Italian state (partisan organizations had important and official coordination with the state). The Germans, therefore, were entitled to exercise a right of reprisal."[130] However, the executions could not be justified under international law because, the court concluded, the executions were obviously disproportionate.[131]

VIII. Conclusion

Cyber warfare has been ongoing for some time. Cyberattacks can be considered a modern tactic in the battlefield. Although there is no definition of cyber in the 1949 Geneva Conventions or 1977 Additional Protocols, IHL/LOAC can be used for dealing with cyber attacks. The application of IHL/LOAC rules is difficult for cyber issues. However, IHL can be applied to cyber attacks which met the threshold requirements. If there is an intrusion which includes injury or death, damage or destruction of military or civilian objects, it would constitute as an attack in the same way as kinetic weapons causing such results. There is no need to meet all four criteria. If one is satisfied, it is a cyberattack, which allowsthe right of self-defense under the U.N. Charter. Common Article 2 of the 1949 Geneva Conventions, Additional Protocol I, and Customary law are applicable to a cyberattack which is committed by a state, or an individual, or a group, if the act is attributable to a state. Common Article 3 of the 1949 Geneva Conventions, Additional Protocol II (if possible), and customary law,apply to a cyberattack that is initiated by non-state actors.

Finding a lawful response to cyberattacks is not easy. Problems of attribution, distinction and proportionality raise many issues. Because of these problems, states need time to identify and locate the attacker. All lawful response options have pros and cons. The advantages and disadvantages of all of the potential responses should be reviewed in every case of reprisal. Reprisals will be more useful as a response than other responses because responding immediately is not required, and, as mentioned,identification of the attacker and minimizingdistinction issues are a significant problem. Although the law of

128 *Id*. at 852.
129 *Id*.
130 *Id*. at 855.
131 *Supra* note 95 at 185.

armed conflict applies to cyberwarfare, the difference between cyber warfare and other forms of warfare should never be passed over.

Cyberwarfareis changeable and there is no certain solution to its problems. There are ongoing studies related to cyberwarfare, like the Manual on International Law Applicable to Cyber Warfare, which will be helpful for clarifying the law of cyberwarfare. Cyber warfare is a current problem and state practice will determine its future direction.

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THE RIGHT TO A FAIR TRIAL, THE COVERAGE OF THE RIGHT AND APPLICATION IN THE TAX CASES

Adil Yargılanma Hakkı, Hakkın Kapsamı ve Vergi Davalarına Uygulanması

Gökhan ÇAYAN[1]

ABSTRACT

A lot of discrepancies occur between the government and the individuals as a result of public duty, public welfare, civil service, zoning and licenses. One of the discrepancies that originate is the taxation issues. There are different views regarding whether or not the controversies originating from taxation can benefit from the right to a fair trial that is envisaged in the 6th article of the Convention. ECoHR was at first conflicting about the tax discrepancies and even if the ambiguous ruling cases somehow, they later made their view about these cases clear and settled. As it is known, the individual and the government came to the mutual agreement in social contract. According to this agreement, the government secured some of the rights of the individuals and promised that they will protect these rights. The individuals, in return, gave their public authorities to the government in order to have their rights protected, needs met and the welfare level increased overall. As a result of these public authorizations, the government carries out a series of actions. One of the actions that the government carries out in this manner is taxation. The right of taxation of the government can cause discrepancies between the individual and the government. Whether or not the discrepancy will completely benefit from the assurances provided in the 6th article of the ECHR depends on the fact that whether or not the discrepancy will be considered as belonging to civil rights and obligations. If the discrepancies originating from taxation are accepted as belonging to the civil rights and obligations or criminal charge then they can benefit from the assurances that the right to a fair trial provides. In this research therefore, whether or not the discrepancies originating from taxation is under the coverage of the right to a fair trial will be examined. In the first part of our research, the general assurances that the right to a fair trial and the assurances it provides will be examined; in the second part, the coverage of the right to a fair trial and its field of application and lastly in the third part; whether or not the right to a fair trial will be applied disjunctively in the taxation cases will be examined.

Keywords: The Right to A Fair Trial, Civil Rights And Obligations, Criminal Charge, Tax Cases, Tax Assessment, Tax Penalties.

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ÖZET

Kamu hizmeti, kamu refahı, kamu görevi, imar, ruhsat gibi işlemler nedeniyle devlet ile kişiler arasında birçok uyuşmazlık ortaya çıkar. Ortaya çıkan bu uyuşmazlıklardan birisi de vergilendirme konularıdır. Vergi ihtilaflarının Sözleşme'nin 6'ncı maddesinde öngörülen adil yargılanma hakkı güvencesinden yararlanıp yararlanmayacağı konusunda doktrinde ayrıksı görüşler mevcuttur. AİHM vergilendirme ihtilafları ile ilgili olarak başlangıçta çelişkili ve muğlâk içtihatlar sevk etse de daha sonra bu konudaki görüşünü netleştirerek yerleşik hale getirmiştir. Bilindiği gibi, devlet ile bireyler arasında toplumsal sözleşmede mutabakata varılmıştır. Bu mutabakat gereğince devlet, bireylerin birtakım haklarını güvence altına almış, o hakları koruyacağına dair söz vermiştir. Bireyler de birtakım haklarının güvence altına alınması, ihtiyaçlarının giderilmesi, refahın arttırılması için devlete kamusal yetkiler bahşetmiştir. Bu kamusal yetkiler gereğince devlet birtakım işlemler icra etmektir. Bu icralardan birisi de vergilendirme yetkisidir. Devletin vergilendirme yetkisi, kişi ile devlet arasında uyuşmazlığa sebebiyet verebilir. Bu uyuşmazlığın AİHS'nin 6'ncı maddesinde tanınan güvencelerden yararlanıp yararlanmayacağı, ihtilafın medeni hak ve yükümlülük ya da suç isnadı olarak değerlendirilip değerlendirilemeyeceğine bağlıdır. Eğer vergilendirme işleminden doğan uyuşmazlıklar, medeni hak ve yükümlülüklere ait uyuşmazlık ya da suç isnadı olarak kabul edilirse, bu ihtilaflar adil yargılanma hakkının güvencesinden yararlanabilecektir. Bu çalışmamızda vergi konularından doğan uyuşmazlıkların adil yargılanma hakkı kapsamında olup olmadığı incelenecektir. Çalışmamızın birinci bölümünde genel olarak adil yargılanma hakkı ile hakkın dağladığı güvencelerden, ikinci bölümünde adil yargılanma hakkının kapsamı ve uygulama alanından ve üçüncü bölümünde de münferit olarak vergi davalarında adil yargılanma hakkının uygulanıp uygulanmayacağı incelenecektir.

Anahtar Kelimler: Adil Yargılanma Hakkı, Medeni Hak ve Yükümlülükler, Suç İsnadı, Vergi Davaları, Vergi Tarhiyatı, Vergi Cezaları.

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INTRODUCTION

It is not possible to give a concerted description about the issue of the right to a fair trial. Furthermore, the right to a fair trial comprises of many parameters related to the process of judging. In the same way, this particular right is described with several different terminologies in the different domestic laws of different countries[2]. In its broadest sense, the right to a fair trial is the whole form of the rules that need to be followed in order for the judging process to be in line with the values of fairness and equity.

[2] Vitkauskas Dovydas/ Lewis- Anthony Sian, *Right to A Fair Trial Under the European Convention On Human Rights (Article 6),* Interights Published 2009, p. 2.

There are several regulations in the contracts that are related to the right to a fair trial. The most important one of these regulations is the 6th article of the European Convention of Human Rights. According to this particular article;

1 - In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2.Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3.Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and the facilities for the preparation of his defense;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he can not understand or speak the language used in court.

I. THE RIGHT TO A FAIR TRIAL AND THE ASSURANCES THAT THIS RIGHTS GRANTS

As the article clearly shows, in order to have a fair hearing, a lot of elements need to come together. These elements also address the necessary assurances that are needed for the person to be judged fairly.

The right to have a hearing in an independent and impartial tribunal established by the law; in order to be able to speak about a fair hearing, the case

should be handled in an independent, impartial tribunal established by law. In order for an office to be accepted as a tribunal, it needs to continually solve discrepancies and that their decisions are binding; and the related decisions should not be altered by offices that are not judicatory[3]. The European Court of Human Rights (ECoHR) interprets the concept of courts, which is in the covenant, as needed in the autonomous interpretation principle. While some of the offices that are not defined as courts and not organized as courts according to the regulations of the nation may be accepted as eligible courts by ECoHR according the criteria listed above[4]; some of the courts that are accepted as eligible courts by the law may not be accepted as eligible court by ECoHR. There is no clear definition of the understanding regarding the statement that the court should be established by law. In Posolov V. Russia application, ECoHR stated that two conditions needs to be met in order for a court to be accepted as a court that is established by law. These conditions are: that the national legislation that founded the related court needs to be originating from the decree of a parliament, and that the court is founded according to the procedures that are envisioned in the law. In order for a hearing to be fair, the fact that the tribunal is established by law is not enough. In addition, the tribunal needs to be both independent and impartial. It is not possible to say that the judging is fair unless the tribunal is independent and impartial. It is impossible to set the concepts of independence, which is an assurance related to status, and impartiality[5], which is a circumstance related to activity, apart sharply and make them free of each other.

With the notion[6] of independence, the freedom of the courts is referred

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3 Osce- Digest, *Legal Digest Of International Fair Trial Rights, OHDIR Publishing*, Varşova 2012, p. 53; Benthem V. Holland; Bolilos V. Sweden; Sramek V. Austria; Van De Hurk V. Holland; Vitkauskas and Lewis Antony, 2009: 66.

4 Argyrou and OthersV. Greece; Campbell ve Fell V. United Kingdom; Rolf Gustafson V. Sweden; Sramek V. Austria.

5 The emotions and opinions of the people carrying out the judgmental processes are important regarding the impartiality. For this reason, it is an important necessity that people taking part in the judicial processes are objective towards the parties, that they do not take one of the party's part and leave personal thoughts aside. Impartiality expresses an important moral state regarding the attitude of the judge in the judicial process. Impartiality and being impartial is in fact the necessary component to protect the respect for the judicial system. The determining factor in the court's impartiality is the fact that whether the doubts of the complainant are objectively acceptable or not. When evaluating if the impartiality principle is violated or not in ECoHR confine themselves to the only the content of the regulation related to the subject but also takes the judicial system and legal understanding of the country and evaluates how the subject regulation seem when put in those criteria. (Full Citation: Gorur Hamit, Adil Yargılanma ve İdari Yargıda Görünümü, Master's Thesis, İzmir 2010).

6 Clarke V. United Kingdom: The "independence" notion of the judicial office requires the

to[7] in terms of not experiencing any pressure or influence from extrinsic and intrinsic sources and not receiving any orders and instructions from the executive and legislative powers.

The notion of impartiality refers to the fact that judges are not prejudiced[8] and they do not have any relation to the outcome of the case in terms of material and moral values in a direct or indirect way, and the legislative powers are not prejudiced against the parties of the case and the third parties such as media and so on[9].

Right to be judged with equity; the right to be judged with equity - which has the exact same meaning with the term "substantial justice" – controls[10] the justice based on law. In today's world, the justice mechanism is regulated by the written law in many states of law. In other words, governments arrange the particular rules that they want them to be implemented, and the action takers solve their problems according to these rules. In a democratic state of law, if there is a concern about establishing written law, the right to be judged with equity stepps in and makes sure those possible occurrences of injustice in the case of the practicing of the written law are eliminated. As a result of this, it is not enough to overtly judge people in independent and impartial tribunals in a reasonable time period to establish the right to be judged fairly, but also the judging process needs to be[11] in accordance with the notion of equity.

Right to have a trial within a reasonable time; the other element of the right to a fair trial is to have the trial finished in a reasonable time[12] and

existence of the procedural assurances regarding the separation of the judgment from other powers and especially from executive powers.

7 Le Compte, Leuva ve De Meyere V. Belgium; Ringesien V. Austria.

8 Buscemi V.Italia; Castedo V. Spain; Henryk Urban V. Ryszard Urban V. Poland; Karttunen V. Finland; Kyprianou V. Cyprus; Parterer V. Austria; Piersack V. Belgium.

9 Vitkauskas Dovydas and Dikov Grigoriy, Avrupa İnsan Hakları Sözleşmesi Kapsamında Adil Yargılanma Hakkının Korunması, Council of Europe, Strazburg 2012, p. 45; Osce- Diegest, 2012: 61; Vitkauskas and Lewis Antony, 2009 27.

10 Bayrakcı Esra Tuğba, *Adil Yargılanma Hakkının Bir Unsuru Olarak Savunma Hakkı*, Master's Thesis, Kirikkale 2011, p. 58.

11 The contents of the right to a fair trial with equity was not arranged in the ECHR clearly. However, ECoHR stated that the right to a fair trial equity involves the principle of adversarial proceedings, equality regarding weapons, the right to be ready at the trial, the authority to bring proofs and the right of true decision.

12 The authority and power to command of the judicial offices are ensured with the resolving of the cases in a reasonable time. If the judicial processes are always late in a society, it causes the diminishing of the authority of the judicial offices on the society. This situation creates a powerful discomfort in the society. People who believe that they will not get their rights from the courts in time try to gain their rights themselves. Thus, the

have the discrepancies solved[13]. This is because in order to be able to talk about a fair hearing, the problem needs to be solved in a reasonable time and the rightful party should be established in this period. The trustfulness of the judicial bodies in the society is ensured[14] with the completion of the judicial processes. The reasonable time period does not refer to a period that is determined beforehand for every case. In other words, there is no set reasonable time period that is applicable for every case. ECoHR determines this reasonable time period according to each tangible event and the properties of the controversy present in these events. The decision about this particular problem is made[15] by referring to the complexity of the case and the attitude and behaviors of third parties and competent authorities. The fact that the case is not completed within the reasonable time limits causes the violation of the right to a fair trial.

Right to be judged publicly; another element of the right to have a fair hearing stated in the ECoHR's 6th article is the right to have a public hearing[16].

authority of the government and jurisdiction get damaged. It is impossible to talk about a democratic law state in the situations where government and jurisdiction received heavy damages. For in the social contract, there is an agreement stating that the rights between the government and people can not be sought out by people themselves, and these rights can also be granted by the judicial offices of the government. Giving the rights of the person who deserves those particular rights is the most precious and biggest service that the governments can do. For this reason, it is beyond doubt that the lateness of the judicial processes shakes the very foundations of the governments.

13 Bock V. Germany; Bogetto V. Italia; Capuano V. Italia; Deumeland V. Germany; Erkner V. Austria; Guıncho V. Portugal; Lechner V. Austria; Poiss V. Austria; Zimmermann ve Steiner V. Sweden.

14 Kaşıkara Serhat, *Avrupa İnsan Hakları Sözleşmesi'nin 6. Maddesi Çerçevesinde Makul Süre İçerisinde Yargılanma Hakkı*, TBB Review, Iss. 84, Ankara 2009, p. 243.

15 Deisl V. Austria; Katte Klıtschede La Grange V. Italia.

16 Regarding the regulations about the right to be judged publicly can be seen in Universal Declaration of Human Rights. In the 10th article of the Declaration, it is stated that Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.
The first paragraph of International Covenant on Civil and Political Rights by stating; " All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (order public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children."

To have a public hearing is a right designed to have an open and transparent judicial system. The purpose of this right is to protect the parties in a civil justice and suspects in a criminal justice from the possible arbitrariness that might originate from a secret process of judging and preserving the trust of the society to make justice more visible to everyone[17]. The right to be judged publicly guarantees that the hearing and the decree is open to public. While the transparent state of the hearing is a limited right; the openness of the decree is an absolute right. Failure to have a non-public hearing regarding the concrete case may mean the violation of the right to a fair trial.

II. THE COVERAGE OF THE RIGHT TO A FAIR TRIAL

In order for the principles that are guaranteed with the ECoHR to be applied, the discrepancies need to be originating from the civil rights and obligations or criminal charge. If this discrepancies are not originating from civil rights and obligations or criminal charge; it is not possible to apply the 6th article of ECoHR.

In the 6th article of ECoHR, which regulates the right to a fair trial, the principles and elements that will be implemented in the cases of discrepancies related with criminal charge and civil rights and obligations are arranged separately. In fact, this arrangement is the reflection of the natural difference between the discrepancies originating from civil rights and obligations and criminal charge.

While determining if a discrepancy is in the coverage of civil rights and obligations, ECoHR came to conclusion by researching the tribunal to which the discrepancy is bound to and the national legislation. Discrepancies that are enlisted as civil rights and obligations in the national legislation and the ones that law courts are appointed for resolving the issue were accepted under the coverage of civil rights and obligations[18]. While a discrepancy is covered under the civil rights and obligations in the national legislation of a conventional government and courts of law are appointed for its resolution; in some other conventional government, the same discrepancy may not be covered under the civil rights and obligations in the national legislation or courts of law may not be appointed for the resolution. This situation prevented the unity of supervising the document. A discrepancy could be disciplined thanks to the regulation that puts it under the coverage of civil rights and obligations and

secured the right to be judged publicly. However, in this article, the right to be judged was arranged as a limited right and not an absolute right; and exceptions were included by emphasizing that the right to be judged publicly is a rule.

17 Vitkauskas and Dikov, 2010: 63.

18 Inceoglu Sibel, *Adil Yargılanma Hakkı ve Yargı Etiği*, Council of Europe, Ankara 2007, p. 20.

that courts of law were appointed for its resolution; in another conventional government, the same discrepancy could not be disciplines just because it was not put under the coverage of civil rights and obligations and courts of law were not appointed for its resolution.

In the Reingeisen V. Austria application, to remove the inconveniencies and ensure the unity in supervising the document, ECoHR renounced this aforesaid vision and claimed that while determining if a right or responsibility is civil, the regulations in the national legislations is not binding anymore. From this point on, ECoHR uses the autonomous term principle while determining if a right or responsibility is civil. According to the autonomous interpretation principle, the matter in dispute is evaluated free from the national qualifications in a separate manner for each concrete event[19]. In the real sense, in the Baroan V. Portugal application, ECoHR claimed that the notion of civil rights and obligations are independent from the description present in the national law and the delineation of the related legislation that will be applied to the dispute; and what really matters is the evaluation of whether or not the quality of the right and the outcome of the judgment will have a direct impact on the civil rights and obligations[20]. From this point on, the qualification[21] of the agency that is given permission to solve the discrepancy and the legislation that will be applied to the discrepancy do not have any importance[22] in deciding the discrepancies regarding civil rights and obligations. For this reason, if the discrepancy for which administrative justice or constitutional jurisdiction is appointed for the resolution carries the necessary qualifications, it can be accepted as a discrepancy that belongs to the civil rights and obligations[23].

The 6th article of the European Convention of Human Rights finds its application field first in the discrepancies regarding civil rights and obligations thanks to its nature. In judging if a right is civil or not in its nature, the

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19 İnceoglu, 2007: 15.

20 Vitkauskas and Dikov, 2012: 14.

21 In fact, this view is the consequence of the autonomous interpretation principle. For ECoHR, because they will evaluate the notion of civil rights and obligations free from the characterization of it existent in the national legislation, the subject right and responsibility of the discrepancy, will be evaluated according to the fact that whether or not it is arranged in the private law in the national legislation or whether or not that the discrepancy related to the subject right and responsibility can be solved in law courts.

22 In the application, ECoHR stated that they will not take the regulations in the national legislation while determining the concept of civil rights and obligations. Even if a discrepancy is not categorized as a civil right and responsibility in the national legislation, ECoHR can evaluate the subject discrepancy as belonging to the civil rights and obligation.

23 Inceoglu, 2007: 22.

economical nature of the right is an important factor. In the broadest sense, the rights and obligations originating from civil law, obligations law, law of things, commercial law, and insurance law are considered as civil rights and obligations[24]. However, it is not possible to say that a right or responsibility is naturally civil just by judging it from its economical perspective[25]. For this reason, while making specifications, the parties of the relationship need to be taken into account. For instance, ECoHR presumably accepts that the discrepancies originating from economical activities between private people are in the coverage of civil rights and obligations.

While deciding if a right or responsibility is civil or not, the parties of the discrepancy need to be evaluated. However, in order for the discrepancy to be under the coverage of civil rights and obligations, it is not necessary for the discrepancy to originate between private people. In this sense, discrepancies originating between people and the government, finds the usage of the 6th article of the convention if the discrepancy is related to the civil rights and obligations.

A periodical growth is observed in the intrinsic lines of ECoHR concerning the point that if the discrepancies originating from the administration will be considered under the coverage of civil rights and obligations. In the earlier times, in the cases where the applicant is applying against the decisions of the courts of conventional governments, ECoHR assumed that the competitive right was not under the coverage of civil rights and obligations. After that ECoHR revoked this assumption and put forward a criterion evaluating whether the acts and operations erected by the administration violates the rights in the European Convention of Human Rights. According to this; the discrepancies regarding the rights granted in the convention was started to be heard in ECoHR. At the very last, ECoHR renounced this evaluation and chose the way where they decide whether or not to accept the application depending on the evaluation of the outcome of the relevant discrepancy regarding its violation of the civil rights and obligations[26]. In this ruling case, if the discrepancy is violating the civil rights and obligations, it is claimed that the 6th article of the convention can be applied in the cases where the person is against the government[27]. In a shorter version, according to ECoHR; all cases are in the coverage of the 6th article of the convention as long as their outcomes affect the civil rights and obligations.

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[24] On the contrary, the fact that there is an economical request amongst the complainant's unjust treatments does not necessarily require the conflict to be evaluated as Civil.

[25] Procola V. Luxemburg; Vitkauskas ve Dikov, 2010: 14; Vitkauskas and Lewis Antony, 2009: 7.

[26] Osce- Diegest, 2012: 40- 44.

[27] Vitkauskas ve Dikov, 2010: 14.

There is not a clear definition as to what should be understood when talking about the outcomes belonging to the civil rights and obligations. In order for a discrepancy to belong to the civil rights and obligations as a result of its outcome, the quality of private law needs to be dominant. If public law is dominant in the relationship between the person and the government, the 6th article of European Convention of Human Rights (ECHR) can not be applied to the case[28]. Hence, in the Deumelan V. Germany application, ECoHR assumed that in order for a case to be accepted as within the borders of civil nature; the private law elements needs to be dominant over the public law elements[29].

Another field that ECHR can be applied besides the discrepancies originating from civil rights and obligations is the cases where an accusation is made against a person; in other words, an investigation is opened against him or a prosecution is in place. According to the 6th article of ECHR, all people being accused of a crime will benefit from the right to a fair trial from the point the accusation is made against them[30].

Like the notion of civil rights and obligations, ECoHR explains incrimination in its autonomous interpretation principle. According to the autonomous interpretation principle, the matter in dispute is evaluated free from the national qualifications in a separate manner for each concrete event. The court explains the notion of incrimination essentially and establishes the notion of incrimination by going beyond what is visible[31].

In order for an action to be considered as a criminal charge and the 6th article to be applied to the case, one of the three criteria needs to take place. Unlike the criteria used in discrepancies related to the civil rights and obligations in determining the notion of civil, these criteria do not have to

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28 The court who at first adopted the limiting interpretation method now uses the extensive interpretation method and broadens the coverage of the article by taking the qualifications of the each concrete case in consideration. For example, the social security right which was thought to be out of coverage of the 6th article now is in the coverage of the 6th article. Without doubt, doing the exact opposite of this will damage the trust to the control mechanism brought by the Convention. For the applications originating from administrative law is the things that people are subjected to most violations. The right to a fair trial, like it is exactly the same in other judicial offices, is a basic principle in administrative jurisdiction. For this reason, the fact that the administrative field was not touched upon in the 6th article of the ECHR does not mean that the Convention can not be applied in this field. (Full Citation: Yüksel Hatice, Uluslararası Sözleşmelerde ve Türk Hukukunda Adil Yargılanma Hakkı, Başbakanlık Uzmanlık Tezi, Ankara 2010, p. 40).

29 Vitkauskas and Dikov, 2010: 14.

30 Inceoglu, 2007: 15.

31 Deweer V. Belgium.

take place in a cumulative way. Existence of a single criterion is enough for ECoHR to accept the activity as a criminal charge. According to this; Firstly, Classification of the offense in the law of the respondent state; in this particular case, if the offense is classified as a crime in the law of the respondent state, it is sufficient to consider the act as a crime. There is no need for a further condition to take place. If an act is really classified as an offense by the law of the national law system, the principles of criminal court will step in with the claim that that particular offense took place and the investigation period about the person will begin.

In a system where a the right to a fair trial is granted to people from the point of the starting of the criminal investigation, the classification of the act as a crime in the national legislation is enough to apply the 6th article to the case. Likewise, the classification of the act that the person is claimed to committed as a crime in the national legislation generally causes the person to be exposed to criminal investigation and prosecution. If an act is not classified as a crime in the national legislation; then the attribution of the act needs to be determined by evaluating the act with regard to secondary and tertiary criteria[32]. There are such cases that there may be doubt about if the act are classified as a crime in the national legislation or not[33]. In such a case, an evaluation with regards to secondary or tertiary criteria will be inevitable. Secondly, The Nature of the Offense; by taking into account the essentials such as the resemblance of the act to the acts that are classified as crime in the national law, how this act is tackled with in other conventional governments, what should be the response to such an act in a democratic nation, whether or not the act is a qualification that affects everyone in the society; the criteria used in determining the qualifications of the act is called nature of the act criteria[34]. In this scale, whether or not by taking the nature of the act into account the act should be considered a crime is emphasized. If the act resembles the acts that are considered crimes in the national legislation or if there is a resemblance between the procedure that will be applied to the relevant act and the procedures that will be applied in case of punishments; the act is considered as a crime by its nature. If there is no resemblance between the relevant act and the acts that are considered crimes in the national legislation, whether or not the act is considered in conventional governments or what should be the procedure for this kind of act in a democratic state of law should be considered and be determined if the act is a crime or not. Another essential that must be tackled here is that; moving from the fact that if the

32 Vitkauskas and Dikov, 2010: 18.
33 Ravnsbors V İsveç .
34 Inceoglu, 2007: 20.

act has a qualification that will affect everyone, what should be understood from the notion of determining the qualification of the act. If the punishment given to this particular act can only be applied to a certain part of a society the discipline aspect of the act is considered dominant; and if the punishment given to this particular act can be applied to all people in the society, the crime aspect of the becomes dominant[35]. However, particular crimes that the legislation assumes that they can only be committed by a certain type of people should not be considered in this scope. In the cases where these particular crimes are present, according to the dependence rule, other people can be punished too; because of this, all the society potentially becomes the object of this crime. For instance, because the punishment precluding lawyers from doing their duty only interest the lawyers, it is possible to say that this act's discipline aspect is dominant as it is not possible to punish people with this punishment who are not lawyers.

On the other hand, the act of embezzlement is a deliberate crime. The perpetrator of this crime is the public official by law. However, if another person who is not a public official participates in the crime, he or she will too suffer the consequences that are pre-determined for this kind of an act according to the dependence rule. And lastly, the type and the severity level of the possible punishment**;** the determination of the qualifications of the act by emphasizing the issues of the purpose of the punishment and whether or not the punishment limits the freedom of the person is called the type and severity scale of the punishment[36]. In this scale, the offense being charged is determined by taking the type and the severity of the punishment that will be given to the alleged crimes. ECoHR almost accepts all the acts that require punishments limiting the freedom of the person as criminal charges[37]. However, it is not possible to say in advance that all the punishments limiting freedom originate from criminal charges; and for this reason, the 6th article of ECHR can be applied. For ECoHR determines the accusation's qualification by taking the severity and the longevity of the freedom limiting punishment. For instance in an application, two days of freedom limiting punishment was not seen enough to incriminate the person; while in another application, 3 months long of a punishment was seen enough to be considered a crime. While the time period of the freedom limiting punishment is determined in terms of criminal charges, not the duration of the final punishment that is given should be taken into consideration, but the minimum punishment duration that can

[35] Aydin Bihter, *Türk İdari Yargı Düzeninde Adil Yargılanma Hakkı*, Master's Thesis, Ankara 2012, p. 45.

[36] Inceoglu, 2007: 95.

[37] Vitkauskas and Dikov, 2010: 18.

be given to the act in question according to the national legislation should be considered. For instance if a person is given two days of imprisonment as a punishment as consequence of an act, does not allow the acceptance of the act in question to be considered as a criminal charge just because of the severity of the punishment. Only if three months of imprisonment can be given as the punishment for that person as the consequence of his act then should the act needs to be evaluated as a criminal charge[38]. In other respects, the basic qualification of the punishment is not enough to push the alleged offence out of the coverage of the 6th article. Likewise, the dire situation of the punishment that will be given as a consequence of an act is not mandatory for the 6th article to be applied to the case[39].

In short, in order for the 6th article of the ECHR to be implemented, the discrepancy needs to be related to the civil rights and obligations or criminal charges. It is not possible to apply ECHR to the cases where there is no relation to civil rights and obligations and trials that are out of the coverage of criminal charges. Political rights, investigations related to handing over a commercial firm started by government inspectors, permission to do public duty, returning of the criminals and the decisions to banish criminals, procedures regarding an asylum request, decisions regarding the preparation procedures of the administration and domestic affairs, discrepancies originating from the application of security legislations, procedures regarding being unable to receive passport are out of the coverage of the 6th article and applications regarding these issues are automatically turned down[40]. Competitions like these are seen neither in the coverage of the criminality nor civil rights and obligations.

III. THE RIGHT TO A FAIR TRIAL IN THE TAX CASES

A. DISCREPANCIES ORIGINATING FROM TAX ASSESMENT

The fact that the issues about the taxation are not regulated by the Convention does not mean that the 6th article will not be applied to these cases. For ECoHR, when reasonable justifications are present, accepted that some rights that are granted by the domestic law can be considered under the coverage of the right to a fair trial without checking if they are stated in the provisions of 6th article of the Convention.[41]

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38 Aydin, 2012: 47.

39 Vitkauskas and Dikov, 2010: 18.

40 Cherepkov V. Rusya; Dalea V. Fransa Fayed V. United Kingdom; Monedero Angora V. İspanya; Ravon V. Fransa; Rambus V. Germany; Sukut V. Turkey; Vitkauskas ve Dikov, 2010: 16- 17; Zdanoka V. Latvia.

41 Edition Periscope V. United Kingdom, § 35.

The discrepancies originating from tax assessment can not be considered as criminal charges. As a result of this, whether or not the discrepancies originating from the assessment can benefit from the 6th article is determined according to if they belong to the civil rights and obligations or not.[42]

The view of ECoHR regarding whether or not the 6th article of the Convention can be applied to the discrepancies originating from tax assessment changed over time. After their ambiguous and contradictory decisions, in the X V. France application in 1938, accepted that the discrepancies related to taxation did not belong to civil rights and obligations; and for this reason, the 6th article of the Convention could not be applied to them for the first time. In the Koning V. Germany application, the statement that the notion of civil rights and obligations has a autonomous meaning and the Court is not bound by the provisions of the national legislation; increased the expectation that the tax obligations will be included in the civil rights and obligations. Actually, at that time, the discrepancies that affected the assets and the individual economical status of the individuals were considered as civil rights and obligations.

After these two decisions, ECoHR, in the Editions Periscope V. France application in 1992, accepted that the discrepancies originating from tax assessment belong to the civil rights and obligations. In the related application, the applicant is a limited company that was founded according to the French regulations. “On 21 October 1960 the applicant company applied to the Joint Committee on Press Publications and Press Agencies (“the Joint Committee”) for a certificate of registration for its review in order to secure the tax concessions and preferential postal charges accorded to the press. . The Joint Committee rejected the application on 8 December 1960 and refused two further applications on 9 February 1961 and 17 January 1964. It did not reply to a fourth, lodged on 30 June 1970. The reason given was always the same: the review was classified as an advertising organ because it represented a link between its subscribers and manufacturers for the purposes of a commercial transaction. It published the technical data furnished by the manufacturer himself for the articles presented; a reader interested in a model returned to the head office of Pericope a form with the reference of the model in question; the manufacturer then received this form and sent the relevant documentation. In fact, in order to obtain the advantages which it claimed, the review would have had to have devoted at least a third of its surface to information of general interest or to provide its readers’ service with critical editorial comment. On 15 March 1976 Editions Periscope submitted a preliminary application to the Minister for Finance, the

[42] Ferrazzini V. Italy, § 20.

Junior Minister for Posts and Telecommunications and the Junior Minister of the Prime Minister's office, Spokesman for the Government. It sought compensation of 200,000,000 francs for the damage which it claimed to have sustained since 1962 through the fault (faute) of the public authorities" (Case of Editions Periscope v. France). The company claimed that their right to be judged in a reasonable time and right to be judged fairly was violated. In the acceptability assessment of the application, ECoHR stated that the related discrepancy is related to the economical rights and belongs to the civil rights and responsibilities as a result of its nature even so they are heard by the administrative tribunal and found the application valid to be heard. In the National & Provincial Building Society E.A., The Leeds Permanent Building Society ve The York Shire Building Society V. United Kingdom application in 1997, the applicants who were building societies, claimed that they were charged with an income tax for a second time according to the Finance Law that was put into effect in 1985, they paid the related charged tax mistakenly and demanded the tax they paid mistakenly back from the tax office. The tax office declined the request. The applicants claimed that the national legislation does not allow them to sue the tax office, thus; their right to access to courts was violated. In the acceptability assessment, ECoHR stated that the recharge back demand of the applicants affect their monetary rights and a discrepancy that can be measured with monetary means should be considered under the coverage of the civil rights and obligations; and accepted the application.

As it can be seen clearly, ECoHR put emphasis on the fact that tax assessment affected the applicants monetary rights and accepted the discrepancies related to monetary rights as belonging to the civil rights and obligations both in Editions Periscope V. France and National & Provincial Building Society E.A., The Leeds Permanent Building Society and The York Shire Building Society V. United Kingdom applications. According to us, this evaluation is against the Convention and the law. For in determining if a right is civil in its nature, the economical nature of the society is a crucial factor. However, it is not possible to say that a right and obligation is civil by just judging from its economical aspect.[43] For this reason, when evaluating the situation, the parties of the relation should also be taken into consideration. For instance, ECoHR accepted that the discrepancies originating from economical activities between private individuals belong to the civil rights and obligations until proven otherwise. However, in order for the discrepancy to be a part of the civil rights and obligations, it does not necessarily need to originate between private individuals. For if the topic of the discrepancy that originates between the government and the individual, given that the private law regulations

[43] Procola V. Luxembourg; Vitkauska and Dikov, 2012: 14; Vitkauskas and Lewis Antony, 2009: 7.

are dominant over the public law regulations, belong to the civil rights and obligations, the 6th article of the Convention can be applied[44].

In 2001, ECoHR gave their principle decision about the tax assessment cases. In the Ferrazzini V. Italy application; " The applicant and another person transferred land, property and a sum of money to a limited liability company, A., which the applicant had just formed and of which he owned – directly and indirectly – almost the entire share capital and was the representative. The company, whose object was organizing farm holidays for tourists (agriturismo), applied to the tax authorities for a reduction in the applicable rate of certain taxes payable on the above-mentioned transfer of property, in accordance with a statute which it deemed applicable, and paid the sum it considered due." This application of the applicant was declined. In the meantime, "the tax authorities served a supplementary tax assessment on the applicant on 31 August 1987 on the ground that the property transferred to the company had been incorrectly valued." After that, the applicant requested that the tax assessment should be made by using the real values by applying to the tax commission. " the tax authorities served two supplementary tax assessments on A. on 16 November 1987 on the ground that the company was ineligible for the reduced rate of tax to which it had referred. The tax authorities' note stated that the company would be liable to an administrative penalty of 20% of the amounts requested if payment was not made within sixty days."

The applicant used the way of national legislation to object to this decision but the decision was made clear against him. The applicant applied to the ECoHR claiming that his right to be judged fairly was violated. In the acceptability assessment of the application, ECoHR stated: *" The Court notes that both parties acknowledged that Article 6 did not apply under its criminal head. Thus, it needs to be determined whether or not the related discrepancy belongs to the civil rights and obligations. According to the settled ruling cases of the court, the court is not bound by the regulations that are existent in the conventional government's legislations in the determining of the discrepancies that belong to civil rights and obligations. According to the autonomous interpretation principle, the court will evaluate the notion of civil rights and obligations stated in the first article of the 6th article of the Convention. The fact that the tax discrepancies are related to monetary rights is not enough to apply the 6th article to them. The Convention is a document that needs to be interpreted according to the conditions of our day; and in the tax discrepancies of our day the public law principles becomes prominent. The coverage of the*

[44] On the other hand, if the public law characteristics of the discrepancy that originates between the individual and government is dominant, the 6th article of the Convention can not be applied.

Convention was enlarged regarding the discrepancies originating between the government and the individuals. This has led the Court to find that procedures classified under national law as being part of "public law" could come within the purview of Article 6 under its "civil" head if the outcome was decisive for private rights and obligations, in regard to such matters as, to give some examples, the sale of land, the running of a private clinic, property interests, the granting of administrative authorizations relating to the conditions of professional practice or of a license to serve alcoholic beverages. However, rights and obligations existing for an individual are not necessarily civil in nature. Thus, political rights and obligations, such as the right to stand for election to the National Assembly, even though in those proceedings the applicants pecuniary interests were at stake, are not civil in nature, with the consequence that Article 6 § 1 does not apply. In the tax field, developments which might have occurred in democratic societies do not, however, affect the fundamental nature of the obligation on individuals or companies to pay tax. In comparison with the position when the Convention was adopted, those developments have not entailed a further intervention by the State into the "civil" sphere of the individuals life. The Court considers that tax matters still form part of the hard core of public-authority prerogatives, with the public nature of the relationship between the taxpayer and the tax authority remaining predominant. It considers that tax disputes fall outside the scope of civil rights and obligations, despite the pecuniary effects which they necessarily produce for the taxpayer."[45]

As it can be seen in the Ferrazini V. Italy application, ECoHR stated that although the tax discrepancies create compulsory monetary burden for the taxpayers, the tax discrepancies can not be considered as belonging to civil rights and obligations; and thus, the 6th article of the Convention can not be applied[46]. Essentially, these are the reasons why the tax assessment is not considered under the coverage of the right to a fair trial by ECoHR;

1. The fact that the tax discrepancies are related to monetary rights is not enough to consider them as belonging to civil rights and obligations,

2. The public law principles are dominant over the private law principles in tax assessment cases,

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45 Ferrazzini V. Italy, § § 20- 30.

46 Kıranoğlu Tülin Hamit, "*Adil Yargılanma Hakkı: Fransız Yargıtayı Vergi Davalarında Uygulanma Alanını Daraltıyor",* Doç. Dr. Mehmet SOMER'in Anısına Armağan, İstanbul 2006, p. 961- 963; Kaplan Recep and Yılmazoğlu Yunus Emre, "*AİHM and Anayasa Mahkemesi* İçtihatları *Işığında Adil Yargılanma Hakkının Kapsamı Açısından Tax Uyuşmazlıkları"*, TAAD, Vol. 20, p. 456- 458; Öncü Gülay Aslan, "*Vergi Hukuku and Yargılamasına Avrupa* İnsan *Hakları Sözleşmesinin Uygulanabilirliği: Avrupa* İnsan *Hakları Mahkemesi Kararları Işığında Bir Analiz"*, TAAD, Vol. 20, p. 151- 153.

3. Tax matters still form part of the hard core of public-authority prerogatives,

4. Taxation can not be considered as an intervention that the government makes against the civil field.

In the later decisions that ECoHR made, they repeated that the 6th article of the Convention can not be applied to the discrepancies originating from tax assessment by referring to Ferrazini V. Italy application[47]. Although the tax assessment was not considered under the coverage of the 6th article of the Convention alone, it was accepted that the 6th article can be applied to the case given that it was put forward alongside with a tax penalty. In the Georgiou V. United Kingdom application, ECoHR accepted that it is impossible to separate the tax penalty which is a criminal charge from the tax assessment and as long as it is in accordance with the characteristic evaluation that will be done as a part of the criminal charge, the 6th article can also be applied to the tax assessment. Although ECoHR accepts that only the tax assessment can not benefit from the assurances stated in the 6th article of the Convention, our Constitutional Court considers the tax discrepancies as belonging to the right to a fair trial. In a case where it was opened against a withholding tax return, the Constitutional Court evaluated the application in terms of the right to own property and the right to a fair trial, and accepted the claims that were under the coverage of the right to a fair trial and started the case. After that, in another application, the High Court who evaluated if the tax discrepancies are civil or not, stated that the tax discrepancies are resolved in the boundaries of the judicial system, there is an organic connection between the tax penalty and the tax itself, and this connection still continues in the tax collection process, that the tax relations are related to many individual rights - especially the right to own property - and these discrepancies should be considered as belonging to civil rights and obligations. Our Constitutional Court accepted the discrepancies originating from tax assessment under the coverage of the right to a fair trial by evaluating the coverage of the right to a fair trial more broadly compared to ECoHR[48].

B. DISCREPANCIES ORIGINATING FROM TAX PENALTIES

1. In General

Tax discrepancies do not only originate from tax assessments. There are essentially two sides of these discrepancies. One of these is the tax assessment; and the other one is the tax penalties. Although the tax assessment is not

[47] Meif De Boofzheim V. France.

[48] Keskinkılıç Gıda Sanayi and Ticaret A.Ş. Application.

considered under the coverage of the 6th article and can not benefit from the assurances stated in the article, it needs to be discussed what is the situation for the tax penalties. In other words, it needs to be determined whether or not the tax penalties can be considered as criminal charges. Although ECoHR did not consider the tax penalties as criminal charges, they changed their decisions according to the autonomous interpretation principle. In the Bendenoun V. France application in 1994, ECoHR evaluated the monetary tax penalties from the aspect of criminal charges for the first time. In the relevant application, Mr Bendenoun formed a public limited company under French law, with its head office in Strasbourg, for the purpose of dealing in old coins, objects d'art and precious stones. He owned the greater part of its capital (993 out of a total of 1,000 shares) and acted as its chairman and managing director. The applicant was given a monetary penalty on the grounds that he evaded taxes in VAT and Corporation Income Tax. The applicant claimed that his right to be judged fairly was violated in the hearing. The defendant conventional government claimed that, by referring to the earlier decisions of ECoHR, the discrepancy can not be considered as a criminal charge and the application's topic is about an administrative fine and demanded the decline of the application. In the acceptability assessment, ECoHR stated that the monetary tax punishment that is the topic of the discrepancy originates from the general tax legislation, that this law can be applied to everyone and not just people who have a certain status; that the related regulation is aimed towards punishing and deterring and not collecting the tax money, that the applicant can be sentenced in the case of failure to pay the tax; and for this reason, the discrepancies originating from monetary tax penalties should be heard in a judicial office that is founded by law, independent and impartial publicly in a reasonable time[49].

In the Jussili V. Finland application, " the Häme Tax Office (verotoimisto, skattebyrån) requested the applicant, who ran a car-repair workshop, to submit his observations regarding some alleged errors in his value-added tax (VAT) declarations (arvonlisävero, mervärdesskatt) for fiscal years 1994 and 1995. On 9 July 1998 the Tax Office found that there were deficiencies in the applicant's book-keeping in that, for instance, receipts and invoices were inadequate. The Tax Office made a reassessment of the VAT payable basing itself on the applicant's estimated income, which was higher than the income he had declared. It ordered him to pay, inter alia, tax surcharges amounting to 10% of the reassessed tax liability." The applicant opened a case against the relevant actions in the administrative court by requesting an oral hearing. The administrative court declined applicant's both hearing and objection

[49] Öncü, 2011: 154- 157; Toydemir, 2013: 27; Kaplan And Yilmazoglu: 457- 458.

requests. The decision was made final in this form in the national legislation. The applicant claimed that his right to be judged fairly was violated as a result of the decline of his requests about wanting to have an oral hearing. ECoHR assessed the application and decided as follows: "

"The present case concerns proceedings in which the applicant was found, following errors in his tax returns, liable to pay VAT and an additional 10% surcharge. The assessment of tax and the imposition of surcharges fall outside the scope of Article 6 under its civil head. The issue therefore arises in this case whether the proceedings were "criminal" within the autonomous meaning of Article 6 and thus attracted the guarantees of Article 6 under that head. The Court's established case-law sets out three criteria to be considered in the assessment of the applicability of the criminal aspect. These criteria, sometimes referred to as the "Engel criteria", were most recently affirmed by the Grand Chamber in Ezeh and Connors v. the United Kingdom. The court will also look into the question whether or not another approach should be put forward or not regarding this situation. It observes that in Bendenoun, which concerned the imposition of tax penalties or a surcharge for evasion of tax (VAT and corporation tax in respect of the applicant's company and his personal income tax liability), the Court did not refer expressly to Engel and Others v. the Netherlands listed four elements as being relevant to the applicability of Article 6 in that case. The court will come to a decision by using Engel criteria in this relevant case. turning to the first criterion, it is apparent that the tax surcharges in this case were not classified as criminal but as part of the fiscal regime. This is however not decisive. The second criterion, the nature of the offence, is the more important. The Court observes that, as in the Janosevic and Bendenoun cases, it may be said that the tax surcharges were imposed by general legal provisions applying to taxpayers generally. Further, as acknowledged by the Government, the tax surcharges were not intended as pecuniary compensation for damage but as a punishment to deter re-offending. It may therefore be concluded that the surcharges were imposed by a rule whose purpose was deterrent and punitive. Furthermore, the tax surcharges are not only applicable to the individuals that have a certain status but to everyone. As with the explained reasons above, because the tax surcharge needs to be considered as a criminal charge, the court found the application acceptable."

According to the Jussillia decision which is still valid today, one of the three criteria that is stated in the Engel decision needs to be existent in order for a charge regarding taxation to be considered as criminal charge[50]

[50] If the tax punishments are regulated as criminal charges in the penal law, there will not

1. Categorization of the referred tax penalty as criminal in the domestic law: It is enough for the tax penalty to be considered as criminal in domestic law here. There is no other condition needed to be existent. If the tax penalty is indeed accepted as a criminal charge in the domestic law system, the execution principles will come into effect and the investigation period about the related person will be started. In a system where the right to a fair trial is granted to the people starting from the criminal investigation, the consideration of the action as criminal in the domestic law is not enough to apply the 6th article to the case[51].

2. The Nature of the Tax Penalty: If the tax penalty resembles the actions that are classified as criminal act in the national legislation or has a characteristic that affects everyone in the society, it is accepted as a criminal charge as a result of the nature of the act[52]. If there is no resemblance between the act that is classified as criminal in the national legislation and the tax penalty regarding their characteristics and methods, it needs to be determined that whether or not the tax penalty is considered as a criminal charge in the conventional governments or what should be the provisions about it in the democratic law states, and whether or not the accusation can be considered as criminal charge should be determined.

3. Nature and Degree of Severity of Penalty: If a freedom binding penalty can be given to the individuals as a result of the tax penalties, the tax penalty is considered as a criminal charge. ECoHR accepted almost all the actions that were given a freedom binding punishment as criminal charges[53]. However, it is not possible to out rightly say that all freedom binding punishments originate from criminal charges; and thus, the 6th article of the ECHR can be applied. For ECoHR determines the qualities of the accusation by taking the severity and the duration of the freedom binding punishment into consideration.

The Constitutional Court also accepts the tax penalties as criminal charges and considers the discrepancies originating from these allegations as under the coverage of the right to a fair trial. In addition to this, the Constitutional

be any problems. For the discrepancies listed as criminal charges in the Penal Law of a Conventional Government will benefit from the 6th article. The tax offense was not stated in the Penal Law, and if a freedom binding punishment is envisioned as a result of the offense, a criminal charge becomes the question because of the third criterion and the 6th article of the Convention will be applied to the judicial process regarding the discrepancy. With this, if the punishment of the tax crime is regulated as a monetary punishment, the situation must be examined in a separate manner.

51 Ravnsbors V Sweden.

52 İnceoğlu, 2007: 20.

53 Vitkauska and Dikov, 2012: 18.

Court accepts the discrepancies originating from tax assessment under the coverage of the right to a fair trial by interpreting the notion of civil rights and obligations that are stated in the 6th article of the convention more broadly compared to ECoHR[54].

In the E.T.Y.İ Inc. Corp. application, according to the tax audit report that was created as the result of the examination of 2002, 2003, 2004 and 2005 accounts, the applicant did a management agreement regarding the golf field, hotel and the holiday village, that the applicant did not pay his VAT returns by calculating the VAT for the invoice costs of the advertisements and the promotion services that he had a foreign company do for him, and he was imposed with VAT and loss of tax penalty. The case the applicant opened against the additional tax assessment and the loss of tax was declined and the decision was made final after the appeal phase ended[55]. The applicant claimed that his right to be judged fairly was violated as a result of the decline of his case. In the acceptability assessment of the application, the Constitutional Court discretely examined whether or not the cases opened against the tax assessment are under the coverage of the right to a fair trial. In this examination, the Constitutional Court made the following decision and re-stated that the cases opened against tax assessments are under the coverage of the right to a fair trial: *"the tax discrepancies in our judicial system, in the field of administrative jurisdiction and not in any other jurisdictional field and provided that the provisions in the special laws remain hidden, generally according to the Administrative Jurisdiction Procedures Law which is numbered 2577 and came into effect on 6/1/1982, are resolved in a judicial procedure that has the same methods as the other administrative discrepancies. Furthermore, if there is an existent failure to comply with the taxation responsibility, the related tax assessment and the envisioned tax penalty should be sent as a notification to the taxpayer in the same written notice by the related administrative office, the tax assessment and the tax penalties are considered in the same judicial procedure and made into a case, the organic link between the original tax and the tax penalty except the cases where the punishment is given for an illegal act, continues its existence also in the tax collection process. Furthermore, in the case of the complete rejection of the case which was filed against the tax assessment which was made in officio and extra, according to the related legislation, the interest for late payment was envisioned to increase in the same rate with the duration of the case (also look. 3rd paragraph of 112nd article of the law numbered 213, 5th paragraph of the 28th article of the law numbered 2577), and with this aspect - for the*

[54] Keskinkılıç Gıda Sanayi and Ticaret A.Ş. Application.
[55] E.T.Y.İ. A. Ş. Application, § 7.

discrepancies that are related to the original taxes - the right to be judged in a reasonable time which is especially one of the assurances given in the right to a fair trial can play a functional role, and the only tax related discrepancies that are considered to be more public for this reason, are understood to be a relationship that has reflections in the field of civil rights and obligations and according to the determinations made, that discrepancies regarding taxation should be considered under the coverage of the right to a fair trial. In this situation, the violation claims regarding the relevant discrepancy is under the power of the Constitutional Court as a result of its topic"[56]

In the Gür-sel Construction Materials Int.Trade.Co.Ltd application, in the examination of the 2002 accounts of the applicant company's which was made in 2007, it was determined that they used fake invoices which were obtained by a forger who made fake invoice trade and benefited from the VAT discount unjustly and caused tax havoc. According to the relevant examination, in the October of 2002 the company was fined with additional tax assessment caused by the loss of tax and was punished with private illegal act punishment, and the written notice was sent to the applicant on 17/12/2007. The illegal act part of the case that was opened against these acts by the applicant was accepted and the additional tax assessment part was declined. The decision was made final after its appeal process. The applicant claimed that his right to be judged fairly was violated and applied to Constitutional Court. The court found the relevant application valid and started the case.

2. The Minimum Assurances that Should Be Provided to the Taxpayers in the Tax Penalties

In the 3rd paragraph of the 6th article of ECHR, it is stated that some minimum assurances need to be given to the defendants that are being accused of something. If the tax penalty is considered as criminal charge according to the Engel criteria, the relevant assurances need to be provided to the defendants in an appropriate manner. If the relevant assurances are not provided to the defendants that are being referred to with the tax penalty in an appropriate manner, the Convention is considered as violated[57].

[56] E.T.Y.İ Application, § 28.

[57] The tax crime will be referred at the time the punishment is issued generally. On the other, the crime can be referred to the individual before the tax punishment is issued. In the Honzee V. Holland application, the ECoHR accepted the tax examination which was done before the issuing of the punishment as criminal charge. Similarly, it needs to be accepted that the crime is referred to the individual in the cases of taking the statement of the taxpayer, calling the workplace of the taxpayer or being held (Toydemir, 2013: 28). In the Funke V. France application, the customs penalties were considered as criminal charges just as tax penalties.

a. The Right to Have Information About the Criminal Charge

According to the 6th article of the ECHR, everyone charged with a criminal offence has the right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him. The information that will be given to the defendant should include that information of what criminal charge is being put against him and what legal characteristics this act has[58]. It is not enough to inform the defendant with the reason and the characteristics of the criminal charge. The information needs to be in a certain abundance that will allow the defendant to defend himself. In other words, the defendant needs to be informed enough that he can start his defense.

The information about the charge needs to be given to the defendant in a language that he can understand. Although the enough information is given to the defendant, but the information is not in a language that he can understand, the Convention is violated[59]. What requires the utmost attention here is that the notification should be done in a language that he can understand, and not in his mother tongue. If the defendant can understand the language even if it is not his mother tongue, the Convention is not violated. If the information is in another language other than the language the defendant can understand, the defendant has the right to have the information translated into a language that he can understand[60].

If the failure of notifying the defendant about the criminal charge in its appropriate manner was caused by the defendant's own actions, as the government can not be blamed for this, the right to be informed about the criminal charge of the defendant is not violated[61]. In order to give a violation decision regarding the notification of the criminal charge in an appropriate way, there needs to be a failure of the government. If there is not a failure of the government, the violation decision is not made.

b. The Right to Have a Decent Amount of Time and the Convenience to Prepare the Defence

In order for the defendant to prepare his defense in the best possible way, he needs to have the information about the criminal charges brought against him and obtain the details about these charges, and have a decent amount of time to prepare a defense. This situation shows that very basic right to defend

58 Sanıvar, 2012: 87.
59 Celık and Others V. Turkey.
60 Komasinki v. Austria.
61 Hennings V. Germany.

is the right to have information about the criminal charge brought against the defendant. It is, indeed, possible to say that a defendant's who did not receive the complete information about the criminal charge brought against him right to defend himself in a whole manner is violated[62].

The right to have a decent amount of time and the convenience to prepare the defense has two main conditions. The first one is the consideration of the facts about the case such as the qualifications and complicatedness of the case, in which stage the case is in and which rights of the defendant is being threatened while deciding the decent amount of time that should be given to the defendant. Thus, the decent time changes according to every concrete case. It is possible that compared with the cases where the qualifications are complicated, the numbers of defendants and witnesses are abundant, where there is a complication in collecting evidence and where these qualifications are otherwise; and the cases requiring hard punishments compared with light punishments, and the cases which will end up with freedom binding punishments compared with the ones which will not end up with this type of a punishment, they can be given a longer time to prepare the defense[63].

Besides a decent time period, in order to provide a real possibility for the defendant to prepare a defence, the conveniences for him to prepare his defense should also be provided for him. What should be understood from the notion of "necessary conveniences" can change from defendant to defendant. However, generally this includes, the convenience to examine the file, obtain the necessary information and documents from the file, demanding to be listened legally. These can be shown amongst the conveniences that needs to be provided to the defendant in order for him to prepare his defense.

c. The Right to Defend Himself.

The right to defend himself is probably the most important right in the judicial process. There can be no judicial process in which the defendant does not defend himself. If there is not judging, it is not important to wonder if it is fair or not. For this reason, the right to defend himself constitutes the very roots of the judicial processes.

In the 6th article of the ECHR, in the b paragraph, it was stated that everyone has the right to have adequate time and facilities for the preparation of his defense; and in the c paragraph, to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay

62 Sanıvar, 2012: 92.

63 Toydemir, 2013: 65; Yüksel, 2012: 103; Vitkauskas and Dıkov,2011: 96.

for legal assistance, to be given it free when the interests of justice so require was stated openly.

When the c paragraph of the 6th article of ECHR is examined, it can be said that the right to defend himself contains three rights that are connected to each other. In other words, the right to defend himself is a broad concept which includes three rights[64].

1. The right to defend himself in person,

2. The right to have a legal assistance through a lawyer of his own choosing and the right to be informed about this right,

3. If he has not sufficient means to pay for legal assistance, the right to benefit from free legal assistance.

It is crucial that these rights are provided to the defendants in the discrepancies originating from tax penalties. Otherwise, the right to a fair trial of the defendant will be violated as a result of the violation of the right to defend himself.

d. The Right to Examine or Have Examined the Witnesses and the Obtainment of Witnesses

Although the right to examine the witnesses and have witnesses for himself is regulated in the Convention, this right also includes the right to bring evidence and to want to be legally listened.

According to us, in the tax penalties that are accepted as criminal charges, the right to examine or have examined the witnesses and the Obtainment of Witnesses should be provided alongside with the right to want to be legally listened. However, as long as the right to bring evidence and to want to be legally listened is provided, the inexistence of the right to examine or obtain witnesses does not cause the violation of the Convention on its own.

e. The Right to Benefit From a Translator Charge Free

According to the "e" bullet point of the third paragraph of the 6th article of ECHR all the defendants have the right" to have the free assistance of an interpreter if he can not understand or speak the language used in court."

The purpose of this provision is to prevent the defendant from losing their right to actively defend themselves as a result of the inadequacy in language skills[65].

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64 Osce- Digest, 2012: 139.

65 Sanıvar, 2012: 112.

In the cases where the relevant defendant does not understand the language that is used in the hearing or can not speak it, he or she is assured to have a free assistance of an interpreter. It is not needed for this right to be provided in the mother tongue. In other words, the right to benefit from a free assistance of an interpreter is valid in the cases where the language used in the hearing is not understood. If the defendant wishes to do his defense in his or her mother tongue although he or she understands the language used in the hearing; they will not be able to benefit from a free assistance of an interpreter[66].

If the request of the defendant regarding benefiting from a free assistance of an interpreter gets declined by the court; the court needs to prove and concretely show that the defendant understand the language used in the hearing[67]. If the court can not prove that the defendant understand the language used in the hearing, they are obliged to give the defendant the right to benefit from a free assistance of an interpreter. If otherwise is the case, the defendants right to be judged fairly is considered violated[68].

There is not a clear provision regarding whether or not the right to benefit from a free assistance of an interpreter can be applied to the cases regarding tax penalties. This particular situation was also not evaluated by ECoHR. According to us, as long as it is in accordance with the characteristics, the right to benefit from a free assistance of an interpreter is an assurance that needs to be given to the taxpayers. Especially in the cases where the tax penalty requires a penalty that is freedom binding, not giving this right to the defendant might violate the right to a fair trial.

CONCLUSION

The problem of whether or not ECHR will be applied to the discrepancies related to taxation were decided with stable ruling cases a result of a long period. There are essentially two categories of discrepancies originating from taxation. The first one is the discrepancies originating from the taxation assessment, and the second one is the discrepancies originating from tax penalties. ECoH, after accepting that the discrepancies originating from taxation assessments are related to civil rights and obligations and the right to a fair trial can be applied to these discrepancies, with the Ferazzini V. Italia decision in 2001, they revoked this ruling case. In the related decision, ECoHR stated that in the discrepancies originating from taxation assessment, the

66 Vitkauskas and Dikov, 201: 113.
67 Brozicek V. Italy.
68 Osce- Digest, 2011: 144.

public law is dominant and the tax-raising power constitutes the very core of the public privileges. According to the Ferrazzini V. Italia decision which is still valid today, the 6th article of the Convention will not be applied to the discrepancies originating from tax assessments. On the other hand, the Constitutional Court accepted that tax assessment affects the property rights of the individuals and the discrepancies originating from assessment belong to the civil rights and obligations; and stated that the 6th article can be applied to these discrepancies. The situation is much more clear in the discrepancies originating from tax-raising power. The tax penalties are subjected to obstacle test and the tax penalties that contain one of the three criteria stated in the test are accepted as criminal charges and the 6th article is applied to the discrepancies originating from these situations. The Constitutional Court also accepts this decision of ECoHR, and applies the 6th article to the tax penalties which has one of the three criteria which was envisaged in the engel test.

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