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„DAS INTERNATIONALE ERBRECHT DE LEGE LATA UND DE LEGE FERENDA IN DEUTSCH-TÜRKISCHEN SACHVERHALTEN“, VORTRAG VOR DER RECHTSANWALTSKAMMER*

Prof. Dr. Ansgar Staudinger**

ABSTRACT

In the case of any disputes regarding Turkish-German law of succession, the bilateral Intergovernmental Agreement signed between Turkey and Germany on 28.02.1929 shall apply. The basic rule of this bilateral Agreement concerns the application of provisions of Turkish law of succession in the case that a Turkish citizen dies in Germany. However, international law of succession differs from country to country in terms of European Union Member States. The rules which apply in many Member States close to Germany are different from those stated in the Turkish-German agreement. The European Union Commission has stipulated the harmonisation of international law of succession in the light of free movement right. It has been adopted under the Article 16 of Regulation adopted by the European Union Commission that the law of succession to be applied shall be determined in accordance with the law of habitual domicile residence in order to ensure a common international law of succession in the future. Therefore, the German Parliament adopted a similar Law on 13.02.2012. The law of succession to be applied in the future shall be determined, as a rule, not on the basis of citizenship, but on the latest law of domicile residence. In terms of legal policy, those developments in law increase the pressures on the Federal Government of Germany in Berlin regarding the termination of the bilateral agreement between Turkey and Germany forming a basis for the principle of citizenship.

Keywords: Law of succession, Turkish-German law of succession, law of habitual domicile residence, citizenship.

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** Der Autor *Staudinger* ist Inhaber eines Lehrstuhls für Bürgerliches Recht, Internationales Privat-, Verfahrens- und Wirtschaftsrecht sowie Direktor der Forschungsstelle für Reiserecht an der Universität Bielefeld.

ZUSAMMENFASSUNG

Auf einen deutsch-türkischen Erbrechtsachverhalt wird vorrangig der bilaterale deutsch-türkische Staatsvertrag vom 28.5.1929 angewendet. Nach dessen Grundregel findet auf den Erbfall eines in Deutschland verstorbenen türkischen Staatsangehörigen türkisches Erbrecht Anwendung. Das Internationale Erbrecht ist aber in den einzelnen EU-Mitgliedsstaaten divergiert. So findet sich in einer Vielzahl von Nachbarstaaten zu Deutschland ein abweichendes Modell als dem Grundregel des deutsch-türkischen Staatsvertrages. Die Europäische Kommission sah sich nun gerade im Lichte der Freizügigkeit veranlasst, eine Harmonisierung des Internationalen Erbrechtes voranzutreiben. Sie sieht demzufolge vor, dass zukünftig das in der Sache einschlägige Erbrecht gemäß Art. 16 VO-E anhand des letzten gewöhnlichen Aufenthaltes des Erblassers zu ermitteln ist. Das deutsche Parlament hat eine entsprechende Verordnung am 13.3.2012 verabschiedet. Das in der Sache einschlägige Erbrecht ist zukünftig in der Regel nicht anhand der Staatsangehörigkeit, sondern nach Maßgabe des letzten gewöhnlichen Aufenthalts zu ermitteln. Als Korrektiv verbleibt dem Erblasser die Wahl seines Heimatrechts, wenn auch unter bestimmten formalen Einschränkungen. Rechtspolitisch steigt allerdings der Druck auf die Bundesregierung in Berlin, die Staatsangehörigkeit als Anknüpfungsmodell, welches eben auch dem bilateralen deutsch-türkischen Staatsvertrag zugrunde liegt, aufzugeben.

Schlüsselwörter: Erbrechtsachverhalt, Deutsch-Türkischen Erbrechtsachverhalt, Aufenthalts Maßgabe, Staatsangehörigkeit.

ÖZET

Bir Türk-Alman miras hukuku uyuşmazlığında öncelikle 28.2.1929 tarihli Türk-Alman ikili Devletlerarası Anlaşması uygulanacaktır. Bu ikili Anlaşmanın temel kuralı, bir Türk vatandaşının Almanya'da ölmesi durumunda, Türk miras hukuku hükümlerinin uygulanmasına yöneliktir. Ancak Avrupa Birliği üyesi ülkelerde uluslar arası miras hukuku farklılık göstermektedir. Almanya'nın komşusu olan bir çok üye ülkede Türk-Alman anlaşmasının temel kuralından farklı kurallar geçerlidir. Avrupa Birliği Komisyonu serbest dolaşım hakkının ışığı altında uluslar arası miras hukukunun uyumlaştırılmasını sağlamayı öngörmüştür. Avrupa Birliği Komisyonu tarafından kabul edilen Tüzüğün 16. maddesi ile, gelecekte ortak bir uluslararası miras hukukunu sağlama amacıyla, uygulanacak miras hukukun mutad yerleşim yeri hukukuna göre belirleneceğini kabul edilmiştir. Alman Parlamentosu da buna benzer bir Yasayı 13.2.2012 tarihinde kabul etmiştir. Gelecekte uygulanacak olan ortak miras hukuku kural olarak vatandaşlık esasına göre değil, en son yerleşim yeri hukukuna göre belirlenecektir. Bu hukuki gelişmeler hukuk politikası yönünden Berlin'deki Federal Almanya Hükümeti üzerinde, vatandaşlık kriterini esas alan Türk-Alman ikili Anlaşmasının sona erdirilmesi yönündeki baskıları artırmaktadır.

Anahtar Kelimeler: Miras hukuku, Türk-Alman Miras Hukuku, yerleşim yeri kriteri, vatandaşlık kriteri.

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I. Deutsch-Türkischer Konsularvertrag vom 28.5.1929

Verstirbt auf deutschem Territorium ein türkischer Staatsangehöriger, so bedarf es der Ermittlung des anwendbaren Erbrechtes. Laut Artikel 3 Nr. 2 EGBGB genießen insofern bereits bestehende völkerrechtliche Vereinbarungen Vorrang vor dem allgemeinen deutschen Internationalen Erberecht. In einem deutsch-türkischen Sachverhalt greift mithin vorrangig zunächst der am 28.5.1929 (in Kraft seit dem 18.11.1931) zwischen beiden Staaten geschlossene Staatsvertrag ein. Nach dessen Grundregel findet auf den Erbfall eines in Deutschland verstorbenen türkischen Staatsangehörigen türkisches Erbrecht Anwendung. Hierbei handelt es sich um einen sogenannten Sachnormverweis. Demzufolge wird unmittelbar türkisches Erbrecht herangezogen. Mithin scheidet eine Rückverweisung ins deutsche Erbrecht ebenso aus wie eine Weiterverweisung in dasjenige eines dritten Staates. Gleichermaßen differenziert das staatsvertragsrechtliche Modell nicht zwischen beweglichem und unbeweglichem Nachlass. Mithin gilt jedenfalls für Erbrechtsfragen auch dann türkisches Erbrecht, wenn der verstorbene türkische Staatsangehörige zur Lebzeit etwa Eigentümer einer in Deutschland belegenen Immobilie war, die dort im Grundbuch eingetragen ist. Hiervon zu trennen bleibt die Frage des anwendbaren Sachenrechtes. Nach dem Grundsatz „lex rei sitae“ nach Artikel 43 Abs. 1 EGBGB gilt das jeweilige Belegenheitsrecht, so dass etwa für die Auflassung des Grundstücks an den bzw. die Erben das deutsche Sachenrecht zu beachten ist. Als Zwischenergebnis lässt sich damit festhalten, dass kraft des völkerrechtlichen Vertrages aus dem Jahre 1929 auf den Erbfall eines in Deutschland verstorbenen türkischen Staatsangehörigen allein türkisches Erbrecht zur Anwendung gelangt. Es scheidet eine Rück- oder Weiterverweisung ebenso aus wie eine Nachlassspaltung, da nicht zwischen beweglichem und unbeweglichem Vermögen differenziert wird.

II. Deutsches Internationales Erbrecht de lege lata (Art.25 EGBGB)

Die zuvor genannten Grundprinzipien decken sich derzeit weithin mit dem allgemeinen deutschen Internationalen Erberecht. So folgt aus Art. 25 Abs. 1 EGBGB, dass ganz allgemein die Staatsangehörigkeit als Anknüpfungspunkt zur Ermittlung des anwendbaren Erbrechtes gilt. Verstirbt mithin ein griechischer Staatsangehöriger auf deutschem Territorium, so ergibt sich aus Art. 25 Abs. 1 EGBGB im Ausgangspunkt ein Verweis auf die griechische Rechtsordnung. Abweichend vom

deutsch-türkischen Staatsvertrag ordnet allerdings Art. 4 Abs. 1 S. 1 EGBGB einen Gesamtverweis an, welcher das griechische Internationale Erbrecht einschließt. Abhängig davon, ob dieses den Verweis annimmt oder eine Rück- oder Weiterverweisung ausspricht, gelangt dann womöglich griechisches Erbrecht zur Anwendung.

Art. 25 Abs. 2 EGBGB erlaubt demgegenüber abweichend von dem Grundprinzip der objektiven Anknüpfung eine beschränkte Rechtswahl. Hiernach können auch schon derzeit Erblasser deutsches Erbrecht ungeachtet ihrer Staatsangehörigkeit wählen, sofern es um die Vererbung der in Deutschland belegenen Immobilien geht. Zusammengefasst sieht mithin das deutsche Internationale Erbrecht einerseits eine objektive Anknüpfung auf der Grundlage der Staatsangehörigkeit vor. Dabei handelt es sich um einen Gesamtverweis. Andererseits erlaubt Art. 25 Abs. 2 EGBGB eine beschränkte subjektive Anknüpfung. Hiernach wird die Wahl deutschen Erbrechtes eröffnet, allerdings nur, sofern auf deutschem Territorium belegene Grundstücke betroffen sind.

III.Vor-und Nachteile der Staatsangehörigkeit als Anknüpfungspunkt

4 Welche Vorzüge bestehen nun für den Anknüpfungspunkt der Staatsangehörigkeit, wie er sich gleichermaßen im deutsch-türkischen Staatsvertrag von 1929 wie ganz allgemein in Art. 25 Abs. 1 EGBGB findet? Aus dem Blick des Rechtsanwenders und mithin der Anwälte, Notare aber auch Nachlassgerichte bietet die Staatsangehörigkeit den Vorzug der fehlenden Manipulier- und besseren Vorhersehbarkeit. Überdies erweist sich der Anknüpfungspunkt als nicht wandelbar. Während sich etwa ein gewöhnlicher Aufenthalt verstanden als Lebensmittelpunkt etwa durch einen Umzug verändern kann, ist die Staatsangehörigkeit hiervon unabhängig. Als Ausnahme gilt allein der Fall, dass jemand eine Staatsangehörigkeit zugunsten einer anderen aufgibt. Diesbezüglich handelt es sich allerdings um einen seltenen Ausnahmefall.Überdies lässt sich die Staatsangehörigkeit etwa anhand von Ausweispapieren leicht ermitteln.

Aus Praktikersicht bleibt allerdings auch ein gravierender Nachteil festzuhalten. In einer Vielzahl von Fällen gelangt infolge des deutsch-türkischen Staatsvertrages sowie nach Maßgabe von Art. 25 Abs. 1 EGBGB mitunter fremdes, etwa türkisches Erbrecht vor deutschen Nachlassgerichten zur Anwendung. Dabei wird unterstellt, dass Nachlassgerichte etwa wegen des Erbfalls oder in Deutschland belegener

Nachlassbestandteile die internationale Zuständigkeit besitzen. Die Ermittlung ausländischen Erbrechtes geht nur mit zeitlichen Verzögerungen und einem höheren finanziellen Aufwand einher. So muss ein Nachlassgericht in Deutschland vielfach ein Gutachten zum ausländischen Erbrecht einholen. Der Richter überträgt faktisch im Ergebnis seine originäre Aufgabe der Rechtsprechung auf Gutachter. Dies mag im Einzelfall mit einer unzutreffenden Anwendung fremder Rechtsquellen einhergehen. Als weiteres Zwischenergebnis lässt sich damit festhalten: Die Staatsangehörigkeit ist ein nicht wandelbarer und leicht voraussehbarer Anknüpfungspunkt. Diesem Vorzug steht allerdings gegenüber, dass bei Versterben eines ausländischen Staatsangehörigen in Deutschland etwa Nachlassgerichte gezwungen sind, sich fremder Hilfe Dritter als Sachverständige zu bedienen. Dies führt zu einer Verzögerung der Nachlassabwicklung sowie zu einer verteuerten Rechtsfindung. Hinzu kommen mag im Einzelfall eine erhöhte Gefahr der fehlerhaften Anwendung ausländischer Nornen.

Weitere Bedenken ergeben sich aus dem Blickwinkel eines Durchschnittsbürgers in Deutschland. So erscheint zweifelhaft, ob ein ausländischer Staatsangehöriger ungeachtet seines längeren Aufenthalts auf deutschem Territorium immer noch von der Maßgeblichkeit seines Heimatrechtes ausgeht. So muss doch in Zweifel gezogen werden, dass etwa ein italienischer Staatsangehöriger, der seit über 50 Jahren in Deutschland seinen Lebensmittelpunkt hat, tatsächlich erwartet, am Lebensabend nach italienischem Erbrecht beerbt zu werden.

Gerade mit Blick auf den Binnenmarkt kommt eine weitere Facette hinzu. So ist der Binnenmarkt als Rechtsschutzraum zu verstehen, in dem Unionsbürger Niederlassungsfreiheit genießen. Sie sollen mithin ohne Bedenken ihre Rechte wahrnehmen und etwa ihren Lebensmittelpunkt innerhalb der Mitgliedsstaaten frei wählen. Das Leitbild innerhalb des Rechtsschutzraumes ist dabei nicht der Staatsangehörige, sondern der Unionsbürger. Dies kommt im Vertrag von Lissabon an prominenter Stelle durch das allgemeine Diskriminierungsverbot in Art. 18 AEUV zum Ausdruck, wonach EU-Bürger nicht durch ihre Staatsangehörigkeit benachteiligt werden dürfen.

IV.Vereinheitlichung des Internationalen Erbrechts durch den europäischen Gesetzgeber

Sollte nun innerhalb Europas der supranationale Gesetzgeber in Zukunft das Internationale Erbrecht vereinheitlichen und wenn ja, in welcher Weise?

Festzuhalten bleibt zunächst der Ausgangsbefund, dass das Internationale Erbrecht in den einzelnen Mitgliedsstaaten divergiert. So findet sich in einer Vielzahl von Nachbarstaaten zu Deutschland ein abweichendes Modell. Abgestellt wird nämlich im Ausgangspunkt für die objektive Anknüpfung gerade nicht auf die Staatsangehörigkeit, sondern den gewöhnlichen Aufenthalt. Die Europäische Kommission sah sich nun gerade im Lichte der Freizügigkeit veranlasst, eine Harmonisierung des Internationalen Erbrechtes voranzutreiben. Als Hintergrund ist dabei zu erkennen, dass der Binnenmarkt nicht mehr als reine Wirtschaftsgemeinschaft verstanden wird, sondern als Rechtschutzraum ebenso familiäre und erbrechtliche Beziehungen einschließt. Allerdings ist es dem supranationalen Gesetzgeber verwehrt, das Erbrecht selbst und mithin das Sachrecht anzugleichen oder gar zu vereinheitlichen. Hierzu fehlt es ihm nicht nur an einer entsprechenden Kompetenz. Dem steht auch das Subsidaritätsprinzip sowie das Gebot der Verhältnismäßigkeit entgegen. Hinzu kommt, dass das Erbrecht als materielles Recht vielfach auf kulturelle oder gar historische und religiöse Wurzeln zurückgeht, die es auch in mittelfristiger Perspektive aussichtslos erscheinen lassen, einen gemeinsamen Nenner innerhalb der Mitgliedsstaaten zu finden. Mithin sah sich die Kommission allein befugt, Grundprinzipien des Internationalen Erbrechtes zu harmonisieren. In Anbetracht einer Vielzahl von Staaten, in denen das in der Sache einschlägige Erbrecht kraft objektiver Anknüpfung nach Maßgabe des gewöhnlichen letzten Aufenthaltes bestimmt wird, war es naheliegend und konsequent, nicht auf das alternative Modell der Staatsangehörigkeit abzustellen. Als Hauptargument hiergegen spricht vor allen Dingen das Verbot, Bürger anhand ihrer Staatsangehörigkeit offen oder versteckt und mithin unmittelbar oder mittelbar zu diskriminieren. Um letztlich keinen Konflikt mit dem Primärrecht des Vertrages von Lissabon heraufzubeschwören, verblieb der Kommission allein der Ansatz, auf den Lebensmittelpunkt des Erblassers abzuheben. Der von der Kommission unterbreitete Verordnungsvorschlag KOM (2009) 154 endgültig vom 14.10.2009 (Vorschlag für eine Verordnung des Europäischen Parlaments

und des Rates über die Zuständigkeit, das anzuwendende Recht, die Anerkennung und die Vollstreckung von Entscheidungen und öffentlichen Urkunden in Erbsachen sowie zur Einführung eines Europäischen Nachlasszeugnisses) sieht demzufolge vor, dass zukünftig das in der Sache einschlägige Erbrecht gemäß Art. 16 VO-E anhand des letzten gewöhnlichen Aufenthaltes des Erblassers zu ermitteln ist. Dabei soll es sich gemäß Art. 26 VO-E um einen Sachnormverweis handeln. Demzufolge scheiden Rück- und Weiterverweisungen aus.[1]

Die Vorzüge dieses Modells bestehen darin, dass der Erbfall einem einzigen Sachrecht, nämlich dem gewöhnlichen Aufenthaltsrecht des Verstorbenen unterworfen ist. Es kann mangels Rück- und Weiterverweis nicht zu einer Spaltung des Erbrechtes kommen. Ebenso wenig wird zwischen beweglichem und unbeweglichem Vermögen differenziert. Auch dies trägt dem Gebot der Rechtssicherheit und -praktikabilität Rechnung, sodass in der Gesamtschau der Erbfall einem einzigen Erbrecht unterstellt wird, unabhängig davon, ob sich im Nachlass bewegliches oder unbewegliches Vermögen befindet. Kritikwürdig erscheint an dem Vorschlag der Kommission allein, dass der gewöhnliche Aufenthalt bislang nicht legal definiert wird. Bis zur Veröffentlichung des Rechtsaktes im Amtsblatt mag diese Lücke noch seitens der Legislative geschlossen werden.[2] Nicht von der Hand zu weisen ist, dass der gewöhnliche Aufenthalt, anders als die Staatsangehörigkeit, ein wandelbarer Anknüpfungspunkt ist. Demzufolge mag man das Risiko der Manipulation nicht ganz von der Hand weisen. Allerdings dürfte sich die Verlagerung des Lebensmittelpunktes allein aus dem Motiv, ein anderes Erbrecht zur Anwendung zu berufen, in der Praxis eher als Ausnahmefall erweisen.

Neben dieser objektiven Anknüpfung eröffnet der Vorschlag der Kommission eine Rechtswahl. Zur Wahl gestellt wird gemäß Art. 17 VO-

1 Im Nachgang zum Vortrag hat das dem Europäischen Parlament am 13.3.2012 eine teils veränderte Fassung angenommen. Diesem Text muss der Ministerrat noch formal zustimmen. Allerdings bleibt es ebenso nach der vom Parlament verabschiedeten Formulierung des Art. 16 Abs. 1 beim Anknüpfungspunkt des gewöhnlichen Aufenthalts. Eine Durchbrechung erlaubt allerdings Art. 16 Abs. 2 für den Ausnahmefall, wenn sich aus der Gesamtheit der Umstände ergibt, dass der Erblasser im Zeitpunkt seines Todes eine offensichtliche engere Verbindung zu einem anderen Staat hatte. Erläuterungen finden sich insofern im Erwägungsgrund Nr. 12b. Gleichermaßen sieht Art. 26 in der Fassung des Parlaments eine Veränderung dahin vor, dass der Verweis auf ein Drittstaatenrecht unter Umständen als Gesamtverweis zu deuten ist. Beachtung verdient insoweit Erwägungsgrund Nr. 23b.

2 In der vom Parlament angenommen Fassung finden sich zumindest in den Erwägungsgründen Nr. 12 wie auch 12a Interpretationshilfen.

E das Heimatrecht des Erblassers. Der Erblasser kann mithin etwa, wenn er in Deutschland seinen Lebensmittelpunkt hat, allerdings italienischer Staatsangehöriger ist, ebenso in einem Testament festlegen, dass für die Erbschaft italienisches Erbrecht gelten soll. Derzeit ist jedoch noch unklar, wie diese Vorschrift bei Personen mit doppelter Staatsangehörigkeit oder bei Staatenlosen zu handhaben ist. Auch insofern bleibt abzuwarten, ob der Rechtsakt bis zur Drucklegung im Amtsblatt nachgebessert wird. Andernfalls ist im ersten Fall wohl davon auszugehen, dass der Erblasser zwei wählbare Rechtsordnungen zur Auswahl hat, im Fall des Staatenlosen hingegen eine Rechtswahl ausscheidet.[3]

Die Wahl des Heimatrechtes kann nach der Fassung der Kommission wohl nicht stillschweigend und mithin nicht konkludent erfolgen, vielmehr bleibt eine ausdrückliche Wahl erforderlich.[4] Dies ist Ausfluss des Gebotes der Rechtssicherheit. Mithin erscheint eine Rechtswahl nur dann als wirksam, wenn der Erblasser sie explizit und insofern etwa in testamentarischer Form trifft. Diese Formvorgaben bedeuten, dass der rechtsunterworfene EU-Bürger von Rechtsanwälten und Notaren auf die womöglich veränderte Rechtslage nach Inkrafttreten und Anwendbarkeit der Verordnung hinzuweisen ist.

De lege ferenda könnte mithin zukünftig nach der von der Kommission vorgeschlagenen Verordnung das europäische Internationale Erbrecht wie folgt aussehen: Verstirbt ein italienischer Staatsangehöriger mit Lebensmittelpunkt in Deutschland, so wenden deutsche Nachlassgerichte kraft der Verordnung objektiv deutsches Erbrecht an. Dies gilt lediglich dann nicht, wenn der Erblasser ausdrücklich etwa in einem Testament die Wahl italienischen Rechtes bestimmt hat.

Der Vorzug dieser Lösung besteht zweifelsohne darin, dass in einer Vielzahl von Fällen im Nachgang zur Anwendbarkeit der Verordnung die jeweiligen Nachlassgerichte mit dem ihm vertrauten eigenen Erbrecht befasst werden. Demzufolge können Nachlassverfahren demnächst

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3 In der vom Parlament verabschiedeten Version wird einer Person, die mehrere Staatsangehörigkeiten besitzt, die Wahl des Rechts einer dieser Staaten eröffnet. Von Bedeutung ist überdies der Erwägungsgrund Nr. 18c.

4 Auch in Art. 17 Abs. 2 der vom Parlament angenommen Fassung findet sich die Formulierung, dass die Wahl „ausdrücklich in einer Erklärung in Form einer Verfügung von wegen“ erfolgen muss. Allerdings genügt nunmehr ebenso, dass sich eine derartige Rechtswahl „aus den Bestimmungen einer solchen Verfügung“ ergibt. Zur Erläuterung dient insofern Erwägungsgrund Nr. 18a.

zeitlich straffer abwickelt werden. Darüber hinaus dürften derartige Verfahren durch das Entfallen aufwändiger und kostenintensiver Gutachten günstiger und damit finanziell attraktiver werden. Man mag einen weiteren Vorteil darin sehen, dass, wenn deutsche Gerichte etwa ihr heimisches Erbrecht auf den Beispielsfall anwenden, dies ebenso das Erbrecht des Staates als Noterbrecht einschließt.

V.Auswirkung eines vereinheitlichten Internationalen Erbrechts auf europäischer Ebene für den deutsch-türkischen Konsularvertrag vom 28.5.1929

Die vorgeschlagene Verordnung der Kommission ist unmittelbar heranzuziehen und genießt in den Mitgliedstaaten, welche der Verordnung unterstellt sind, Anwendungsvorrang. Nach der augenblicklichen politischen „Großwetterlage“ zum Zeitpunkt des Vortrages ist davon auszugehen, dass die Verordnung in sämtlichen Mitgliedsstaaten einschlägig ist, mit Ausnahme von Dänemark.[5]

Damit stellt sich die Frage des Zusammenspiels der vorgeschlagenen Verordnung mit dem Staatsvertrag zwischen Deutschland und der Türkei von 1929. Die Verordnung – unterstellt, sie gelangt in Deutschland zur Anwendung – zwingt nicht zu einem Völkerrechtsbruch. Vielmehr ist nach der derzeitigen Fassung vorgesehen, dass diejenigen Mitgliedsstaaten, die bereits zuvor einen Staatsvertrag mit einem Drittstaat abgeschlossen haben, auch zukünftig an solchen Konvention festhalten können, vgl. Art. 45 I, II VO-E.[6] Der europäische Gesetzgeber nimmt sich mithin und den Anwendungsvorrang seiner Verordnung für die bereits bestehenden bi- oder multilateralen Konventionen zurück, sofern deren Parteien unter anderem Drittstaaten sind. Als weiteres Zwischenergebnis bleibt damit festzuhalten, dass nicht automatisch mit Inkrafttreten der von der Kommission vorgeschlagenen Verordnung der Vertrag zwischen Deutschland und der Türkei von 1929 hinfällig wird.

Allerdings bleibt zu fragen, ob es sich als überzeugend erweist, innerhalb des Binnenmarktes und damit innerhalb Deutschlands einerseits sämtliche ausländische Staatsangehörige, und zwar auch solche aus

5 Nach dem aktuellen Stand im März 2012 ist indes davon auszugehen, dass auch das Vereinigte Königreich sowie Irland von ihrem „Opt-out“ Recht Gebrauch machen.

6 Auch laut Art. 45 Abs. 1 S. 1 sowie Abs. 2 in der vom Parlament verabschiedeten Fassung lässt die Verordnung die Anwendung internationaler Übereinkommen zwischen einem Mitglied- und einem Drittstaat unberührt.

Drittstaaten, der EU-Verordnung, andererseits lediglich türkische Staatsangehörige einem abweichenden Modell nach Maßgabe eines Staatsvertrages aus dem Jahre 1929 zu unterstellen. Zunächst ist nämlich im Ausgangspunkt Folgendes festzuhalten: Die Verordnung erfasst sämtliche Erbfälle mit grenzüberschreitendem Bezug, sofern sie hypothetisch vor Nachlassgerichten der Mitgliedsstaaten verhandelt werden können. Demzufolge erstreckt sich die Verordnung ebenso auf Erbfälle, wenn der Verstorbene ein Nicht-EU-Bürger ist. Mithin unterliegt etwa selbst dann der Todesfall der vorgeschlagenen Erbrechtsverordnung, wenn der Erblasser etwa serbischer Staatsangehöriger oder ein solcher aus Kasachstan oder Aserbaidschan ist. Nun mutet es ein Stück weit merkwürdig an, derartige Drittstaatenangehörige - und natürlich sämtliche EU-Bürger - einem Prinzip zu unterstellen, nämlich der Maßgeblichkeit des letzten gewöhnlichen Aufenthaltes für die objektive Ermittlung des Erbrechts, demgegenüber türkische Staatsangehörige in Deutschland einem abweichenden Modell zu unterwerfen. Dies gilt umso mehr, als es sich bei der Staatsangehörigkeit als Anknüpfungspunkt jedenfalls innerhalb des Binnenmarktes um ein Auslaufmodell handelt. Demzufolge erscheint es naheliegend, dass sich die Bundesregierung womöglich im Nachgang zum Inkrafttreten der Verordnung an die Regierung der Türkei wenden wird, um womöglich eine Korrektur des Staatsvertrages auszuhandeln bzw. um Verständnis dahin zu werben, an der Konvention aus dem Jahre 1929 nicht mehr festhalten zu müssen. Um dies noch einmal deutlich herauszustreichen: Der seitens der Kommission angedachte Sekundärrechtsakt ordnet keinen Völkerrechtsbruch an. Er erzwingt ebenso wenig eine Kündigung des Staatsvertrages und führt erst recht keine solche automatisch herbei. Allein rechtspolitisch entsteht womöglich für eine Regierung eines Mitgliedstaates wie Deutschland ein politischer Handlungsdruck. So dürfte es auf Dauer der eigenen Bevölkerung kaum vermittelbar sei, dass für sämtliche EU-Bürger wie Drittstaatenangehörige die EU-Verordnung und mithin das Grundprinzip gilt, wonach das Erbrecht infolge des letzten gewöhnlichen Aufenthaltes ermittelt wird, lediglich für türkische Staatsangehörige in Deutschland ein abweichender Staatsvertrag einschlägig sein soll. Hinzu kommt, dass die EU-Verordnung – unterstellt man das Auslaufen des deutsch-türkischen Staatsvertrages – ebenso die Wahl türkischen Erbrechtes erlaubt. Mithin bedeutet die Maßgeblichkeit der EU-Verordnung auch für türkische Staatsangehörige in Deutschland keine Abkehr davon, dass der

Erbfall türkischem Erbrecht unterstehen *kann*. Der türkische Erblasser ist vielmehr nur gezwungen, eine solche Wahl zukünftig dann (ausdrücklich) in seinem Testament zu treffen. Demzufolge sollte nicht vorschnell der Lösungsansatz der Kommission kritisiert werden. Denn auch wenn dieser Rechtsakt den Staatsvertrag von 1929 einmal ablösen sollte, steht jedem türkischen Staatsangehörigen in Deutschland weiterhin der Weg offen, sein Heimatrecht kraft ausdrücklicher Rechtswahl zur Anwendung zu berufen. Wie bei allen anderen ausländischen Staatsangehörigen schaffte dies gleichermaßen für Rechtsanwälte und Notare ein Beratungspotential eben auch türkischen Bürgern gegenüber.

VI.Zusammenfassung

Die mittlerweile vom Parlament am 13.3.2012 verabschiedete Verordnung in Erbrechtssachen wird jedenfalls mit Blick auf das Kollisionsrecht in Deutschland zu einem fundamentalen Bruch führen. Das in der Sache einschlägige Erbrecht wird zukünftig in der Regel nicht anhand der Staatsangehörigkeit, sondern nach Maßgabe des letzten gewöhnlichen Aufenthalts ermittelt. Als Korrektiv verbleibt dem Erblasser die Wahl seines Heimatrechts, wenn auch unter bestimmten formalen Einschränkungen. Das Inkrafttreten der Verordnung dürfte der Auslöser eines Dominosteineffektes in Bezug auf weitere Rechtsquellen sein. So bleibt zweifelsohne der Konsularvertrag zwischen Deutschland und der Türkei aus dem Jahre 1929 von dem angedachten Sekundärrechtsakt unberührt. Rechtspolitisch steigt allerdings der Druck auf die Bundesregierung in Berlin, die Staatsangehörigkeit als Anknüpfungsmodell, welches eben auch diesem bilateralen Staatsvertrag zugrunde liegt, aufzugeben. Andernfalls drohte nicht nur innerhalb des Binnenmarktes, sondern sogar in Deutschland ein zweispuriges Internationales Erbrecht. Innerhalb einer deutschen Rechtsordnung erscheint eine derartige Ungleichbehandlung in Erbsachen ein Stück weit verfassungsrechtlich bedenklich, jedenfalls aber systemwidrig.

VII.) Die vom Parlament am 13.3.2012 verabschiedete Verordnung in Erbrechtssachen schafft innerhalb des Binnenmarktes ein weiteres Stück Rechtseinheit wie -sicherheit und ist daher zu begrüßen. Der Erlass dieses Rechtsaktes macht deutlich, dass sich der Binnenmarkt von einem bloßen Marktplatz für den Austausch von Waren und Dienstleistungen immer mehr zu einem Rechtsschutzraum entwickelt. Mit Blick auf das derzeitige deutsche Internationale Erbrecht bewirkt die Verordnung einen

fundmentalen Wandel.Sie dürfte wohl ebenso zu einem Anpassungsdruck hinsichtlich des Konsularvertrages zwischen Deutschland und der Türkei aus dem Jahre 1929 führen.

THE FIFTY YEARS OF THE CONSTITUTIONAL COURT OF TURKEY (1962-2012)

Prof. Dr. Kemal BAŞLAR*

ABSTRACT

The Constitutional Court of Turkey is the fifth constitutional court adopting the European (Austrian) model of constitutional review. The Constitutional Court commemorated the 50th anniversary of its establishment on 25 April 2012. Its history is fraught with political and legal debates concerning the composition, competence, organisation and jurisprudence of the Court. This article is devoted to accounting for the these developments save its case-law. To be precise, the case law of the Court will not be assesed here; rather, a bird's-eye-view-account of the past of the Court will be under scrutiny.

This article addresses foreign readers who would like to learn how the Turkish Constitutional Court evolved over the last five decades. To do this, the author has divided the history of the Court under three headings. The first period covers the years between 1962-1982; the second period falls between 1983-2010. The third period commenced after the approval of the 2010 constitutional amendments and ends with the developments until the end of May 2012. It is hoped that a cursory look at the past will provide the non-Turkish speaking reader a better understanding as to how constitutional justice has developed in Turkey.

Keywords: Turkish Constituitonal Court, constitutional justice in Turkey, judiciary, the 2010 constitutional amendments, composition, competence and organisation of the Constitutional Court

ÖZET

Türk Anayasa Mahkemesi, Avusturya/Kelsen modelini benimseyen Avrupanın beşinci anayasa mahkemesidir. Ellinci yılını 25 Nisan 2012 tarihinde kutlayan Anayasa Mahkemesinin geçmişi mahkeme üyelerinin kompozisyonu, mahkemenin görev ve yetkileri, kuruluş yapısı ve verdiği kararlar itibariyle siyasi ve hukuksal tartışmalarla doludur. Bu makale mahkeme içtihatları ve kararların eleştirisi dışında, mahkemenin diğer yönleri üzerinde geçmişin kuş bakışı bir özetini vermeyi hedeflemektedir.

* Kemal BAŞLAR is a Professor of International Law at the Turkish Police Academy, he is also Former Rapporteur and Secretary General of the Constitutional Court (2002-2007)

Bu makale Türk Anayasa Mahkemesinin son 50 yılda nasıl geliştiğini öğrenmek isteyen yabancılara hitap etmektedir. Bu bağlamda, makale, Mahkemenin gelişimini üç başlık altında incelemektedir. İlki, 1962 yılından başlayıp 1982 yılına kadar gelen süreci kapsamaktadır. İkinci dönem, Mahkemenin yeni kuruluş kanunu ile çalışmaya başlağı 1983 yılından kapsamlı Anayasa değişikliklerin yapıldığı 2010 yılına kadar dönemi kapsamaktadır. Üçüncü dönem ise, 2010 Anayasa Değişliklerinin kabulünün ardından Mahkemenin kuruluş kanununun yayımlanması ile başlayan ve Mayıs 2012'ye kadar olan süreci özetlemektedir. Bu makale ile Türkçe kaynaklardan Türkiye'de anayasa yargısının nasıl geliştiğini öğrenme fırsatı bulamayan yabancı okurlara, İngilizce olarak Mahkemenin nasıl bir süreç içerisinde bugünlere geldiği anlatılmak istenmektedir.

Anahtar kelimeler: Türk Anayasa Mahkemesi, Türkiye'de anayasa yargısı, yargı, 2010 Anayasa Değişiklikleri, Anayasa Mahkemesinin üye yapısı, görev ve yetkileri ile kurumsal yapısı

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1. Introduction

The Constitutional Court of Turkey (for short, the Court) commemorated the 50th anniversary of its establishment on 25 April 2012. This article aims at introducing foreign readers to the composition, organisation and jurisdiction of the Court in the light of its 50-year-history. It would be a prudent approach to analyse the colossal case-law of the Court in a separate work. Hence, landmark cases and the jurisprudence of the Court have been intentionally omitted in this article. It is hoped that, despite the concise nature of this work, readers will garner sufficient information on the said aspects of the Court.

It is apt to categorise the composition, organisation and jurisdiction of the Court under three different periods. The first period starts with its establishment in 1962 with the Court Act (No 44) and ends with the 1982 Constitution. The second period falls between the adoption of the new Court Act (No 2949) in 1983 and entry into force of the September 2010 Constitutional Amendments. The composition, powers and structure of the Court were so significantly modified with this Amendment Package that the new Court was reorganised with the Court Act (No 6216) in March 2011. From the vantage point of the 2010s, a cursory look at the past will provide the reader a better understanding as to how constitutional justice has developed in Turkey. One must admit that the relatively short account of history of the Court, portrayed in this article,

may not satisfy the zealous, but this summary would be a first step for a broader understanding of jurisdiction of the Court.

2. The First Two Decades (1962-1982)

The 1924 Basic Law (Constitution), which was adopted shortly after the Republic of Turkey was established in 1923, had embraced the unification of powers.[1] The Parliament had been vested in the power to interpret the laws (Art. 26). The Council of State was a part of the administration rather than the judiciary. It was the Parliament rather than the Council of State that had the power to review the conformity of regulations to laws. The absense of constitutional review mechanism under the 1924 Constitution was understanable since an independent constitutional review mechanism had just started in Austria in 1920.

The need for constitutional review emerged after the multi-party system was ushered in Turkey in 1946. After the first democratic election held in 1950, the practices of the then ruling Democratic Party created serious tensions both within the Parliament and between the Government on the one hand and the army, civil society and universities on the other. The absence of the control of the acts of the Democratic Party resulted in the necessity to protect the constitutional order. The need for the existance of a constitutional review mechanism was first put forward by intellectuals and academics[2] and later supported by the then opposition party, CHP.[3] During the period when the 1924 Basic Law was in force (1924-1960), the Council of State and the Court of Cassation abstained from reviewing the constitutionality of laws. Had they displayed judicial activism so as to review the compatibility of laws to the Constitution, a decentralized

1 Some figures and statistics used in this article are premised on my earlier research I did for the 45th anniversary of the Constitutional Court in 2007, during which I was acting as the Secretary General of the Constitutional Court. See Kemal BAŞLAR and Murat ARSLAN, *Kuruluşunun 45. Yılında Anayasa Mahkemesi* (1962-2007), Anayasa Mahkemesi Yayınları, Ankara, 2007 (for the statistics see http://www.anayasa.gov.tr/files/pdf/veri-istatistik/uye_raportor/uye-istatistik.pdf) and Kemal BAŞLAR, The Constitutional Court of Turkey (English booklet), Anayasa Mahkemesi, 2007. See also, Kemal BAŞLAR, Anayasa Mahkemesi Üyeliği, (2007), www.anayasa.gen.tr/aym_uyeligi.doc

2 See e.g. Turhan FEYZIOĞLU, *Kanunların Anayasaya Uygunluğunun Kazai Murakabesi*, AÜSBF Yayını, Ankara, 1951, 251-333.

3 See for an extensive survey of the history of the constitutional review in Turkey, Erdal ONAR, "Türkiye'de Kanunların Anayasaya Uygunluğunun Yargısal Denetimi Alanında Öncüler", in Mehmet TURHAN and Hikmet TÜLEN (eds), *Anayasa Yargısı İncelemeleri -1*, Anayasa Mahkemesi Yayınları, Ankara, 2006, 3-44.

constitutional justice (viz. American) model would have been adopted. On 27 May 1960, the Army-led a coup d'etat removed the Democratic Party from power due to its so-called "dictatorial" tendencies and dissolved the Parliament. In October 1961, the military junta gave back the power to civilian authority. The new constitution was adopted in 1961 to galvanize democratization of Turkey. The founders of the 1961 Constitution agreed on the necessity of a permanent and special independent body to review the constitutionality of laws. The power to resolve the claim of unconstitutionality by ordinary courts was solely vested in the Constitutional Court. One could tentatively say that the establishment of the Court was the most radical characteristic of the 1961 Constitution.

In search for a model for the Court, the European (Austrian/Kelsian) model was the most viable option in asmuchas the Turkish legal system had been premised on the continental legal system since the 1920s. In determining its functions and organisational structure, the German, Italian and Austrian Constitutional Court models, which were the only prominant antecedents in Europe at that time, were tailored so as to fit into the Turkish legal system. Accordingly, the Court became one of the first special constitutional courts in Europe at the beginning of the 1960s.

In the 1961 Constitution, the Court had not been categorised under the heading of "Higher [viz. Supreme][4] Courts" (Arts. 139-142)[5]. Rather, a separate section (Arts. 145-152) had been reserved for the Court within the Third Chapter titled "the Judicial Power". This preferrence was a reflection of its *sui generis* nature as the highest authority entrusted with a special task. Hence, the Court has never construed itself as "a court *a*

4 One should clarify the confusion over the translation of certain phrases into English. "*Yüksek Mahkeme*" is translated as Higher or "High Court". In fact, in this study, "High Court" has been used in place of *Yüce Divan* (textually, Grand or Sublime Tribunal), a special organ trying the President of the Republic, the Prime Minister etc. In Turkish, the Court of Cassation (*Yargıtay*) is translated as "Supreme Court". However, Turkey has not adopted the Anglo-Saxon model. That is why there is confusion as to the competence of the Court of Cassation when referred to as "Supreme Court". In this article, supreme court has been used to refer to all last-recourse-appeal-courts mentioned in the Constitution (including the Court of Accounts).

5 As far as the 1961 Constitution is concerned, the Higher Courts (Section B) are the Court of Cassation (Art. 139), the Council of State (Art. 140), the Military Court of Cassation (Art. 141) and the Court of Jurisdictional Disputes (Art. 142). The Constitutional Court has been placed on a par with the Higher Courts (Section D) together with the Supreme Court of Judges (Section C).

quo" while dealing with abstract and concrete norm review.[6] In the early jurisprudence of the Court, judges emphasised the view that only in cases concerning the closure of political parties and the High Court trials, the Court functioned as a court *a quo*.[7]

The Court began to carry out its activities on 25 April 1962 upon the promulgation of the Law on the Establishment and Judgement Procedures of the Constitutional Court (hereinafter the Court Act, Law no 44, 22 April 1962). The first plenary meeting was convened on 1 September 1962. The first decision was rendered on 5 September 1962.

2.1. The Judges

Between 1962-1982, the Court was composed of 20 judges. Of these, 15 judges were principal and 5 were substitute (reserve). Out of 15 principal judges, 8 judges used to come from the judiciary. The General Board of Court of Cassation (4 judges), the General Board of the Council of State (3 judges) and the Court of Accounts (1 judge) used to elect, rather than nominate, their members by the absolute majority of their plenary members, that is, without seeking the appoinment of the President of the Republic.

In the first period, the Parliament, composed of the National Assembly and the Senate, had 5 quotas for principal judges: 3 members used to be elected by the National Assembly and 2 members used to be designated by the Senate. The Legislative Assemblies used make these selections by absolute majority and by secret ballot, from among individuals outside the Grand National Assembly. In the first two decades, 14 members out of 69 judges elected within this period were elected by the Legislative Organ: Of which, 8 by the National Assembly and 6 by the Senate

Even though the Parliament and the Senate as well as the President of the Republic were free to choose 6 judges outside the judicial and political quarters, they preferred to choose judges from the Court of Cassation

6 The first case in this regard is E.1964/22, K.1964/54. In subsequent cases, this view was maintained E.1967/6, K. 1968/9: E.1969/24, K.1969/50. Note that hereinafter only the Docket Number (Esas, for short E.) and Decision Number (Karar, for short K.) will be used to refer to the decision of the Court. No details will be given such as the pages where the decision was published in the Case Reports of the Court (AMKD). Full text of decisions are available at a click distance, see Kararlar Bilgi Bankası (Database of Decisions) at http://www.anayasa.gov.tr/ to access to the full text (*alas*, in Turkish).

7 E.1971/41, K.1971/67.

(9)[8], the Council of State (5)[9], the Military Court of Cassation, (3)[10], first instance courts (2)[11] or among freelance lawyers (1)[12] and former politicians (1).[13]

The President of the Republic used to designate 2 principal members. One of the two members used to be selected among three candidates nominated by the Military Court of Cassation by absolute majority of its plenary session.

As it could be seen, the first composition of the Court was judge-dominated. That is, 9 out of 15 judges was coming from supreme courts. The judges elected by the Parliament (5) and the President (1), were often preferred within the judiciary. This was not an ideal composition, which in the end, turned the Court into a quasi-supreme court, which it had not been envisaged as such. That is why many traditions of the Court of Cassation and the Council of State held sway in the corridors of the Constitutional Court and made indelible imprints on the organisation and jurisprudence of the Court.

As to 5 substitute judges, they used to be directly elected by the Court of Cassation (2), the Council of State (1), National Assembly (1) and the Senate (1). Because of tensions between principal and substitute judges, they had hardly had a chance to sit in the plenary assembly. They were so cast-out that substitute judges were not even allowed to vote for the election of the president (chief justice) of the Court.

During the first two decades, not a single academic was elected to the Court. Even though Article 145/4 of the 1961 Constitution, said "Of the members to be elected by each legislative body, one shall be selected from among the candidates nominated in joint session by the teaching staffs of the schools of law, economics, and political sciences of the universities, by secret ballot among a group of originally proposed candidates three times as many as the vacant places". Not a single academic was elected in the first decade by the the Parliament. The lack

8 Ömer Lütfi Ömerbaş, M. Celâlettin Kuralmen, İsmail Hakkı Ketenoğlu, Ali Fazıl Uluocak, Muhittin Taylan, Ahmet Salih Çebi, Adil Esmer, Hasan Semih Özmert, Mahmut Celâlettin Cuhruk

9 İbrahim Senil, M. Yılmaz Aliefendioğlu, Yekta Aytan, A. Şeref Hocaoğlu, Selâhattin Metin

10 Hasan Gürsel (brigadier general), Servet Tüzün and Nahit Saçlıoğlu

11 M. Şemsettin Akçoğlu and Ekrem Korkut

12 Yekta Güngör Özden

13 Halit Hulki Zarbun

of academic expertise significantly reduced the doctrinal and theoretical bedrock of the decisions.

What is worse, on 12 March 1971, the commanders of the armed forces delivered an ultimatum to the President of the Republic; thereafter, the Demirel government was forced to resign. In an attempt of the military leaders to herd the Turkish politicians, a number of articles of the 1961 Constitution were amended on 20 September 1971 including 5 out of 8 articles concerning the organisation and functions of the Constitutional Court.[14] With the 1971 Amendments, the quota allocated to academic staff was removed.

In the first ten years of the Constitutional Court, the judges used to receive higher salary than parliamentarians and senators. That is why the chief justices of the supreme courts, presidents of the chambers of the supreme courts, chief public prosecutors and other notable judges rivalled to be a judge at the Court. But after the 1971 Military Intervention, and with the intrusion of other supreme courts, this previlige was taken back in 1974 and the salaries of the judges were leveled with those of other high court judges. This significantly faded out the insentive to be a judge at the Court. This had also decreased the quality of judges and corollary, reasoning of the decisions in the long run.

The first two decades had been completely male-dominated court, out of 69 judges elected in the first period, none of them was female. Even though, Turkey was among pioneering nations in Europe giving women universal suffrage and the right to be nominated in Parliamentary elections as early as the 1930s. The propertional representation of female judges had never been an agenda item for supreme court judges and the Parliament, which they were supposed to observe the principle of equality between sexes laid down in the Constitution.

2.2. The Staff

The Court worked in a rented small apartment at the heart of the city center in Ankara from its establishment until 1989. It was a small court with no judge-appointed drivers and secretaries. That is why from 1962 to 1976, there was no need to appoint a permanent secretary general, even though according to the Rules of the Court which was in force

[14] These are Articles 145, 147, 149, 151 and 152 of the Constitution with the Law no 1488.

between 1962-1982, secretary generals were supposed to be elected among those who graduated from law, political and economic sciences. In the first years of the Court, the chief administrative functions were discharged by the President in person, assisted by the head of the Court's office and a head of management in view of the fact that the Court had less than 40 staff. In 1982, a special provision was added to Article 57 of the Court Act, according to which the President was given the power to appoint secretary general from among the rapporteurs. Ever since then no deviation was made from this practice.

2.3. The Competence of the Court

The competence of the Court will be dwelled upon in the second phase of the development of the Court (1983-2010), as many of the functions and competence of the Court remained unchanged during the 1982 Constitution. Suffice it to remark in passing that the 1961 Constitution was different in some respects from the 1982 Constitution concerning the jurisdiction and the rules of the Court. These are as follows:

a) During the 1961 Constitution, the all members of the Council of State used to be elected by a two thirds majority vote of the Constitutional Court by secret ballot from among the two lists of nominees corresponding to the number of vacancies, submitted seperately by the Council of Ministers and the General Assembly of the Council of State. If such majority was not obtained in two ballots, an absolute majority would be sufficient (Article 140/3). This competence was drawn by the 1982 Constitution.

b) It was only after 1971 that the Court started reviewing the constitutionality of decrees having the force of law (Art. 64) which was introduced with the 1971 Amendment). But unlike the 1982 Constitution, the scope of review extended to those being enacted during martial law or the state of emergency.

c) Action for annulment had been given, apart from the organs mentioned in the 1982 Constitution, to political parties receiving 10 per cent of votes cast in the previous elections, Court of Cassation, Council of State, High Council of Judges and universities.

d) If the Court could not deliver a decision within six months, courts *a quo*s could settle the claim of unconstitutionality according to their own conviction rather than applying the law challenged.

e) The Court could have the power to settle the case *inter partes* rather than *erga omnes*.

2.4. Workload of the Court (1962-1982)

455 individual applications (complaints) were made during the first period. Since the Court was not entitled to hear complaints coming from individuals, they were refused on the ground of lack of competence. But they were shown in the chart of the workload of the Court. In the first years, the Court docketed them and treated individual applications on a par with other applications. The refusal decisions were numbered and published in the book on the Decisions of the Constitutional Court.

The bulk of its workload was composed of abstract and concrete norm review, which could be seen in the table below. Lifting parliamentary immunity of MPs was subject to debate in 1968 and 1971.

In the first two decades, six political parties were banned by the Court. These are chronically İşçi-Çiftçi Partisi (1968), Milli Nizam Partisi (1971), İleri Ülke Partisi (1971), Türkiye İşçi Partisi (1971), Büyük Anadolu Partisi (1972) and Türkiye Emekçi Partisi (1980). Only, the application of the closure of Yüce Görev Partisi was turned down.

The Court, sitting as the High Court, tried 5 former ministers for their acts during their terms of office. Two were acquitted and 3 were sentenced to heavy imprisonment.

THE WORKLOAD OF THE COURT

(1962-1982)

YEARS	ABSTRACT	CONCRETE	LIFTING IMMUNITY	CLOSURE OF PARTIES	HIGH COURT	ALL COMING FILES	TURNOVER	ALL FILES REGISTERED
1962	6	29	—	—	—	141	—	141
1963	149	30	—	—	—	360	17	377
1964	15	20	—	—	1	52	76	128
1965	13	21	—	—	—	43	50	93

1966	7	19	—	—	—	34	29	63
1967	15	24	5	—	—	57	16	73
1968	7	48	12	1	—	78	24	112
1969	19	31	—	—	—	71	37	108
1970	23	32		—	—	63	23	86
1971	17	29	2	3	—	62	36	98
1972	13	38	—	1	—	59	13	72
1973	16	22	—	—	—	47	9	56
1974	9	39	1	—	—	59	16	75
1975	5	187	—	—	—	204	22	226
1976	22	30	—	—	—	60	10	70
1977	11	119	—	—	—	141	13	154
1978	20	49	—	—	—	76	6	82
1979	10	29	—	1	—	43	16	59
1980	3	73	—	—	—	77	9	86
1981	—	16	—	—	2	18	17	35
1982	—	6	—	—	2	12	4	14

3. The Second Period (1983-2010)

On 12 September 1980, the right-wing Demirel Government was overthrown by a military coup. The National Security Council prepared a new constitution, which was approved by referendum on 7 November 1982.[15] The system of constitutional review established by the 1961 Constitution was preserved in the 1982 Constitution with some modifications. Articles 146-153 of the 1982 Constitution lay down in detail the composition, competence, procedures of the Court and other issues concerning constitutional review. A new Court Act (Law no 2949) was adopted 10 November 1983. It was only after 3 June 1986, the Court managed to prepare a new Rules of the Court. Even though the Court had the chance of reformulating its working method in the light of a two-

[15] The new Constitution was promulgated on 9 November 1982 (Official Gazette no 17863 (Repeated)).

decade-experience, the then judges, alas, were not interested in introducing novelties to organisational structure and review procedure.

Unlike the 1961 Constitution, the 1982 Constitution placed Constitutional Court under the section of the Supreme Courts (Arts. 138-158) as the first of of this kind. However, the the Court remained considering itself as a non-judicial organ. For example, in February 2002 the Court faced, in a concrete norm review case in which Article 25 of the Court Act prevented it from hearing the case. Even though Article 25 was blatantly against the Constitution in view of the fact that the last paragraph of Provisional Article 15, a verbatim of Article 25, prohibiting the constitutional review of laws enacted during the National Security Council (12.9.1980-6.12.1983), was annuled in 2001, the Constitutional Court held that since it was not a court *a quo* during the abstract and concerete norm review process, it could not raise the issue of unconstitutionality.[16] The Court thought that it could not scrutinize the case unless a petition for review was made by subjects enumerated in the constitution. As no authority initiated a proceeding, the only way was to omit the Article 25. Three judges writing one dissenting opinion argued that the Constitutional Court was a court *a quo* and therefore entitled to raise the issue and declare afterwards Article 25 as unconstitutional.[17] The Constitutional Court annuled Article 25, 6 months later during a party closure case pending before it, where the Court deemed itself as a court *a quo*.[18] And it referred a preliminary question to itself to annul the said provision.

3.1. The Judges

The 1982 Constitution decreased the number of judges from 20 (15+5) to 15 (11 principal and 4 substitute). The election of all judges was placed under the supervision of the President of the Republic. In the 1961 Constitution, 7 (5+2) out of 20 judges used to be elected by the Parliament and the Senate of the Republic, whereas the 1982 Constitution did not want Parliament to interfere in the elections of judges. The system

16 E.2002/23, K.2002/32, The issue had been discussed during the preliminary stage.

17 See Fulya Kantarcıoğlu, Rüştü Sönmez ve Ertuğrul Ersoy's shared dissenting opinion in Bknz. E.2002/44, K.2002/90, 8.10.2002 (R.G. 27 Ocak 2004, 25359, 29-32). Note that since the dissenting opinion was forgotten to be published together with the decision of the case E. 2002/23, the same opinion was published in another case of similar nature.

18 E.2002/121, K.2002/62.

of parliamantery election of judges was abolished. The Higher Courts were not also allowed to send their own respresentatives directly to the Court. Rather, the President started appointing a judge among 3 candidates nominated by supreme courts. One university professor was given a seat once again to work at the Court.

The awkward relation between the Court and the Council of State in terms of the election of judges of each other came to an end. In other words, the vicious circle on the election of all Council of State judges by the Court and the election of the 3 Constitutional Court judges by the Council of State was shattered. This was a necessary change in that in the past judges coming from the Council of State had influence on the Court. For example, the Court of Accounts is not regarded by the Court as a court in strict sense. For the Constitutional Court, the first was somewhat an administrative organ. The reason of this approach could be better understood if one casts a cursory look at the clash between the judges of the Council of State and Court of Accounts in the 1970s and the victory of the first-led group thereafter.[19] This approach was entreched in 1991[20]

Between 1983-2010, the composition of the Court was as follows[21].

a) Supreme Court Judges: Between 1983-2010, the Court of Cassation was represented with 4 judges, whereas the Council of State with 3, the Military Court of Cassation, the High Administrative Military Court of Cassation and the Court of Auditors with 1 for each. In other words, 10 (7 principal and 3 substitute) out of 15 judges, that is 2/3 majority, used to come from within the judiciary.

For a foreing reader, seeing military judges sitting at the Court should be odd, but this shows the influence of the military regime in the formation of the Court. The presence of two principal judges coming from military supreme courts does not commensurate with the size and scope of jurisdiction of the military courts.[22]

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19 This is illustrated in Kemal BAŞLAR, *Anayasa Yargısında Mahkeme Kavramı* [The Concept of Court a Quo in Constitutional Justice], Roma, 2005, 17-22. Pertev Bilgen, Sayıştayın Yargı Düzeni İçindeki Yeri: Bir Savaş Hikayesi [The Place of Court of Accounts within the Judiciary: A Tale of War], *İstanbul Üniversitesi Siyasal Bilgiler Fakültesi Dergisi*, no, 7, 1994, 37-54.

20 E. 1990/30, K. 1991/21.

21 For a comparative analysis of the subject, see *Composition of Constitutional Courts*, No. 20, Venice Commission, 1997.

22 See Kemal Gözler, *Türk Anayasa Hukuku*, [Turkish Constitutional Law] Ekin Yayınevi, 867.

b) One University Professor: Until the 2010 Amendments, the President of the Republic used to select only one member from a list of 3 candidates, working in the fields of law, economics or political sciences, nominated by the Higher Education Council. Prof. Vural Savas is the first academic, who took his office in September 1986. Up until the end of 2010, only four professors have been elected within this quota; none of them had any expertise on either public law or constitutional justice.[23] There had been only one judge from academia who was specialised on constitutional justice. But this judge who had a link with the Istanbul Bar, was chosen from the quota allocated to lawyers.[24] In sum, out of 121 judges elected up until the end of 2010, only 4 academics could have found a chance to convey their academic expertise, albeit on non-legal shperes, at the plenary sessions.

c) Senior Public Officials and Lawyers: Three members and one substitute member used to be elected from among senior public officials and lawyers. Candidates, selected from among senior administrative staff, was needed to practice as a chairman or member of the Higher Education Council, or rector or dean of a higher education institution, or undersecretary, deputy undersecretary, general, admiral, ambassador, regional governor or governor.[25]

One could once again notice the intrusion of the Army to judicial affairs: During the time of the National Security Council, it was hoped by the military coup leaders that generals and admirals could be represented at the Court as senior public officials in addition to military judges.

It has been seen in practice that it was not necessary for a judge to hold one of these positions at the time of his/her election.[26] His/her past senior public official experience was construed to fulfil constitutional requirement, which was not in tandem with the wording of the Constitution. Within this period, 9 senior public officials (5 permanent and 4 substitute) had been elected from these professions. As to lawyers,

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23 These are Prof. Vural Savaş (economics), Prof. Erol Cansel (civil law), Prof. Sacit Adalı (public administration)) and Prof. Engin Yıldırım (economics). Prominent constitutional lawyer, Prof. Mustafa Erdoğan remarks that scientific expertise is not a precondition to become a judge, see Mustafa Erdoğan, Anayasa Hukukuna Giriş [Introduction to Constitutional Law], Liberte, Ankara, 2004, p. 249.

24 The term of office of Prof. Fazıl Sağlam lasted only one and a half year. (21.8.2003-23.2.2005)

25 Article 3, Law no 2949.

26 This problem will be mentioned under "3.1.2. Discussions About the Disqualification of Judges"

no academic or other distintive qualification is sought for lawyers to be elected. Only 4 lawyers had been elected until the end of 2010.[27]

One could also notice that judges represent a diversity of experience based on different backgrounds and professions, as well as varying standpoints and conceptions of society (judges, auditors, university professors, governors, lawyers, ambassadors). However, since this diversity is not backed up with outstanding juridical or academic qualifications (i.e a distinguished record or service, highly reputed in the field of legal research and having political experience or an authoritative published works on public or comparative law),[28] the quality of decisions has always been an acrominous issue for the public.

The mandate of the judges of the Constitutional Court used to expire automatically upon reaching the age of 65. So there was no fixed terms of office between 1982-2010. The avarage age for the commencement of a judge to his office was 57. Thirty-nine out of 121 judges were elected at the age of 60 or older. The avarage terms of office for judges was 6 years and 8 months. It is for this reason that most judges, with no constitutional or public law background, could not make noteworthy contribution to constitutional justice in Turkey.

Male-dominated structure of the Court was maintained in the second period as well. Samia Akbulut, the first female judge, the wife of a former Prime Minister, who was appointed as a substitute judge on 25.10.1990, Later five, female judges were elected: Fulya Kantarcıoğlu (19.12.1995), Aysel Pekiner (substitute) (20.12.1995), Tülay Tuğcu (22.12.1999) and Z. Ayla Perktaş (27.6.2007). The ratio of female judges among 121 judges is less than 4 per cent. Tülay Tuğcu became the first ever female president of the Court in 2005.

[27] These are Mahir Can Ilıcak, Enis Tunga, Fazıl Sağlam and Serruh Kaleli. Even though Yekta Güngür Özden (1979-1997) was a lawyer; he was elected by the Parliamentary quota before the 1982 Constitution.

[28] There are of course exceptions to this conviction. For example, Mustafa Ekrem Tüzemen, Ahmet Recai Seçkin, Şevket Müftügil, Sıtkı Şekip Çopuroğlu and Yılmaz Aliefendioğlu have good academic qualifications. See for further discussion my article, Kemal BAŞLAR, "Anayasa Mahkemesi Üyeliği", [Membership at the Constitutional Court] http://www.anayasa.gen.tr/aym_uyeligi.doc

3.1.1. Principal and Substitute Judges: A Bizzare Distinction

Between 1962-2010, there were two types of judges at the Court: Principal and substitute. Principal judges were judges similar to their counterparts in a number of European constitutional courts. Even though the model of substitute judge model was adopted from the Austrian system, its implication did never resemble to that of the Austrian system.[29] Substitute judges rarely attended deliberations during their entire terms of office. Even though they were fully employed at the Court, they were not utilised at all and excluded from the judicial and administrative duties. Substitute judges did not participate in plenary sessions unless there was an absence of a principal judge.[30] Which this was unusual.

Substitute judges were even excluded from the elections of the president and vice-presidents of the Court. Ever since at the outset, never did the principal judges allow them to take part in the voting process in spite of the absence of a legal justification. The clash between principal and substitute judges was publicised in 2007. The exclusion of the substitute judges from the election process was challanged by them before the court of first instance and and later the Consitutitional Court. The background of the case is as follows. The absurdity of maintaing the substitute judgeship system, which was in force in the 1961 Constitution, was seen by the drafters of the 1982 Constitution. The Consultative Assembly abolished the two-tiered system in its Draft Constitution in September 1982. But some of the judges of the Constitutional Court at that time convinced members of the National Security Council that the old system be maintained. During the final negotiations of Article 146 before Constitutional Commission, the old system was maintained. Article 146 says that "The Constitutional Court shall elect a president and Deputy President … by an absolute majority of the total number of members".

[29] Six substitute judges of the Austrian Constitutional Court do not spend all of their time at the Court. They step in if one of the 14 justices is, for example, ill or considered to have a conflict of interest. They have full-time occupations, e.g. Irmgard Griss (President of the Supreme Court (2008>), Lillian Hofmeister (JD, Former Justice Vienna Commercial Court) (1998>), Gabriele Kucsko-Stadlmayer (University Professor) (1995>) and Robert Schick (Judge of the Administrative Court) (1999), Nicholas Bachler (Judge of the Administrative Court) (2009, Barabara Leitl-Staudinger (University Professor) (2011>); see http://www.vfgh.gv.at/cms/vfgh-site/english/justices1.html (7 June 2012).

[30] Out of 121 members (in this period), 35 members have been elected as substitute member.

But, Article 8 of the Constitutional Court Act was formulated in 1983 so as to be contrary to Article 146: "The Constitutional Court elects a President and a Vice-President … by the absolute majority of principal members".[31] The Constitutional Court in its decision dated 30.7.2007 did not ironically hold that wording of Article 8 was different from Article 146 of the Constitution and said that Article 8 was in conformity with the Constitution. Therefore, principal judges did not allow substitute judges to vote for the election of the current president in 2007.

But one must admit that substitute judges were given a chance to become the president of Court of Jurisdictional Disputes. Out of 19 presidents of the said Court, only 4 substitute judges became the president in the fifty-year-history of the Court. But only one judge (Yılmaz Aliefendioğlu) out of 4 was chosen during the 1982 Constitution for a period slightly more than a year.

3.1.2. Discussions About Disqualification of Judges

There is a lacuna as to what happens if the President of the Republic appoints a judge who does not satisfy one or more of the criteria required by the Constitution. To put it differently, neither the Constitution nor the Court Act has any provision concerning the settlement of a dispute raised by the legislative or executive organs or the public, challanging the legality of the appointment of a judge.

There have been examples of this in the past in this vein. For example, during the presidency of Yekta Güngör Özden, who was actively in politics at side of the left-wing Republican Peoples Party (CHP) before his appointment (1951-1979),[32] Prof. Süleyman Aslan was elected in 1992 by the then President Turgut Özal, former head of right-wing Motherland Party. Though Prof. Arslan took his office, the then Chief Justice Özden argued that Prof. Aslan did not qualify as a Court Judge because the did not fulfill the criterion of "15 years of service as an academic" and hence did not allow him to take oath. That is why Prof.

[31] E.2007/84, K. 2007/74: The approach of the Court has been criticised in Kemal BAŞLAR, "Anayasa Mahkemesi Başkanlığı Seçiminde Toplantı ve Karar Nisabı", [The Meeting and Deciding Quorum during the Election of the President of the Constitutional Court] *Yasama Dergisi*, 6 (Temmuz-Ağustos-Eylül), 2007, 91-112.

[32] His remarks were came across at the following google search: http://www.zaman.com.tr/haber.do?haberno=968167&title=yekta-gungor-ozdenden-inanilmaz-itiraf (Zaman , 1 April 2010).

Aslan, even though there was no question whatsoever of his fulfilment of the criterion, decided to resign. Chief Justice Özden misinterpreted the constitutional clause and used his discretion despite that there was no provision entitling him to do so.

Chief Justice Özden, as was elected during the 1961 Constitution, must have remembered that there was a provision in the old Court Act No 44 (which was valid at the time he was appointed). According to Article 3/2 of the Court Act (No. 44):

"Contentions as to whether those, who have been elected as a member of the Constitutional Court, do satisfy the qualifications sought are decided once and for all by the Constitutional Court. The member whose election is challanged cannot participate in the deliberations and the voting. Should the challenge is upheld, it is presumed that there had been no the election made for the appointment of that member…"

There was no such a provision in the new Court Act (No. 2949) when the aforemention dispute arose. The absense of similar provision in the new Act is tantamount to the lack of the competence of the Chief Justice in particular and the Plenary Assembly in general. But, no one questioned if the diposal of Özden was of legal ground.

Similar problems came to the fore when Fulya Kantarcıoğlu was elected in 1995. She worked at the Court more than 13 years (1979-1992) as a rapporteur before she was promoted as the Deputy Undersecretary of the Ministry of Justice in July 1992. After two years, she was elected as a member of the Council of State in October 1994. When she was serving at the Council of State, Suleyman Demirel, the then President of the Republic, elected her as a judge of the Constitutional Court from the vacant quota allocated to "senior public officials". In fact, this election was against the textual interpretation of the Constitution since she was a justice rather than a senior public official; but as there was no means to challenge this in legal terms, no action was taken. Neither did Chief Justice Özden use his discretion to declare the election null and void. Although she was rather overqualified, but the wording of the Constitution was not paid heed to. Similar criticism could be made for the election of Ertuğrul Ersoy who was a member of the Council of State at the time of his taking his office in 1999. However, as he was former

governer of many years of experience, he was elected from the quota allocated to senior public officials.

Challenges towards newly elected judges due to their failing to meet the criteria as a Court judge are not confined to the examples mentioned above. When Özdemir Özok, the then President of the Union of the Turkish Bar Associations, was elected in 2003 as a judge from the quota allocated to lawyers, his membership to the Republican Peoples Party shadowed his independence. Even though there was no need to resign, he stepped back shortly after public criticism. Prof. Fazıl Sağlam was elected in his place in 2003 from the same quota for lawyers. However, he had an academic pedigree rather than a practising lawyer. Upon his retirement, Serruh Kaleli, a practising lawyer, replaced the empty seat. But he was also criticised for having set up a transitional political party in 1994.

3.1.3. The Privileges and Immunities of Judges

As to privileges, in the Ankara (Capital) State Protocol, the president of the Constitutional Court is preceded by 5 dignitaries.[33] The order of the Vice-President, the President of the Court of Jurisdictional Disputes (who is elected among the members of the Constitutional Court) and ordinary members of the Court are 25, 26 and 27 respectively.[34] The President's official car's plate number is "003", which comes after the Speaker of the Parliament and the Prime Minister.

The President and the Vice-President have the right to have diplomatic passports and travel at business class. Each judge has one official car, a driver and a secretary. From 1974 until 2006, all high court judges used to receive less than half of the salary of parliamentarians.

In 2006, the salaries of all judges increased 40%. But there is still no incentive for outstanding jurists to be a constitutional court judge, because they receive the same salary given to other judges, or earn more money at the universities or as a lawyer. Unless the salaries of

[33] These are (1) the Speaker of the Parliament, (2) the Prime Minister, (3) the Chief Head of the General Staff, (4) the President of the Main Opposition Party and (5) former Presidents of the Republic. Deputy Prime Ministers come after the President of the Court. As to the President of the Republic, he is above all these and ratify this order prepared by the Ministry of Foreign Affairs.

[34] This Protocol was valid until 14 May 2012. We could not find the new priority order issued thereafter to see how much this order was changed.

Constitutional Court judges are equated with the speaker of the parliament, the quality of judges will not be at desired levels.

As to the immunities, the initiation of an investigation with regard to personal offences and offences relating to the function of the President and members of the Constitutional Court rests on a decision by the Plenum. The President may also, where he/she deems it necessary, without waiting for the case to be brought before the Court, assign a member with the task of carrying out preliminary enquiries. If the Court reaches a decision to initiate an investigation, the task of conducting the necessary examination, of reaching a decision in accordance with the Code of Criminal Procedure, and of making use of the competences assigned to the judge of investigation by the afore-mentioned Law, shall be given to three members of the Court. The decisions reached by the board thus composed are final. Matters concerning the conducting of preparatory investigations, the election of members to the board, the handling of investigations, and the giving of decisions if necessary are regulated by the Rules of Procedure made by the Constitutional Court.

3.2. The Staff

3.2.1. Secretary General

Unlike the Court of Cassation and the Council of State where secretary generals are chosen among justices, the secretary generals of the Constitutional Courts are appointed among rapporteurs (non-permanent legal staff). There have been 9 secretary generals elected since 1982. Five of them are from auditors. Three come from within the judiciary (judge and prosecutors). And one rapporteur came from within academia. The avarage term of office of a secretery general is slightly more than 3 years. Under the direction of the President, the Secretary General is responsible for the administration of 17 departments. In all departments, avarage 121 civil servants worked between 1989-2009. In 2009, the Court moved to its impressive new building, where the number of staff increased significantly.

Since the Secretary Generals are not part of the plenary assembly and have no right to attend its meeting of the plenary assembly even with no voting right, the representation of the Court belongs to the President and in his/her absence to the Vice President. Compared to other constitutional courts in Europe where secretary generals are of judicial function, the

role and rank of the secretary general in Turkey is confined to administrative matters. This conviction holds true when one compares secretary generals of the Court of Cassation and the Council of State, where they are chosen among high court judges. Therefore, there is a problem in the relations between the Constitutional Court and other high courts. In other words, even though the Constitutional Court is superior to other courts, its secretary general is lower in rank and younger than the secretary generals of other high courts.

3.2.2. Rapporteurs

"Rapporteur Judge" is a special term in the parlance of the Turkish constitutional justice. In the European constitutional justice system, presidents of constitutional courts appoint a judge as rapporteur for each case from among the constitutional judges. Thus, in every hearing and every session in camera, different judges alternate as rapporteurs for the discussion of the various cases being examined. In Turkey, the election of rapporteurs is at the entire disposal of the President. S/he is not obliged to seek the permission of the plenary of the Court or the Vice-President.

Rapporteurs are only responsible towards the President. The President or members of the Constitutional Court cannot give any instructions to the rapporteur-judges on the substance of the cases, Rapporteurs are independent and not attached to judges just like legal assistants or law clerks in the US Supreme Court. In the Turkish Constitutional Court the rapporteur-judges have pivotal role. The cases are assigned by the President to rapporteur-judges and they present their reports to the President and the Plenary. But, their reports should be impartial and have no authority over the members of the Court. It is judges that deliberate and decide the case at hand, and rapporteur-judges pen the draft decision in accordance with deliberations. Accordingly, the role of a Turkish rapporteur-judge is rather akin to that of the rapporteur-public of the French Council of State.

During the 1961 Constitution, there were two types of rapporteurs: permanent and occasioanal. No permanent rapporteurs were appointed between 1962-1982. Therefore, during the preperation of the Law no 2949, this distinction was left aside. As from 1983 onwards, all rapporteurs who are originally state officials have been employed on temporary basis. This means that the duration of the service of a

rapporteur depends on the will of either the president or the rapportueur. The statistical recors reveal that the average term of office for a rapporteur is 8 years.

There are three types rapporteurs. First, judges and prosecutors working at civil, criminal, administrative courts (excluding military judges) or at the Ministry of Justice constitute the majority. Out of 104 rapporteurs appointed so far, almost the two-thirds have come from this source. The second type of rapporteurs comes from the Court of Accounts; controllers, chief controllers or experts are utilised in auditing political parties. There have been some 15 rapporteurs coming from the Court of Accounts hitherto. Between 2004-2009, due to heavy workload of the Court, several auditors were employed as *ad hoc* rapporteurs.

The third source is allocated to academics. Assistant or associate professors and those holding at least a Ph.D. in law, economics, and political science from any institute of higher education may be assigned to the Court. The Constitutional Court Act does not allow professors to be employed at the Constitutional Court. Even though, the Law no 2949 provided for an opportunity to employ 3 academics at the same time, this had been recourse to only after 2002. Out of 104 rapporteurs, only 8 academics (assistant and associate professors) have had the chance of amalgamating theory with practice..

Until 2010, the Constitution did not provide for a leeway for an active rapporteur to become a constitutional court judge. There was a tortuous way to do so: if they become either a judge at one of supreme courts or a senior public officials in bureaucracy. Out of 124 Constitutional Court judges appointed so far, only 4 rapporteurs have had the chance of being elected as a constitutional court judge.[35]

There is no permanent posts for rapporteurs. All of them retain their posts at their own institution. The indefinite time appointment of rapporteurs are made by their own institution. When the President of the Court sends an official letter to the institution of a candidate rapporteur, it is compulsory for the head of the institution to grant permission. The personal affairs of rapporteurs are regulated according to the profession they come from; also the time they spend as reporter at the Court is

[35] These are Orhan Onar, Selahattin Metin, Fulya Kantarcıoğlu and Alparslan Altan.

counted as the exercise of their professions. Promotions, however, must be handled in accordance with written rules drawn up by the President of the Court.

3.3. The Competence of the Court

Competencies of the Court between 1982-2010 were laid down in the Constitution, the Court Act and the Political Parties Act. These were, by and large, the same – albeit with tiny changes, if any – during the first period of the Court (1962-1982). The competence of Court the remained, as a whole, the same after the 2010 Amendment, save certain points to be mentioned hereafter.

3.3.1. Constitutional Review of Certain Norms

The Court examines the constitutionality, in respect of both form and content, of laws, decrees having the force of law and the Rules of Procedure of the Turkish Grand National Assembly. As to constitutional amendments, they are examined and verified only with regard to their form. (Article 148/1 of the Constitution).

3.3.2. Trying Certain State Officials sitting as the High Court

The Court, sitting as the High Court, tries the President of the Republic, the Prime Minister and members of the Council of Ministers, as well as the presidents and prosecutors of the supreme courts on criminal cases related to their official duties (Article 148/1 of the Constitution)[36]

The prosecution in matters concerning the High Court is exercised by the Chief Public Prosecutor or his deputy. One or several of his assistants may also participate at the trials.

3.3.3. Deciding on the Closure of Political Parties

The Court may decide the dissolution or closure of political parties, upon the motion of a suit by the office of the Chief Public Prosecutor (Article 69/5 of the Constitution).

3.3.4. Auditing the Finances and Expenditures of the Political Parties

The Court audits the income, expenditure and acquisitions of political parties. The Political Parties Act regulates the establishment of the

[36] This Article was amended with the 2010 Referendum, see next heading for the change.

conformity to law of their revenue and expenses, methods of auditing and sanctions to be applied in the event of unconformity. The Court employs auditors to perform this task. The judgments rendered by the Court has *res judicata* effect. (Article 69/4 of the Constitution)

3.3.5. Deciding on the Warning to the Political Parties.

Article 104 of the Political Parties Act (Law no 2820) sitipulates that if the activities of a political party are incogruous to the mandatory rules of the Political Parties Act other than the provisions of Article 101, or other mandatory rules of other laws, the Chief Public Prosecutor of the Republic may submit an application to the Constitutional Court. If there are differences to the provisions of laws, the Constitutional Court warns political party to rectify those incongruties. If the incogruities are not rectified then the Chief Public Prosecutor of the Republic files a dissolution suit.

3.3.6. Reviewing the Decisions of Parliament Concerning Waiving the Parliamentary Immunity and Loss of Membership

If the Parliament waives the immunity of a deputy or if the loss of membership has been decided according to the first, third or fourth paragraphs of Article 84, the deputy in question or another deputy may, within seven days from the day of the decision of the Grand National Assembly of Turkey, appeal to the Court. The Court decides on the appeal within 15 days. (Article 85 of the Constitution)

3.3.7. Electing the President of the Court of Jurisdictional Disputes

The Court appoints two of its members as President and Vice-President of the Court of Jurisdictional Disputes. Due to strong ties, the Court of Jurisdictional Disputes, which has always been located within the premises of the Constitutional Court, operates closely with the Court (Article 158 of the Constitution). Ever since its establishment, there have been 14 principal and 4 substitute judges who have been elected as the President of the Court of Jurisdictional Disputes.

3.4. Constitutional Adjudication

The Constitutional Court does not act *ex officio*. It has to work on the basis of relevant applications filed in the Court. The Constitution defines a strictly limited range of bodies authorized to access to the Court. Under the Constitution, access to the Court can be made in the following ways.

3.4.1. Action for Annulment (abstract review of norms)

The President of the Republic, parliamentary group of the ruling party and of the main opposition party and a minimum of one-fifth of MPs (that is, 110) have the right to apply for an annulment action to the Court. If more than one political party is in power, the party having the greatest number of members exercises the right of the parties in power to apply for an annulment action.

The cardinal function of the Constitutional Court is to review the constitutionality of laws. The term 'law' is used not in respect of substance, but in form. In other words, even laws which do not create general and abstract norms, like budget laws and laws on the execution of capital punishments are within the scope of the review of the Court.

The verification of laws as to form is restricted to consideration of whether the quorum was obtained in the last ballot; the verification of constitutional amendments is restricted to consideration of whether the quorum was obtained for the proposal and in the ballot, and whether the prohibition on debates under urgent procedure were complied with.

The jurisdiction of the Court comprises all laws except the Reform Laws (of the Republic) enlisted in Article 174 of the Constitution.[37]

[37] Article 174 says that "No provision of the Constitution shall be construed or interpreted as rendering unconstitutional the Reform Laws indicated below, which aim to raise Turkish society above the level of contemporary civilisation and to safeguard the secular character of the Republic, and which were in force on the date of the adoption by referendum of the Constitution of Turkey". Upon this provision, Article 24 of the CCA prohibits the constitutional review of the following laws:
"1. Act No. 430 of 3 March 1340 (1924) on the Unification of the Educational System;
2. Act No. 671 of 25 November 1341 (1925) on the Wearing of Hats;
3. Act No. 677 of 30 November 1341 (1925) on the Closure of Dervish Monasteries and Tombs, the Abolition of the Office of Keeper of Tombs and the Abolition and Prohibition of Certain Titles;
4. The principle of civil marriage according to which the marriage act shall be concluded in the presence of the competent official, adopted with the Turkish Civil Code No. 743 of 17 February 1926, and Article 110 of the Code;
5. Act No. 1288 of 20 May 1928 on the Adoption of International Numerals:
6. Act No. 1353 of 1 November 1928 on the Adoption and Application of the Turkish Alphabet;
7. Act No 2590 of 26 November 1934 on the Abolition of Titles and Appellations such as Efendi, Bey or Paşa;
8. Act No. 2596 of 3 December 1934 on the Prohibition of the Wearing of Certain Garments" (Article 174/2 of the Constitution).
Note that until the 2001 Amendments the constitutional review of laws enacted during the time of the National Security Council (that is between 12.9.1980-6.12.1983) used to be forbidden by

The time limit for lodging constitutional appeal in terms of form expries within 10 days and the right to apply for annulment in terms of content lapses 60 days after publication in the Official Gazette of the contested law, the decree having the force of law, or the Rules of Procedure of Parliament.

3.4.2. Contention of Unconstitutionality (concrete review of norms)

Unlike the abstract control of norms, contention of unconstitutionality can be initiated any time by the general, administrative and military courts and any party involved in a case before a court *a quo.* Applications are made by correspondence.

According to Article 152 of the Constitution, if a court *a quo* is convinced that the norm to be applied in a pending case is unconstitutional, or if it is convinced of the seriousness of a claim of unconstitutionality that may be submitted by one of the parties, it postpones the proceeding of the case until the Court decides on the issue. The decision taken by the court *a quo* upon the motion of the parties must include the arguments of the parties.

The Court is not entitled to render an "inadmisability decision" if the referral of the court *a quo* is not well-reasoned or does not convincingly state the reasons why they believe that the regulation in question is unconstitutional. No matter how ungrounded or frivolous the application may it be, the Constitutional Court has to conduct an in-depth examination of the application and write a reasoned opinion. The absense of any filtering mechanism increases the workload of the Court. What the Constitutional Court does is to verify the relevance of the problem submitted to it. Should the norm contested is evidently irrelevant or not applicable in the case in question, it then dismisses the application.

The Court is expected to decide on the matter within 5 months of receiving the contention. If no decision is reached within this period, the court *a quo* must conclude the case under existing legal provisions (Article 153/3 of the Constitution). In practice, courts *a quo* do not take into account this constitutional order and wait until the Constitutional Court decides on the matter. Taking into account that the Court is in the

Provisional Article 15/3 of the Constitution. With the Law no 4709 adopted on 3.10.2001 this provision was repealed.

habit of concluding a case in 2-3 years, the time limit is deveoid of any meaning for lower courts.

No allegation of unconstitutionality may be made with regard to the same legal provision unless 10 years elapse after the publication in the Official Gazette of the decision of the Court dismissing the application on its merits.

3.4.3. Application for the Dissolution of Political Parties

An application for the closure of a political party is made by the Chief Public Prosecutor. The Court examines the case and gives its verdict on the basis of oral hearings including the defence made by the defendant party and assertions made by the Chief Public Prosecutor; and on the basis of the report prepared in respect of merits by the appointed rapporteur. The cases concerning the dissolution of political parties is investigated and decided upon files by the Plenary Assembly in accordance with the applicable provisions of the Criminal Procedure Act. The dissolution of political parties is decided on the basis of written defence and evidence. (Article 52 of the Court Act)

The Constitution enumerates certain prohibitions that could lead to the dissolution of political parties in the event that:

The statutes and program of a political party is contrary to Article 68/4 of the Constitution.

A political party becomes a focal point of actions contrary to Article 68/4 of the Constitution.

A political party receives financial aid from foreign countries, international institutions and from real persons and legal entities not belonging to Turkish nationality.

A permanently closed political party re-establishes itself under a new name.

The dissolution of a party is rendered by a two-thirds majority of the Plenum. The Court may also decide to deprive the Party from the state aid partially or fully depending on the severity of the contested actions if it has carried out actions laid down in Article 69 of the Constitution.

The Court has dealt with 50 cases on the dissolution of political parties. Six of them were concluded during the 1961 Constitution. Out of 44

cases lodged after 1982, the Chief Public Prosecutors asked the closure of 36 parties. Out of 44 cases, 43 cases were settled; 1 application was pending at the time of publication.[38]

3.4.4. Application for Warning of Political Parties

According to Article 104 of the Political Parties Act (No: 2820), the Office of the Chief Public Prosecutor of the Republic applies to the Constitutional Court if a party fails to abide by the provisions of the said Act (other than Article 101) and other compulsory rules of other laws. If the Constitutional Court identifies a breach of these provisions, it makes a decision to notify the relevant political party for this breach to be redressed. If the breach is not redressed within six months of the communication of this notification, the Chief Prosecutor's Office may, *ex officio*, file a case at the Constitutional Court requesting that the political party in question is partially or fully deprived of State fiscal aid. This decision is notified by the Chief Public Prosecutor to the political party concerned and is sent to the Official Gazette

3.4.5. Trial of Statesmen as the High Court of Justice

The Court, as it acts in the capacity of High Court, conducts and concludes the trial in accordance with the existing law. The provisions of the Criminal Procedures Act are completely implemented. Re-examination of the judgements is possbile if it is filed within 15 days. . As from 2010, the Court may decide to hold a hearing for re-examination purposes upon a request from the Chief Public or the Deputy Chief Prosecutor, the defendant or the intervening party or on its own initiative. The realization of the fair trial before an independent and impartial court

[38] The names of 18 political parties being dissolved after 1982 are (chronologicaly); Türkiye Birleşik Komünist Partisi , Cumhuriyet Halk Partisi, Sosyalist Parti , Halkın Emek Partisi, Yeşiller Partisi, Özgürlük ve Demokrasi Partisi, Sosyalist Türkiye Partisi, Demokrasi Partisi, Sosyalist Birlik Partisi, Demokrat Parti, Demokrasi ve Değişim Partisi, Emek Partisi, Diriliş Partisi, Refah Partisi, Demokratik Kitle Partisi, Halkın Demokrasi Partisi, Fazilet Partisi and Demokratik Toplum Partisi.
The names of 17 parties which were not dissolved are (chronologicaly) Yüce Görev Partisi , Bizim Parti , Muhafazakâr Parti , Yeni Düzen Partisi , Doğru Yol Partisi , Bayrak Partisi , Sosyalist Parti , Milliyetçi Çalışma Partisi , Demokratik Barış Hareketi Partisi, Türkiye Sosyalist İşçi Partisi , Adalet Partisi, Türkiye Adalet Partisi , Büyük Adalet Partisi , Türkiye Özürlüsü İle Mutludur Partisi , Devrimci Sosyalist İşçi Partisi , Anayol Partisi and Hak ve Özgürlükler Partisi

as required by the rules and principles of the criminal judgement is therefore fully achieved.[39]

3.4.6. Constitutional Amendments

The scope of judicial review on the constitutional amendments is restricted to review of constitutionality only in respect of form. The competence of the Constitutional Court does not include any review of the Constitution itself. The Constitutional Court examines whether a constitutional amendment was enacted in accordance with the provisions of the Constitution stipulating quorum for the proposal and the vote, and whether the prohibition on debates under urgent procedure was observed. In this context, a proposal for the amendment of Constitution should be submitted by at least one-third of the members of Parliament (which amounts to 184 out of 550), and accepted by a three-fifth majority of votes (which amounts to 330).

The Constitutional Court annulled in 5 June 2008 the constitutional amendments made to Articles 10 and 42 of the Constitution aiming to strengthen equality before the law and expand the right to education by eliminating the unconstitutional denial of fundamental right to women wearing the headscarf. The Court based its decision on Article 4 of the Constitution, which does not allow the first three articles of the Turkish Constitution be amended. With this judicial activisim, the Court

[39] High Court Cases between 1962-2008: (1) Mehmet BAYDUR, Former Minister of Commerce, E.1964/1 (26.2.1964), K.1965/3 (17.6.1965), Acquitted: (2) Hilmi İŞGÜZAR, Former Minister of Social Security, E.1981/1 (4.2.1981), K.1982/2 (13.4.1982), Sentenced to heavy imprisonment: (3) Tuncay MATARACI, Former Minister of Customs and Monopolies, E.1981/2 (27.4.1981), K.1982/1 (16.3.1982), Sentenced to heavy imprisonment: (4) Şerafettin ELÇİ et al, Former Minister of Public Works and Settlement, Sentenced to imprisonment and fines, E. 1982/1 (19.3.1982), K. 1983/2 (12.4.1983): (5) Selâhattin KILIÇ, Former Minister of Public Works and Settlement, Acquitted, E.1982/2 (19.3.1982), K.1983/1 (9.3.1983), (6) İsmail ÖZDAĞLAR, Former Minister of State, Sentenced to imprisonment, E.1985/1 (21.5.1985), K.1986/1 (14.2.1986): (7) İsmail Safa GİRAY, Former Minister of Public Works and Settlement & Cengiz ALTINKAYA, Former Minister of Public Works and Settlement, Acquitted, E.1993/1 (26.1.1993), K.1995/1 (12.4.1995): (8) Yaşar TOPCU, Former Minister of Public Works and Settlement, Trial Suspended, E. 2004/5 (11.11. 2004), K. 2006/2 (26.5.2006), (8) A. Mesut YILMAZ, former Prime Minister & Güneş TANER, Former Minister of State, Trial Suspended, E. 2004/2 (16.7.2004), K. 2006/3 (23.6.2006): (9) H. Hüsamettin ÖZKAN, Former Minister of State & Recep ÖNAL, Former Minister of State, Acquited, E. 2004/1 (18.6.2004), K. 2006/1 (31.3.2006), (10) Koray AYDIN, Former Minister of Public Works and Settlement, Acquitted, E. 2004/4 (11.11.2004), K. 2007/2 (5.10.2007),: (11) M. Cumhur ERSÜMER, Former Minister of Energy and Natural Resources & Zeki ÇAKAN, Former Minister of Energy and Natural Resources, Pending, E. 2004/3 (16.7.2004). There is only one case pending before the Court at the time of writing, which concerns the trial of a judge of the Court of Cassation.

overstepped its competences by violating the principle of seperation of powers.

3.4.7. Rules of Procedure of the Parliament

Article 148/1 of the Constitution, the Rules of Procedure of the Turkish Grand National Assembly is subject to review both it terms of form and substance. Despite that the Rules of Procedure of the Turkish Grand National Assembly is a parliamentary decision in respect of its legal status, it is subject to constitutional review owing to the its peculiar political importance in terms of the democratic participation of the party in power and the opposition parties in the works of the Parliament.

In addition to the Rules of Procedure, the decisions on the annulment of the parliamentary immunity or disqualification from membership are also subject to constitutional review.

The Constitutional Court, by having recourse to judicial activism, trespasses its jurisdictional borders and rules every now and then that if parliamentary decisions carry the force of the Rules of Procedure in practice or result in an amendment to the Rules of Procedure, then it has to right to review the constitutional legality of these decisions. The notorious '367 Decision' is a good example of this unparallel activism.

3.4.8. Status of International Agreements

According to Article 90/5 of the Constitution, "International treaties duly put into effect have the force of law. No appeal to the Constitutional Court can be made with regard to these treaties, on the ground that they are unconstitutional". Between 1962-2004, there had been deep disagreement over the status of international treaties *per se* and the European Convention on Human Rights in particular due to the ambiguous nature of "having the force of law" phrase.

With the constitutional amendment made in May 2004, a new sentence was added to the last paragraph of Article 90. According to this;

"*In the case of a conflict between the provisions of international treaties in the area of fundamental rights and freedoms duly put into effect and the provisions of domestic laws on the same matter, the provisions of international agreements shall prevail."*

Thanks to this provision, the disputes over the status of human rights treaties have finally come to an end. The courts of general jurisdiction are now obliged to rely on the Convention provisions while rendering their judgements. Recent judgements of the Court of Cassation and the Council of State point out direct application of the provisions of the European Convention and the other international treaties on human rights.

Lower courts are not entitled to take the issue to the Constitutional Court claiming that domestic laws appear to contradict the ECHR. This is because the Constitution does not empower the Court to review the constitutionality of national laws *vis-à-vis* the international treaties. In case of contradiction between the domestic laws and the Convention, the court *a quo* should implement the provisions of the ECHR directly by virtue of the supremacy of international human rights treaties.

Even though the Constitution stipulates that duly ratified international treaties cannot be subject to constitutional review, the Constitutional Court declared in 1997[40] that it can review the legality of laws enacted by Parliament approving of ratification. However, it will be mentioned later that the Court stepped back this stanpoint in May 2012 in the absense of a clear provision enabling it to do so.

3.4.9. Suspension the Operation of a Norm

Despite the fact that there is no a clear provision in the Constitution empowering the Constitutional Court to suspend the implementation of a norm, the Court, in a decision numbered K.1993/40-42, established a very important precedent and decided that it was competent and authorized, under certain circumstances, to suspend the implementation of a norm, pending its final decision about its constitutionality. As to the grounds for such a decision, the Court regarded that such a power was a stage within the decision-taking process and "a means existing in the essence of the effectiveness of judicial review", and where such a power was not given, individuals and the public order would be deprived of constitutional protection; and as neither the Constitution nor the law stipulated any provision on such a power, nor did they contain prohibitive

[40] E.1996/55, K.1997/33, 27 February 1997

provisions, this legal lacuna should be filled with the case-law of the Court.

The Court never justifies its decision of suspension implementation. But, never did the Court attempt to show in what way and to what extent the challanged norm resulted in detriments which were difficult or impossible to rectify, and at the same time this norm is clearly unlawful. The Court only and shortly used to that the contested norm had been suspended. This practice was clearly against Article 141/3 of the Constitution which stipulates "The decisions of all courts shall be made in writing with a statement of justification".

3.5. Nature and Features of the Decisions

3.5.1. Decisions Taken in Camera

The Court examines cases on the basis of files, except where it sits as the High Court. The Court makes its deliberations in camera. Hearings of the Court are confidential. However, whenever a case is of high public interest, or when it deems necessary, it may call on those concerned and those having knowledge such as ministers and bureaucrats relevant to the case, to present oral explanations.

In lawsuits on the dissolution of political parties, it hears the defence of the chairman of the party concerned or his representative, after listening the viewpoint of the Chief Public Prosecutor of the Republic. The cases related to the dissolution of political parties, in which the Criminal Procedural Law applies *mutatis mutandis*, arises as a unique sort of case where the parties and those concerned with the case are heard and deliberations are made on the basis of written documents and then a decision is taken.

The fact that Court proceedings are not conducted in public, all decisions are delivered in camera. The view of the rapporteur who prepares the report of the case is neither mentioned in the case nor is it publicised. These cast serious doubts as to the supervision of the impartiality and legality of the decision-making process.

All the same, hearing the cases in camera does not mean that the media is kept away from the activities of the Court. The Court maintains a close contact with the media by informing them about the agenda, preliminary and final decisions. This practice is maintained in the face of the

constitutional provision saying that "decisions of annulment cannot be made public without a written statement of reasons" (Article 153). The Constitutional Court always disregards this prohibition and publicises its reasoned decision almost one year after the announcement of the short decision.

3.5.2. Binding Character of Decisions

The decisions of the Constitutional Court are final and binding not only on the parties in a given case *(inter partes),* but also on the legislative, executive and judicial organs, on the administrative authorities, and on real and legal persons (*erga omnes effect)*[41]. Due to the fact that the decisions are final, no legal allegation (appeal or correction of decision) can be lodged against them. For the same reason, the dispute settled by that decision cannot be dealt with as another case subject by the same parties on the same grounds. Neither the legislative nor the executive has the power to amend or delay the decisions of the Constitutional Court.

In the course of annulling the whole or a provision of laws or decrees having the force of law, the Constitutional Court may not act as the law-maker and pass any judgment leading to new implementation. All judgements adopted by the Constitutional Court are published in the Official Gazette and in a yearbook, named as "The Decisions of the Constitutional Court".

3.5.3. Non-Retroactivity of Decisions

The Constitution stipulates that rulings of the Constitutional Court have an effect *ex nunc*. Such a rule means that the annulled law remains valid until the annulment decision of the Constitutional Court comes into effect (Article 153/5). The effect *ex nunc* does not apply to cases pending before courts at the time when it pronounced its ruling. Where necessary, the Constitutional Court may also decide on the date on which the annulment decision shall come into effect. That date shall not be more than one year from the date of publication of the decision in the Official Gazette. (Article 153/3). In the event of the postponement of the date on which an annulment decision is to come into effect, the Turkish Grand

[41] In the 1961 Constitution (Article 152/4), the Constitutional Court used to rule that decisions based on claims of unconstitutionality by other courts, were restricted in scope with the case in question and binding only parties involved.

National Assembly shall debate and decide with priority on the draft bill or law proposal, designed to fill the legal void arising from the annulment decision (Article 153/4).

The Constitution does not regulate the effect of the annulled decisions on the verdicts of definite condemnation issued on the grounds of the annulled law. On the other hand, it is obvious that execution of criminal convictions which became final prior to the annulment decision would be unjust and contrary to the principles of criminal law. The same should apply for the necessity of the application of a law, which requires a lighter punishment as a result of the annulment decision.

THE WORKLOAD OF THE CONSTITUTIONAL COURT

(1982-2010)

YEARS	ABSTRACT	CONCRETE	LIFTING IMMUNITY	CLOSURE OF PARTIES	HIGH COURT	ALL COMING FILES	TURNOVER	ALL FILES REGISTERED
1983	—	11	—	6	2	20	2	22
1984	6	8	—	4	—	21	2	23
1985	12	19	—	2	1	36	7	43
1986	10	14	—	—	—	24	18	42
1987	13	22	—	3	—	39	11	50
1988	10	52	—	2	—	67	14	81
1989	8	23	—	5	—	40	24	64
1990	13	27	—	7	—	47	10	57
1991	7	54	—	7	—	68	19	87
1992	5	43	—	7	—	56	15	71
1993	20	33	—	5	1	59	10	69
1994	19	34	39	7	—	99	7	106
1995	13	43	—	6	—	62	15	77
1996	16	61	—	4	—	81	7	88

1997	4	73	2	8	—	87	40	127
1998	2	56	1	1	—	60	43	103
1999	12	39	—	2	—	53	12	65
2000	29	57	—	—	—	86	13	99
2001	23	472	—	13	—	508	48	556
2002	11	160	—	12	—	183	186	369
2003	18	95	—	8	—	121	160	281
2004	28	90	—	4	5	126	172	298
2005	35	134	—	3	—	172	161	333
2006	23	146	—	2	—	171	218	389
2007	31	84	—	2	—	117	268	385
2008	23	93	—	1	—	117	278	395
2009	12	82	—	—	—	94	207	301
2010	16	105	—	1	—	122	143	265

4. The Third Period (2010-2012)

A rapid increase in the number of applications in the 2000s due to the evolving Turkish legislative landscape has placed a heavy burden on the capacity of the Court. The average number of cases of abstract and concrete norm reviews brought before the Court between 1981 and 2000 was 62. The caseload of the Turkish Constitutional Court almost tripled after the year 2000 as a result of certain amendments made in the Constitution and the radical legal reforms which were largely inspired by the case law of the Strasbourg Court and undertaken for the alignment with the EU *Acquis*. Due to ever increasing workload and backlog problems, a thorough review of the workings of the Court and possibly an amendment of the Constitution system was inevitable.

To overcome the burden of the workload, the Constitutional Court, by its own motion, drafted a proposal on a constitutional amendment with regard to the organisational and procedural restructuring of the Court in 2004. The Court was so sure that its amendment package, including individual application, would be adopted by the Parliament. Hence, the Court asked for the construction of a massive constitutional court

building of 29500 sq meters on a plot of 6,4 hectares. The architecture of the building was planned so as to accommodate almost 20 judges, 50 rapporteurs, and two law clerks for each judge to meet the demands of the individiual application procedure. Soon after the construction of the new Court building finished in 2009, the Court moved in it.

The Government wanted the proposed amendments be laid down in a brand-new "civil constitution", since it promised in the 2007 elections that it would adopt a new, civilian and democratic constitution during its second term.[42] As the civil constitution progress was protracted between 2007-2010, the Parliament bundled Court-suggested proposals with those of the political parties and embeded them into the 2010 Constitutional Reform Package.[43]With the adoption of the constituional amendments by referandum in September 2010, the Structure of the Court changed significantly.

Here are changes made as to the composition, competence and jurisdiction of the Court.

4.1. The Judges

The 2010 Amendments fixed the terms of office of judges to 12 years. The tenure of the judges is limited with no right of reelection. The age of election increased from 40 to 45, while the retirement age (65) remained unchanged.

The number of judges increased from 11 to 17 and the partial removal of the dative tutelage of the President of the Republic over the Court. The Turkish Grand National Assembly was given three quota: 2 judges are elected from the Court of Accounts and 1 judge among lawyers.[44] All the

[42] See for comparison of old and new provisions in Selin M. Bölme and Taha Özhan, "Constitutional Referendum in Turkey", SETAV, August 2010, No: 47, http://www.setav.org/Ups/dosya/44512.pdf, p. 19 et seq.

[43] See in general Levent GÖNENÇ, "2010 Proposed Constitutional Amendments to the 1982 Constitution of Turkey", TEPAV, September 2010 http://www.tepav.org.tr/upload/files/1284468699-0.2010 Proposed Constitutional-Amendments to the 1982 Constitution of Turkey.pdf

[44] Article 146/2: "Turkish Grand National Assembly shall elect the two members among the nominated three candidates for each vacant seat from among the president and members of the Plenary Assembly of the Court of Accounts, and one member from among the three candidates of lawyers nominated by bar presidents with a secret ballot. In this election to be held in the Turkish Grand National Assembly, two thirds of the total number of members in the first voting for each vacant seat shall be required and for the second voting absolute majority of the total number of members shall be required. When absolute majority cannot be provided in the

same, the President retained the appoinment of 14 judges directly or indirectly. As to the selection of 14 judges, 7 judges come within the judiciary (3 from the Court of Cassation; 2 from the Council of State; 1 from Military Court of Cassation and 1 from the High Military Administrative Court); 3 judges come from the academic community.[45] The President elects 7 supreme court judges and 3 academics from a list of three candidates nominated by supreme courts and the Higher Education Council respectively. The President directly appoints the remaining 4 judges from among the senior administrative officers, self-employed lawyers, first ranked judges and prosecutors, or from among the rapporteurs of the Constitutional Court. To sum up briefly, out of 17 judges, 9 come from supreme courts, 3 from universities, 1 from lawyers and 4 judges come from different sources mentioned above. With this amendment, the number of academics increased to 3; rapporteurs have had the chance of being elected while they are within the Court rather than being appointed to senior posts before coming back to the Court.

4.1.1. End of Principal-Substitute Judge Distinction

With the 2010 Amendments, the two-tiered structure based on principal and substitute membership was abolished. As a matter of fact, the awkward distinction between the principal and substitute judges had been on the agenda at the drafting stage of the 1982 Constitution. When the Consultative Assembly adopted its draft on 23 September 1982, the substitute judge system had been removed from the Constitution because of its ineffective application over the years (see Article 154 and its reasoning).[46] But it is said that principal members, headed by Ahmet

second voting, the third voting shall be held for the top two candidates in the second voting; the candidate who shall receive the highest votes shall be elected as the member"

45 Article 146/3: "The President of the Republic shall select three members from the Court of Cassation; two members from the Council of State; one member from Military Court of Cassation; one member from High Military Administrative Court from among three candidates nominated by their general assemblies for each vacant seats from their presidents and members ; three members from a list of three candidates nominated by the Higher Education Council from among members of the teaching staff of institutions of higher education who are not members of the Council but are serving in the faculties of law, economy and political sciences; four members from among the senior administrative officers, self-employed lawyers, category 1 judges and prosecutors or from among the rapporteurs of the Constitutional Court who have at least five years of experience as rapporteur"

46 Consultative Assembly composed of 160 delegates adopted it at its 156th Session and sent it to the National Security Council on 24 September 1982 (1/463) (National Security Council Reports, 118th Session, 18 October 1982)

Boyacıoğlu, the then President of the Court, objected to the annulment of this caste system and interfered with the drafting process by talking to the National Security Council. That is why the Constitutional Comission, composed of a major general and 5 generals, reverted back the old system without explaining why they did not subscribe to the wording of the Consultative Assembly in their draft Article 146.[47] In sum, 5 soldiers' preference eclipsed that of 160-member-Consultative Assembly. That is why the removal of this caste system could be seen as a significant achivement.

4.1.2. Challenge for Disqualification of Judges Remains

In the new period, the challenges against recently elected judges for their disqualification came to the fore twice. In the first case, Hicabi Dursun, a member of the Court of Accounts, born on 20 October 1965, was elected by the Parliament on 6 October 2010. This was the first election made by the Parliament after 31 years. When elected, he was 14 days short of satisfying the 45 years of age requirement brought by the 2010 Constitutional Amendments. Şahin Mengü, an MP from CHP, filed an application to the administrative court for the annulment of the election by the Parliament. Kamer Genç, another MP from CHP, petitioned to the Office of the General Secretariat of the Parliament arguing that the election be repeated becasue the constitutional requirement was not met. In fact, if we accept that the Court of Accounts is a supreme court, there is no age requirement for judges coming from supreme courts. However, the Constitutional Court does not categorise the Court of Accounts as a court, let alone a supreme court. That is why in the light of four-decade-jurisprudence of the Constitutional Court, this election should have been renewed. But as there was a lacuna as to who would have the final word in settling the dispute, this caused fruitless heated debates. As far as are concerned, the Court of Accounts is an appeal court whose decisions are of *res judicata* effect and the criticisms were wrong.[48] The debate was

[47] Constitutional Commission (1/397), 17 October 1982 (National Security Council (No. 450) (National Security Council Reports, 118th Session, 18 October 1982)

[48] In a panel on "Yeni Anayasa'da Sayıştay'ın Konumu", [The Poisition of the Court of Accounts in the New Constitution] held at Barolar Birliği on 15 May 2012, I questioned why the Constitutional Court does not regard the Court of Accounts as a court and why the latter should be regarded as a supreme court. The proceedings will be published by Sayder (Association of Auditors).

also futile in that 14 days later the Parliament could have elected Hicabi Dursun once again.

In the second case, criticisms were raised against the election of Prof. Zühtü Arslan in April 2012. It was contested that he failed to satisfy two criteria: (1) he did not get his undergraduate degree in the field of law and (2) he was not teaching at the time of his election; as he was a bureaucrat. These claims shadow the fact that he was the second constitutional lawyer elected out of 124 judges and he is one of the best academics on constitutional justice.

The disqualification challages started with Prof. S. Arslan in 1992 (see Section 3.1.2) ended with Prof. Z. Arslan in 2012. These cricisms have blatantly displayed the need for a special provision in the Court Act (No 6216) authorising the Plenary Assembly to settle these sorts of challenges without damaging the image of the elected judges.

4.2. The Staff

Under the new court model, even though the selection of rapporteurs, among regular judges and prosecutors, academics holding at least Ph.D degree and legal researchers and auditors remained the same, but after September 2010, their numbers almost doubled: that is, from 23 to 41. In the past, assistants to the Secretary Generals used to be selected among the heads of the departments, who were senior public officials. As from September 2010 onwards, two deputies from rapporteurs were commissioned to assist secretary generals.

The new Court Act required for the first time that candidates getting at least 70/100 mark from Foreign Language Examination for Public Servants (KPDS) and having a postgraduate degree are preferable for assignment or appointment as rapporteur (Art. 24/3). This will significantly bolster the quality of reports in the long run and the case law of regional and foreign courts will be reflected in court decisions more often than before.

Another novelty in the new court model is that a special position, called assistant rapporteurship, was created, which it appears to have been inspired from law clerkship model in US or referendaire model in Europe. But, administratively speaking, they are subordinated only to the President of the Court, rather than to the judges or rapporteurs. They are lower in rank and assist rapporteurs in the preparation of reports and

dealing with individual application. They enjoy the same rights, privileges and judicial immunity of the same rank judges (Art. 24/4). In February 2012, 26 asisstant rapporteurs were employed after an open competition exam. The more the workload of the Court increase after individual applications come to the Court, the more assistants are to be employed.

Another new feature in terms of staff affairs is the establishment of Higher Disciplinary Board. The disciplinary matters of the staff, employed at the Court, - excluding the President, deputy presidents, members and those specified in sub-paragraphs of Article 24/2- are to be handled by the Higher Disciplinary Committee. The Board consists of three rapporteurs recommended by the Secretary General and approved by the President. The senior rapporteur is to chair the Board. (Article 28)

4.3. Organisation

The Amendment Package envisaged a court of bicameral nature. That is, 17 judges would be split into two chambers. Each Chamber would convene with its vice-president and four members, and shall take decisions by absolute majority In this system, all files would be distributed to the chambers equally except files on examination of constitutional amendments, dissolution of political parties and trials to be performed in capacity of the High Court. The Plenary Assembly would convene with its president or of the vice-president to be determined by the President of the Court and twelve members and shall take the decisions by absolute majority. However, decisions of annulment of constitutional amendments and dissolution of the parties decisions of the political parties would be taken by three-fifths majority of the Plenary Assembly. Commissions can be formed for the review of the eligibility of individual complaints. Cases and applications, annulment and appeal cases related with political parties, as well as trials where it acts as the Supreme Court are carried out by the General Assembly while individual applications shall be decided over by Chambers. The decision of annulment of Constitutional amendments and closure or the deprivation of the political parties from Government aid shall be taken by two-thirds of the total number of members (Article 149).

4.4. Competence

With the Amendment Package, the competence of the Court was broadened. The first and foremost example is the advent of the individual application (constitutional complaint) mechanism. According to this, everyone has the right to apply to the Court arguing that the public authorities have violated any one of his/her fundamental rights and freedoms protected under the Constitution which falls within the scope of the ECHR and its protocols ratified by Turkey. All administrative and judicial remedies must be exhausted prior to applying to the Court. Direct individual applications may not be petitioned against legislative proceedings and regulatory administrative proceedings; proceedings excluded from judicial review by the Constitution pursuant to Constitutional Court judgments are not subject to individual application (Article 148 of the Constitution and the Law no 6216, Article 45).

The second area of broadening the scope of the Court's competence became the jurisdiction of the High Court. In the past, there was no mechanism to review the decisions of the Court, sitting as the High Court. As of 2010, the judgements of the High Court are no longer final. They are now subject to appeal, which became in tandem with the right to fair trial. The accused could now apply for a review to the Plenary Assembly. There was also a lacuna as to how the Speaker of the Parliament, the Chief of General Staff and the commanders of the Land, Air, Naval and Gendarmerie Forces can be tried for offences related to their duties. This dilemma was solved by empowering the Court to try these persons as High Court.

The Quorum, after 2010, is as follows: The Plenary Assembly and Sections render decisions by an absolute majority of participants. The President has casting vote in cases of equality. A two-thirds majority is required for decisions on annulment of Constitutional amendments, dissolution of political parties or deprivation of political parties of state aid.

In the new Court Act, retrial situations have been regulated clearly (Article 67). Accordingly, (1) Retrial is possible in two cases: First, against decisions of the Court on dissolution of political parties and against decisions of the Court rendered in its capacity as the High Court. (2) Provided that Strasbourg Court finds that political parties have been

banned and the High Court violated the right to fair trial and other relevant articles, then an application of retrial may be lodged within one year after upon the finalisation of the decision of the Strasbourg Court.

5. Conclusion: The Road Ahead for New Constitution

The Constitutional Court was tailored by the military-chosen bureaucrats and generals who penned the 1961 and 1982 Constitutions. So is the case with the Court Acts No 44 (1962) and No 2949 (1983) which envisaged a very narrow statute for the Court.[49] The Court was conceptualised for the protection of the State rather than individuals. To rectify the flaws seen on the composition, competence and organisation of the Court, the 2010 Amendements and the new Court Act No. 6216 (2011), as a civilian initiative, could be construed as two positive steps. But the achievements made so far are far from satisfactory. On the way to new civil constitution, the Court should be reorganised in the light of its five-decade-experience so as to have prestige just as its conterparts within the Council of Europe. At the beginning of the 1960s, there were a handful of constitutional courts to study over; but today there are almost 60 courts based on the Austrian model.[50] The drafters of the new constitution should make use of examples in comparative constitutional law, especially courts established after the Cold War not only in the Balkans and the Turkic Republic but also in Asia such as the Indonesian Constitutional Court (2003).

As far as we are concerned, the following headings are the points to be ironed out when drafting the new Constitution.

1. In terms of the appointment, qualification and terms of office of the judges, there are many things to say. Suffice it to remark for the time being that the appointment of judges should be based on meritrocracy rather than like-mindedness. The 12-year-tenure of judges does not commensurate with the prevailing European practice, which is 9 years. The President of the Republic should not elect judges nominated by the General Boards of supreme courts. Rather, it is supreme courts that should elect their own representative, just as during the 1961

[49] Karş: İbrahim KABOĞLU, *Anayasa Yargısı* [Constitutional Justice], 3. baskı, İmge Yayınevi, 2000, Ankara, 204.

[50] For a full list of the Courts adopting the European (Austrian) model, see http://www.concourts.net/ .

Constitution. Concerning the two seats given to Military Court of Cassation and the High Military Administrative Courts, the presence of military judges, notwithstanding their personal qualifications and merits, is a scar of two constitutions prepared by the Army. As far as we could observe, no other constitutional court in the world has a permanent seat allocated to military judges.[51] It is not sufficient for the Parliement to elect only 3 members out of 17. The number should amount to at least 1/3 of all members (around 6). This will be in line with the prevailing constitutional justice practice in the world. Last but not least, concerning challenges of judges who are claimed to have failed to satisfy the criteria required by the Constitution, the Plenary Assembly should be authorised by the Court Act so settle the dispute. Otherwise, the allegations will blur the images of the members of the Court.

2. As to the status of the Court, for the sake of its independence, the Court should not be a part (and even on top) of supreme courts, but be a *sui generis* constitutional body. Position and competences of the Court should be regulated under a special section of the Constitution, just as the position of the Court in the 1961 Constitution. The past experience has shown us very vividly that when the Parliament wanted to ameliorate the status, previleges and immunities of Constitutional Court judges, judges at other supreme courts fiercely opposed any betterment to be made to the judges of the Constitutional Court unless they enjoy the same status. Should the Court be classified outside the ambit of the juridical organs, the Parliament will have a large leeway to regulate any matters that deem essential for the improvement of the conditions of the Court. The removal of the Court from the supreme court framework will also have crucial reverberation on the individual application cases. That is to say, with the advent of the individual application, especially the Court of Cassation and the Council of State have become obsessed with the creation of a "super appeal court" above them. This misunderstanding could be done away with the detachment of the Court from the judiciary.

3. Secretary generals should not be chosen among rapporteurs; rather, either one of the judges or a professional manager should direct the court

[51] The only exception was lieutenant general Achmad Roestandi, who was elected by the Indonesian Parliament. His election was criticised by other members of the Indonesian Constitution Court. http://www.mahkamahkonstitusi.go.id/index.php?-page=website.Organisasi.ProfileHakim&id=608

administration. Just as at the Court of Cassation and the Council of State, the status of secretary generals should be equal to those of judges (justices) of the Constitutional Court. Otherwise, secretary generals, who are supposedly the highest public official controlling the activities of all departments and the only authority authorised to spend the money of the Court, are guided and subjugated by judges and their authority in the eyes of the Court's personnel will remain tarnished.

4. The Court conjured up the suspension of the implementation of norms challanged before the Court in 1994 by way of displaying a judicial activism inpired from administrative law. In view of the absense of legal ground and its arbitrary nature, the Court has always been criticised by using a power not granted by the Constitution. Ever since the mid-2000s, almost all annulment petitions have been coupled with a demand on the suspension of the operation of the provision being challanged. To prevent this misuse of power, there should be a clear authorisation like the following:

"In the course of annulling the whole, or a provision, of laws or decrees having the force of law or the Rules of Procedure of the Turkish Grand National Assembly, where there are strong signs on unconstitutionality, the Constitutional Court may take a decision of "suspension of implementation" in order to prevent situations and damages that can not be recovered after implementation of the related provisions. Laws, decrees having the force of law, or the Rules of Procedure of the Turkish Grand National Assembly or provisions thereof, shall cease to have effect from the date of publication in the Official Gazette of the annulment decision. Where necessary, the Constitutional Court may also decide on the date on which the annulment decision shall come into effect. That date shall not be more than one year from the date of publication of the decision in the Official Gazette."

But, in May 2010, the Parliament drafted a provision prohibiting the Court from suspending the operation of a law. The provision, embedded in the third reform package, was adopted on 31 May 2012. Once enacted, the Court will be deprived of using this judge-made solution, which caused a number of quandaries in the past. In the new Constitution, the prohibition of suspension of the operation of legal norms should be elevated to constitutional level and be clearly articulated so that the Court could not venture to use it anymore.

5. The 1982 Constitution prohibits the Court from reviewing treaties that have duly entered into force (Art. 90/5). There is no any rule as to whether the Court could review treaties approved by the Parliament, but not yet ratified by the President. There is a lacuna in this regard and the Court decided in 1997 that the absence of a specific provision does not hamper reviewing the constutitonality of treaties that are on the way to ratification. The case is as follows: The Standing Committee for Economic and Commercial Cooperation of the Organisation of the Islamic Conference (ISEDAK) prepared an agreement on the Institution for Export and Investment Credit Insurance among Islamic Countries in 1992. Turkey signed the agreement soon after and passed to Parliament in 1995 for approval of ratification. The Parliament approved the Agreement, which was composed of only procedural 3 sentences. Finally, the bill passed with majority. The Opposition Parties appealed to the Constitutional Court for its annulment in 1996. The Court scrutinised the text of the international agreement even though there was no explicit provision allowing the Court to do so. When similar issues were on the agenda of the Court in 2012, the Court said that it was not empowered to review the law enabling the Council of Ministers to issue a decree and send it together with to-be-ratified international treaty to the President of the Republic. On 31 May 2012, the Court retreated from its earlier decision on the constitutional review of international treaties. The Court refused to hear the unconstitutionality of agreements approved by the Parliament with the Laws No. 6007, 6118 and 6119. However, there is urgent need to provide for a provision allowing the Court to review international agreements either by way of *ex ante facto*, a priori (preventive review) or through *ex post facto*, a posteriori (repressive review). Only in Croatia and Macedonia, there is no any provision for constitutional review of treaties. In a number of states such as Albania, Armenia, Bulgaria, Czech Republic, Estonia, Georgia, Poland, Russia and Spain, there are provisions giving courts the competence to declare treaties as unconstitutional. The new Constitution should employ such an approach without fail.[52]

6. Ever since its establishment, the Court did act as High Court, that is as a grand tribunal trying limited top state officials and making use of the

[52] See Kemal BAŞLAR, "Anayasa Yargısında Yeniden Yapılanma" [Perestroika at the Constitutional Justice], Demokrasi Platformu, 1/2, 2005, 87-112.

procedure laid down in the Criminal Procedure Law. There have been a plethora of criticisms arguing that in the light of its composition and competence, the Court is not an ideal organ such a duty to be vested in. Hence, the High Court trials should be given a special chamber to be established within the framework of the Court of Cassation. No more is this true than today since with the advent of the individual application mechanism, the Court metamorphosed itself into a "human rights court". Neither the expertise nor time of judges allows the Court to shoulder this heavy and time consuming burden. Moreover, there are certain problems as to trying the accused in accordance with the right to fair trial. The Court should no longer face the accusations that up to 16 members could be in a position where they have no idea as to how criminal proceedings are conducted and appeal stage will be made within the roof of the same Court etc.[53]The new Constitution should detach this function from the duties of the Court without further ado.

7. So is the case with the reviewing the accounts of the political parties. To put it clearly, ever since its establishment, the Court was burdened with auditing the income, expenditure and acquisitions of political parties. The Court has never effectively performed this ancillary duty. While performing its task, auditors from the Court of Accounts helped the Court. With the metamorphoses mentioned above, the Court sloughed off its old skin and restructured itself as a human rights court. In this milieu, it is the Court of Accounts, rather than the Constitutional Court, that should be devoting time to this mundane task which has nothing to do with protection fundamental rights and duties.

8. In the Anglo-Saxon world and in the practice of some international courts,[54] the *amicus curia* (friends of the court) system is utilised as a means to improve the quality of reports and clarify the facts. To put it clearly, someone or an NGO who is not a party to a challenge before the court, but who believes that the court's decision may affect its interest, they could support facts, figures and documents that will open new vistas for judges. An *amicus curiae* brief brings to the attention of the Court

53 See criticisms coming from the Court of Cassation, Çetin ARSLAN, "Son Anayasa Değişikliğinin Yüce Divan Açısından Değerlendirilmesi" [An Assessment of the Latest Constitutional Amendments in terms of the High Court], International Congress on Constitutional Law, Book of Papers, No. 4., İstanbul Kültür Üniversitesi Publications, No. 171, 272-281.

54 See Article 36 of the Protocol No. 11 of the ECHR: Article 34/1 of the Statute of Inter-American Court of Human Rights.

relevant matter not already brought to its attention by the parties. *Amicus Curiae briefs* are filed in many supreme and constitutional courts. To illustrate this, one is suggested to have a look at the judgements of the Supreme Court, sitting as the Constitutional Court, of the Turkish Republic of Northern Cyprus.[55] In sum, the introduction of this mechanism will significantly help rapporteurs and judges to base their reasoning on concrete legal grounds.

9. Many constitutional courts are entitled to interpret their constitutions. For example, in the constitutions Albania (Article 124/1), Andorra (Article 3), Azerbaijan (Article 3/2, 64, 65 and 83), Belarus (Article 41), Belgium (Article 118), Bulgaria (Article 12/1), Canada (Section 53), Greece (Section 7, Article 51), Hungary (Article 1/g, 30/1(e) and 51), Moldavia (Section 4, 1/6), Russia (Article 21/2) TRNC (Article 149). There is no such a provision in the Turkish Constitution. Should this power be given to the Court, lower courts will correctly understand and interpret the Constitution.

10. The Court ignored hundreds of time the following provision of the Constitution: "decisions of annulment cannot be made public without a written statement of reasons" (Article 153/1). The Court has always been heavily rebuked for its nonchalant attitude towards disregarding this provision. The Court wants to publicise its decision before the promulgation of its reasoned opinion. There are understandable reasons to do so. Ergo, the new constitution should provide for a concrete solution to this long-lasting problem.

In conclusion, this article has intentionally excluded the case-law of the Court. The analysis of the Court's jurisprudence in the light of five-decade-experience, is subject to another study. It must be alluded in concluding that the jurisprudence of the Court is crammed with problems. One hopes that some of the problems arising out of the composition, competence and organisation of the Court will be smoothed away as a result of recent reforms made. The ideal Court however, is contingent upon establishing a court from scratch.

[55] See D.2/2011 or D. 5/2011 of TRNC Supreme Court Decisions at http://www.mahkemeler.net

ANALYSIS IN RESPECT OF THE TURKISH CODE OF OBLIGATIONS NO. 6098 OF CONSEQUENCES ATTACHED TO LUMP SUM FEE IN CONTRACTS FOR WORK

Assoc. Prof. Dr. Mehmet Serkan ERGÜNE*

ABSTRACT

The balance between performances of parties in a contract for work may be disrupted intolerably to the detriment of the contractor due to some later events. Considering this possibility, the lawmaker introduced the adaptability of contracts for work according to the changing circumstances and restoration of the balance between performances of parties where lump sum fee is at issue. This provision set out in TCO no. 6098, article 480/II is based on the clausula rebus sic stantibus theory, which makes performance of contracts conditional upon the persistence of circumstances and which is based on the principle of objective good faith. When conditions of clausula rebus sic stantibus theory are met, the contractor will have a formative right [*Gestaltungsrecht*] relieving him from the restrictive nature of the lump sum fee. We see the fundamental amendment introduced by TCO no.6098, article 480/ II at this point; for the lawmaker brought in a regulation that will end discussions on how the contractor will exercise this right.

Keywords: Contract for work, lump sum fee, clausula rebus sic stantibus theory, formative right.

ÖZET

Eser sözleşmesinde tarafların edimleri arasında kurulmuş olan denge, sonradan gelişen bir takım olaylar sebebiyle yüklenicinin aleyhine tahammül edilemeyecek kadar bozmuş olabilir. Bu ihtimali dikkate alan kanun koyucu, götürü bedelin kararlaştırıldığı hâllerde, eser sözleşmesinin değişen hâl ve şartlara uyarlanmasını, tarafların edimleri arasındaki dengenin yeniden sağlanmasını öngörmüştür. TBK.m.480/f. II'de yer alan düzenleme, sözleşmelerin ifasını koşulların değişmemesi şartına bağlayan ve temelini dürüstlük kuralında bulan clausula rebus sic stantibus teorisine dayanmaktadır. Clausula rebus sic stantibus teorisi için aranan şartlar gerçekleştiği takdirde yüklenici, götürü bedelin bağlayıcılığından kurtulma yönünde bir yenilik doğuran hakka sahip olmaktadır. TBK.m.480/f. II'nin getirdiği esaslı değişiklik de burada karşımıza çıkmaktadır; zira kanun koyucu yüklenicinin bu hakkı nasıl kullanacağı yönündeki tartışmalara son verecek bir düzenleme getirmiştir.

* Istanbul University, Faculty of Law, Department of Civil Law

Anahtar Kelimeler: Eser sözleşmesi, götürü ücret, clausula rebus sic stantibus teorisi, yenilik doğuran hak.

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I. CONCEPT OF LUMP SUM FEE

Determination or determinability in a definite manner in advance of the amount of fee to be claimed by contractor from owner in return for his obligation to produce a work in a contract for work is called lump sum fee.[1] This pre-agreed amount is not dependent on the actual expenses made by the contractor after commencement of the work or the value of the work upon its production. Hence, amount of the lump sum fee is agreed on the basis of the then prevailing state of the cost items such as price of materials and workmanship and predictable increases thereof and experiences from previous works. A profit share to be obtained by the contractor from the work will also be added to this agreed amount.

Lump sum fee may be determined as a total sum for the entire work (fixed turnkey fee) and it may also be agreed over fixed unit prices.[2] In lump sum fee payable as a total sum for the entire work, the fee claimable by the contractor is agreed in the contract as a fixed amount in advance.[3] On the other hand, where the fee is agreed on the basis of fixed unit

1 Halûk Tandoğan, Borçlar Hukuku Özel Borç İlişkileri [Law of Obligations Special Obligation Relationships], Volume: II, 3. Edition, Ankara 1987, p. 234; Gaudenz G. Zindel/Urs Pulver, Basler Kommentar, Obligationenrecht I, Art. 1-529 OR, Herausgeber: Heinrich Honsell/Nedim Peter Vogt/Wolfgang Wiegand, 4. Auflage, Basel 2007, Art. 373, Rn. 6; Kenan Tunçomağ, Türk Borçlar Hukuku [Turkish Law of Obligations], Volume: II, Special Obligation Relationships, İstanbul 1977, p. 1053; Cem Baygın, Türk Hukukuna Göre İstisna Sözleşmesinde Ücret ve Tabi Olduğu Hükümler [Fee in Contracts for Work and Provisions Applicable under Turkish Law], İstanbul 1999, p. 30; Hasan Erman, İstisna Sözleşmesinde Beklenilmeyen Haller (BK.m.365/2) [Hardship in Contracts for Work (TCO no.818 Art.365/2)], İstanbul 1979, p. 63; Enis Torun, "İstisna Akdinde (Eser Sözleşmesinde) Ücretin Götürü Yöntemle Saptanması ve Sonuçları (BK.m.365) I-II", Yargıtay Dergisi, Cilt: 8, Temmuz-Ekim 1982, Sayı: 3-4 [Indication of Fee on Lump Sum Basis in Contracts for Work and Its Consequences (TCO no.818 Art.365) I-II, Journal of the Court of Appeals, Volume: 8, July-October 1982, No: 3-4], p. 416; Aydın Zevkliler/K. Emre Gökyayla, Borçlar Hukuku Özel Borç İlişkileri [Law of Obligations Special Obligation Relationships], 11. Edition, Ankara 2010, p. 414.

2 For detailed information on methods of determination of fee in contracts for work, see Peter Gauch, Der Werkvertrag, 4. Auflage, Zürich 1996, Rn. 898 et seq.; Baygın, p. 30 et seq.; Damla Gürpınar, Eser Sözleşmesinde Ücretin Artırılması ve Eksiltilmesi [Increase and Reduction of Fee in Contracts for Work], İzmir 2006, p. 47 et seq.; Mustafa Alper Gümüş, Borçlar Hukuku Özel Hükümler [Law of Obligations Special Provisions], Volume: 2, İstanbul 2010, p. 148 et seq.

3 If it is agreed that any price increases during performance of work are to be reflected on the fee, global lump sum fee is at issue. See Gauch, Rn. 910 et seq.; Zindel/Pulver, Art. 373, Rn. 6; Baygın, p. 33; Zevkliler/Gökyayla, p. 417; Gürpınar, p. 62-63.

prices, the fee payable by the owner is calculated by way of multiplying the work performed by pre-determined unit prices.[4]

Regardless of the manner of determination of the lump sum fee, the common characteristic applying to all is their inherent certainty. Contractor is obliged to complete and deliver to the owner in accordance with the contract the work he undertook in return for the agreed fee. Even if the production of the work requires more efforts and costs than estimated, the contractor may not claim an increase in the fee from the owner. This principle set out under article 365/I of the former Turkish Code of Obligations [TCO no. 818] is a reflection of the "contracts must be honored" (*pacta sunt servanda*) principle and repeated exactly in article 480/I of the new Turkish Code of Obligations no. 6098 [TCO no.6098] as well.[5]

Lump sum fee is independent from actual production costs of the work and the quantity of the works produced. Contractor's contemplations on cost calculations at the time of agreeing on lump sum fee and whether or not the factors he took into consideration at that time changed afterwards is of no importance. This is why the risk of lump sum fee in contracts for work belongs to the contractor under TCO no.6098, article 480/I.

Likewise, owner's knowledge of the contractor's cost expenditure and whether or not he has informed the contractor on this matter does not affect the certainty of the lump sum fee.[6] This is because, as a person having more technical knowledge and experience compared to the owner, the contractor is required to calculate diligently the costs to result from the work he will produce by also taking his proceeds into consideration. Where the contractor is a tradesman at the same time as in most cases, he

4 Where it is agreed that the fee for the work shall be calculated over the annually changing unit prices, a contract executed on the basis of variable unit prices is at issue.

5 Obligation of the contractor to complete the work in return for a lump sum fee applies in respect of the works agreed to be completed in the contract only. In the event works that are not within the scope of the lump sum fee are performed, the contractor will be entitled to claim an additional fee from the owner. On this point, see Emre Gökyayla, Eser Sözleşmesinde Ek İş ve İş Değişikliği [Additional Work and Change Orders in Contracts for Work], İstanbul 2009, p. 35 et seq.

6 Tandoğan, p. 236; Baygın, p. 31; İbrahim Kaplan, "İnşaat Sözleşmelerinde Yapı Sahibinin Ücret Ödeme Borcu ve Yerine Getirilmemesinin Sonuçları", İnşaat Sözleşmeleri (Yönetici-İşletmeci, Mühendis ve Hukukçular İçin Ortak Seminer) [Owner's Fee Payment Obligation in Construction Contracts and Consequences of Non-payment, Construction Contracts (Common Seminar for Executives, Operators, Engineers and Lawyers], Ankara 18-29 March 1996, p. 130.

must act as a prudent businessman and review his profits and losses without being affected by the other party to the contract.[7]

After stating that the risk of lump sum fee shall belong to the contractor, the lawmaker has introduced the regulation of TCO no. 6098, article 480/III to maintain the balance of interests between parties. According to this provision corresponding to TCO no. 818, article 365/III, even if the produced work was performed with less effort and cost than estimated, contractor may claim the agreed fee from the owner; owner cannot claim a discount on the lump sum fee.

II. CONDITIONS FOR RELIEF OF CONTRACTOR FROM RESTRICTIVE NATURE OF LUMP SUM FEE

The balance between performances of parties in a contract for work may be disrupted intolerably to the detriment of the contractor due to some later events. In such cases, it may be against the principle of objective good faith to expect the contractor to abide by the lump sum fee and perform his obligation in accordance with the previously agreed terms (contracts must be honored). Considering this possibility, the lawmaker introduced the adaptability of contracts for work according to the changing circumstances and restoration of the balance between performances of parties where lump sum fee is at issue. In fact, this possibility brought in favor of the contractor in TCO no.6098, article 480/II is not a new provision but a repetition of TCO no.818, article 365/II.

This provision set out in TCO no. 6098, article 480/II is based on the clausula rebus sic stantibus theory, which makes performance of contracts conditional upon the persistence of circumstances and which is based on the principle of objective good faith.[8]

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7 Mistakes in the amount of lump sum fee can be a reason for annulment for the contractor under certain conditions to the extent they impair the intent to execute contract. However, as a rule, contractor is not entitled to annul the contract by reason of a mistake in the motive. For annulment of the contract by reason of a mistake in the motive by the contractor, who is a specialist in technical matters, does not square with the rules of honesty prevailing in business relations (TCO no. 6098, art.32). See. Tandoğan, s. 236; Tunçomağ, s. 1056; Erman, s. 66.
On the other hand, simple calculation errors do not affect the validity of contract; they are simply corrected (TCO no.6098, art. 31/ II).

8 On the clausula rebus sic stantibus theory, see Kemal Tahir Gürsoy, Hususi Hukukda Clausula Rebus Sic Stantibus (Emprevizyon Nazariyesi) [Clausula Rebus Sic Stantibus (Imprevision Theory) in Private Law], İstanbul 1950, p. 11 et seq.; Mustafa Dural, Borçlunun Sorumlu Olmadığı İmkânsızlık [Impossibility with No Liability of Obligor], İstanbul 1976, p. 28-33;

It needs to be pointed out that whereas TCO no. 818 provided no general provision on adaptation of contracts,[9] TCO no. 6098, article 138 introduced a general provision regarding adaptation under the title of "Hardship". In this respect, TCO no.6098, article 480/II is the reflection of TCO no. 6098, article 138 in contracts for work; in other words, TCO no. 6098, article 138 is a general provision, whereas TCO no.6098, article 480/II is a special provision.

TCO no.6098 introduced no new regulation governing the conditions for the contractor to be able to claim adaptation where lump sum fee is agreed in contracts for work. Therefore, the principles set forth in the doctrine and practice in respect of TCO no. 818, article 365/ II[10] will be applicable to TCO no.6098, article 480/II as well:[11]

Erman, p. 33-44; Karl Oftinger, "Cari Akitlerin Temellerinde Buhran İcabı Tahavvül (Clausula rebus sic stantibus hakkında)", Translated by: Bülent Davran, İstanbul Üniversitesi Hukuk Fakültesi Mecmuası, Cilt: VIII, Sayı: 3-4 [Amendment of Elements of Current Contracts due to Crisis (About Clausula rebus sic stantibus), Periodical of the Istanbul University Faculty of Law, Volume: VIII, No: 3-4], p. 598 et seq.; Şener Akyol, Dürüstlük Kuralı ve Hakkın Kötüye Kullanılması Yasağı [Rule of Objective Good Faith and Prohibition of Abuse of Rights], 2. Edition, İstanbul 2006, p. 83 et seq.; Başak Baysal, Sözleşmenin Uyarlanması [Adaptation of Contract], İstanbul 2009, p. 17 et seq.; Ayşe Arat, Sözleşmenin Değişen Şartlara Uyarlanması [Adaptation of Contract to Changing Circumstances], Ankara 2006, p. 52 et seq.; Seçkin Topuz, Türk – İsviçre ve Alman Borçlar Hukukunda Denge Bozulması ve İfa Güçlüğü Durumlarında Sözleşmeye Müdahale [Intervention to Contract in the Events of Disturbance of Equilibrium and Hardship under Turkish – Swiss and German Laws of Obligation], Ankara 2009, p. 69 et seq.

Version of Clausula rebus sic stantibus theory that has been improved and based on objective foundations is the frustration of contract *[Wegfall der Geschäftsgrundlage]* view. For detailed information on the frustration of contract theory developed in the German doctrine and put into effect as a piece of legislation in BGB § 313 with the reform in 2002, see Dural, p. 33-47; Erman, p. 45-47; Gürsoy, p. 18-22; Rona Serozan, Sözleşmeden Dönme [Rescission of Contract], 2. Edition, İstanbul 2007, p. 347 et seq.; Baysal, Uyarlama [Adaptation], p. 22 et seq.; Yeşim Gülekli, "Aşırı İfa Güçlüğü ve Alacaklının Tasavvurunun Boşa Çıkması Halinde İşlem Temelinin Çökmesi Öğretisi", Mukayeseli Hukuk Araştırmaları Dergisi, No. 18 [Doctrine of Frustration of Contract in Case of Hardship and Obligor's Frustration, Periodical of Comparative Law Studies, No. 18], İstanbul 1990, p. 57 et seq.; Topuz, p. 75 et seq.

9 Since there was no general provision on the adaptation of contracts in TCO no. 818, there have been discussions on whether or not TCO no.818, article 365/ II will also be applicable to contractual relations other than contracts for work by way of analogy; yet the generally accepted view was making the adaptation on the basis of the Turkish Civil Code, article 2. For the views in doctrine, see Baysal, Uyarlama [Adaptation], p. 77 et seq.

10 For detailed information on the conditions required for adaptation of contract, see Baysal, Uyarlama [Adaptation], p. 143 et seq.

11 Where the fee is indicated as an approximate amount or approximate cost estimate is taken as basis in contracts for work, TCO no. 6098 article 480/ II will be applicable by analogy as well. See Hugo Oser/Wilhelm Schönenberger, Kommentar zum Schweizerischen Zivilgesetzbuch, V. Band: Das Obligationenrecht, 2. Teil (Halbband): Art. 184-418, 2. Auflage, Zürich 1936, Art. 373, Rn. 17; Tandoğan, p. 281-282; M. Turgut Öz, İş Sahibinin Eser Sözleşmesinden Dönmesi [Owner's Rescission of Contract for Work], İstanbul 1989, p. 78-80; Cevdet Yavuz/Faruk

• Circumstances unforeseeable or foreseeable yet disregarded by the parties should be at issue.[12]

• Unforeseeable circumstances should prevent[13] or make extremely onerous[14] the performance of the work in return for the agreed lump sum fee.

Acar/Burak Özen, Borçlar Hukuku Dersleri [Law of Obligations Lectures], 9. Edition, İstanbul 2011, p. 470; Zevkliler/Gökyayla, p. 432; Torun, p. 574; for opposing view, see Baygın, p. 132-133.

It should be noted that since adaptation of contracts is regulated as a general provision under the heading of hardship in TCO no. 6098 article 138, in cases where the fee is determined as an approximate amount or approximate cost estimate is taken as basis, it will also be possible to benefit from this provision. See Emre Gökyayla, "6098 Sayılı Türk Borçlar Kanununa Göre Eser Sözleşmesine İlişkin Hükümlerin Değerlendirilmesi", Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi, Özel Hukuk Sempozyumu Özel Sayısı, 6098 Sayılı Türk Borçlar Kanunu Hükümlerinin Değerlendirilmesi Sempozyumu (3-4 Haziran 2011), Prof. Dr. Cevdet Yavuz'a Armağan [Evaluation of Provisions Governing Contracts for Work under Turkish Code of Obligations no. 6098, Marmara University Faculty of Law Journal of Legal Studies, Private Law Symposium Special Edition, Symposium for Evaluation of Provisions of the Turkish Code of Obligations no. 6098 (3-4 June 2011), Tribute to Prof. Dr. Cevdet Yavuz], İstanbul 2011, p. 588.

Since in contracts of construction against land share, the amount of land shares to be transferred to contractor is agreed from the outset, a lump sum fee is at issue. Therefore, the provision in TCO no. 6098, article 480/ II can be applied to contracts of construction against land share as well. Baygın, p. 143 et seq.; Bilal Kartal, Kat Karşılığı İnşaat Sözleşmesi [Contract of Construction against Condominium], Ankara 1993, p. 140.

12 For adaptation of contract, it is not necessary for the event causing disturbance of the balance between performances to be extraordinary. With the concept of extraordinary circumstance mentioned in the doctrine and the court precedents, "unforeseeability" is meant. See Necip Kocayusufpaşaoğlu, "İşlem Temelinin Çökmüş Sayılabilmesi İçin Sosyal Felaket Olarak Nitelenebilecek Olağanüstü Bir Olayın Gerçekleşmesi Şart mıdır?", Prof. Dr. M. Kemal Oğuzman'ın Anısına Armağan [Is it Necessary for an Extraordinary Circumstance that can be Characterized as a Social Disaster to Take Place for Considering a Contract's Purpose as Frustrated?, Tribute to Prof. Dr. M. Kemal Oğuzman], İstanbul 2000, p. 512.

In order to be able to adapt the contract on the ground of frustration of purpose of contract, the event taking place afterwards should be in the nature causing the contract to be annulled on the ground of substantial error in motive if it was present in the beginning. This is because the only difference between application of the frustration of contract purpose view and TCO no. 6098 article 32 regarding substantial error in motive is the moment of occurrence of events. Considering that in TCO no. 6098 article 32, lawmaker does not seek an event of ordinary nature, it is also not required to seek occurrence of an event of ordinary nature in respect of application of TCO no. 6098, article 480/ II. Kocayusufpaşaoğlu, p. 503 et seq.; in particular p. 511-512.

13 Since the expression "*prevents performance of the work*" in TCO no. 818 article 365/ II evokes impossibility of performance, it was criticized in the doctrine. See Georg Gautschi, Berner Kommentar, Kommentar zum Schweizerischen Privatrecht, Das Obligationenrecht, 2. Abteilung: Die einzelnen Vertragsverhältnisse, 3. Teilband: Der Werkvertrag, Artikel 363-379 OR, Bern 1967, Art. 373, Rn. 12a; Tandoğan, p. 246; Fahrettin Aral, Borçlar Hukuku Özel Borç İlişkileri [Law of Obligations Special Obligation Relationships], 8. Edition, Ankara 2010, p. 375; Erman, p. 81-82; Yavuz/Acar/Özen, p. 467; Baygın, p. 77-80; Zindel/Pulver, Art. 373, Rn. 22; Gürpınar, p. 145.

- Emergence of hardship of performance should not be attributable to the contractor.
- Contractor should notify the owner concerning the hardship.[15]
- Contractor should not have waived his right to claim adaption.[16]

When all of these conditions are met, the contractor will have a formative right [*Gestaltungsrecht*] relieving him from the restrictive nature of the lump sum fee.[17] We see the fundamental amendment introduced by TCO

Taking the criticism in the doctrine into consideration, lawmaker used the expression "*prevention of performance of the work in return for the agreed lump sum fee*" in TCO no. 6098 article 480/ II.

14 In order for the contractor to benefit from TCO no. 6098 article 480/ II claiming hardship, he should not have performed his part of obligation. This is because, by performing his own part of obligation, the contractor is considered to have implicitly accepted that the unforeseeable circumstances that occurred did not prevent performance of the work in return for the agreed lump sum fee; unless the contractor performed his obligation by raising a reservation. See Kaplan, p. 153; Baygın, p. 93; Zevkliler/Gökyayla, p. 426; Gürpınar, p. 131.

15 Although such a condition is not sought in TCO no.6098, article 480/ II, this obligation emanates from TCO no.6098, article 472/ III governing the contractor's duty of care. Here, it should not be overlooked that contractor's failure to notify will only cause his inability to benefit from TCO no.6098, article 480/ II; and it will not give rise to his liability.
Furthermore, it should be noted that notification requirement for invocation of clausula rebus sic stantibus theory is sought in all contractual relationships in general. See Gürsoy, p. 169 et seq.

16 Since TCO no. 6098, article 480/ II is not a mandatory provision, parties may agree to the contrary. See Tandoğan, p. 247; Özer Seliçi, İnşaat Sözleşmelerinde Müteahhidin Sorumluluğu [Liability of Contractor in Construction Contracts], İstanbul 1978, p. 60; Erman, p. 122; 126; Tunçomağ, p. 1062; Kaplan, p. 153; Baygın, p. 100.
However, if the exact application of the waiver clause in the contract restricts the personal and economic freedom of the contractor in a manner that can be considered immoral, such waiver undertaking will be invalid as per Turkish Civil Code article 23/ II and TCO no.6098, article 27/I. Likewise, where reliance by the owner on the waiver clause is against the rule of objective good faith, contractor will be entitled to rely on TCO no. 6098 article 480/ II. See İsmet Sungurbey, Medenî Hukuk Sorunları [Civil Law Issues], Volume: I, İstanbul 1973, p. 175-179; Tunçomağ, p. 1062; Seliçi, Müteahhidin Sorumluluğu [Liability of Contractor], p. 62; Erman, p. 126; Zevkliler/Gökyayla, p. 428; Baygın, p. 100-101; Kaplan, p. 153; Gülekli, p. 50; 53.
Whether or not parties can bypass application of the rule of good faith by agreement is disputed. For the view allowing this, see M. Kemal Oğuzman/Nami Barlas, Medenî Hukuk [Civil Law], 17. Edition, İstanbul 2011, p. 296; for opposing view, see Mustafa Dural/Suat Sarı, Türk Özel Hukuku [Turkish Private Law], Volume: I, Temel Kavramlar ve Medenî Kanunun Başlangıç Hükümleri [Basic Concepts and Introductory Provisions of the Civil Code], 6. Edition, İstanbul 2011, p. 243; Ergun Özsunay, Medenî Hukuka Giriş [Introduction to Civil Law], 5. Edition, İstanbul 1986, p. 309; Akyol, p. 7-10.

17 For application of TCO no.6098 article 480/ II, it is not necessary for hardship to arise from cost increases. Since where hardship is caused by another reason, TCO no.6098 article 480/ II will still be applicable, there is no need to invoke TCO no. 6098, article 138, which is a general provision. For opposing view, see Başak Baysal, "6098 Sayılı Türk Borçlar Kanunu'nun 480. Maddesinin Değerlendirilmesi", İstanbul Üniversitesi Hukuk Fakültesi Mecmuası, Prof. Dr. İl Han Özay'a Armağan, Cilt: LXIX, Sayı: 1-2, 2011 [Evaluation of Article 480 of Turkish Code of

no.6098, article 480/ II at this point; for the lawmaker brought in a regulation that will end discussions on how the contractor will exercise this right.[18]

III. ADAPTATION OR RESCISSION OF CONTRACT UNDER TCO NO.6098, ARTICLE 480/ II

A. Out-of-court Exercise of Formative Rights

TCO no.6098, article 480/ II entitles the contractor to request from the judge adaptation of the contract to the new circumstances, and in case this is not possible or the other party cannot be expected to do so, to rescind the contract. Comparing the wording of the two provisions, we see that TCO no.6098, article 480/ II is different from TCO no. 818, article 365/ II. While TCO no. 818, article 365/ II reads *" ... by reason of his discretionary power, judge shall either increase the agreed fee or terminate the contract"*, in TCO no.6098, article 480/ II discretionary power of the judge is not mentioned. Due to such wording of TCO no. 818, article 365/ II, whether or not contractor is required to exercise his formative right by applying to court gave rise to discussions in the doctrine.

According to some authors taking the wording of TCO no. 818, article 365/ II as basis,[19] in order for the contractor to exercise his formative right, he must file a court case; a formative judge order on this matter is required. After establishing that the conditions set out in TCO no. 818, article 365/ II are met in a concrete case, by exercising the discretionary power conferred on him by the lawmaker, judge will order either an increase in the lump sum fee or termination of the contract. The most important outcome intended to be achieved by making these rights exercisable out-of-court is to prevent the contractor, who is in hardship,

Obligations no.6098, Periodical of Istanbul University Faculty of Law, Tribute to Prof. Dr. İl Han Özay, Volume: LXIX, No: 1-2, 2011], p. 479.

18 Formative rights are divided into two in respect of their way of exercise: While some of the formative rights can be exercised through a declaration of intent directly directed at the other party, others can be exercised by way of application to a public authority, in particular, to a court. Where a formative right is exercised by a declaration directed at the other party, a formative act [*Gestaltungsgeschäft*], where it is exercised by applying to court, a formative legal action [*Gestaltungsklage*] will be at issue. See Oğuzman/Barlas, p. 159; Dural/Sarı, p. 180.

19 Gauch, Rn. 1122 et seq.; Zindel/Pulver, Art. 373, Rn. 32; M. Turgut Öz, Yönetim (Management) Sözleşmesi [Management Contract], İstanbul 1997, p. 155-156; Gülekli, p. 68; Gümüş, p. 176-177; for the view generally requiring adaptation claim to be raised by filing an action, see M. Kemal Oğuzman/M. Turgut Öz, Borçlar Hukuku Genel Hükümler [Law of Obligations General Provisions], Volume: I, 9. Edition, İstanbul 2011, p. 212; Topuz, p. 328-331.

from having to continue construction until a result is obtained from a court case to be filed. Although this outcome can eliminate an important downside in practice, it will be appropriate to seek a court order in accordance with the wording of the law. This is because obliging the owner to apply to court to claim his rights, on the other hand, removing the obligation of the contractor, who demands adaptation of the contract to new circumstances claiming that he is facing a hardship, to file a court case, gives rise to undue protection of the contractor. A contractor, who demands an increase in the lump sum fee or termination of the contract, should immediately apply to court and request suspension of his performance obligation pending the proceedings as injunctive relief.[20]

Whereas, according to the predominant view in the doctrine,[21] despite the wording of the TCO no. 818, article 365/ II, in order to meet the requirements of daily life in an easier way, contractor should be able to exercise his formative right through his unilateral declaration to be directed to the owner, without any court order. For it is not an appropriate way of solution to expect a contractor, who is undergoing an unbearable event of hardship, to seek a favorable court order by applying to court first and continue with performing the work during this period.

Lawmaker sides with the predominant view in its regulation of TCO no. 6098, article 480/ II: According to the article's ratio legis, *"Unlike the second paragraph of article 365 of the Code of Obligations no.818, in the draft law, instead of citing judge's discretionary power within the framework of the adaptation right conferred on the contractor, considering that this right involves formative rights that are not necessarily exercisable by way of a court case, which alternative rights the contractor may exercise and in which order he may exercise these is stated."*

In interpretation of TCO no. 6098, article 480/ II, lawmaker's intention specified in article's ratio legis must be taken into account.[22]

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20 Öz, Yönetim Sözleşmesi [Management Contract], p. 156.

21 Gautschi, Art. 373, Rn. 13b; Tandoğan, p. 251 et seq.; Gürsoy, p. 175 et seq.; Serozan, p. 356; Tunçomağ, p. 1060-1061; Erman, p. 114-115; Baygın, p. 106 et seq.; Baysal, Uyarlama [Adaptation], p. 210-211; Torun, p. 575; Arat, p. 173.
For the main solutions agreed on in relation to adaptation of contract, see Baysal, Uyarlama [Adaptation], p. 224 et seq.

22 In interpretation of provisions of law, preparatory works for the law (ratio legis, development of drafts, commission and parliament discussions) are of guiding nature. See Oğuzman/Barlas, p. 73; Dural/Sarı, p. 127.

Accordingly, when a contractor in hardship seeks to claim adaptation of contract, it will no more be possible to assert that this right must be exercised through a court case. [23]

B. Adaptation and Rescission are not Alternative Rights

Contractor's formative rights of adaptation and rescission of contract, which are applicable where the conditions of TCO no. 6098, article 480/ II are present, are not alternative rights. As expressly set forth in the article, contractor must first exercise his right of claiming adaptation of the contract to the new circumstances.[24] Contractor's exercise of rescission right is made subject to satisfaction of certain conditions. Accordingly, if adaptation of the contract to the new circumstances is not possible or the owner cannot be expected to accept the contractor's adaptation claim, the contractor will be entitled to exercise his right of rescission of contract.

As can be understood from TCO no. 6098, article 480/ II, if hardship can be overcome by an increase in the lump sum fee and if such increase in the fee will not be at a level unacceptable to the owner, the contractor is required to claim the adaptation of contract first.[25] Whether or not these conditions are satisfied is to be checked in each concrete case; yet where a substantial part of the work is completed, the requirement of maintaining the contract by adaptation will prevail.

If the increase in lump sum fee does not suffice to overcome the hardship or if the increased amount will be at a level far from the lump sum fee agreed in the contract, contractor may be relieved from the binding effect of the contract by exercising his right of rescission.

Should the matter be brought before the court due to owner's objection to contractor's exercise of his formative right, judge's order will be in the

23 For a similar view, see Baysal, 6098 Sayılı Türk Borçlar Kanunu'nun 480. Maddesinin Değerlendirilmesi [Evaluation of Article 480 of Turkish Code of Obligations no.6098], p. 480-482.

24 Although there was no such regulation in TCO no.818 article 365/ II, in the doctrine it was accepted that efforts must be made first for the keeping up of the contract. See Zindel/Pulver, Art. 373, Rn. 31; Erman, p. 111; Öz, Yönetim Sözleşmesi [Management Contract], p. 154; Gülekli, p. 65; see also Baysal, Uyarlama [Adaptation], p. 251 et seq.

25 If the judge ordered an increase in the lump sum fee in a contract of construction against land share, this increase should be made in the form of a land share to the extent possible. However, if such practice will cause inequitable consequences for the owner or if it will not be possible (e.g. if the land shares were transferred to third parties), the increase in favor of the contractor must be determined as a certain amount of money. See Baygın, p. 144.

nature of a declaratory order. Also, where the contractor wishes to exercise his formative right through a court case, the legal consequence in the form of termination of contract or increase in lump sum fee will be created upon service of the statement of claim to owner.[26]

Notwithstanding this, sometimes court's order may be formative in nature.[27] That is, contractor is not totally free in exercising the rights bestowed under TCO no. 6098, article 480/ II. Judge may decide that the right exercised by the contractor is not suitable for the characteristics of the concrete event as a result of an evaluation on the basis of the objective good faith principle. For example where the construction is complete or the work is at an advanced phase, contractor is, as a rule, entitled to claim adaptation of the contract. In such cases, if the contractor has notified the owner of his termination of the contract and the owner has objected to this, judge may order adaptation of the contract instead of rescission thereof relying on his discretionary power. Likewise, in cases where the contractor claims adaptation, judge may also decide for termination of the contract where necessary (e.g. if the lump sum fee will increase to a level, acceptance of which is not expectable from the owner). In that case, the contractor shall bear the consequences of the judge's disapproval of the alternative right he preferred to exercise.

In this context, it should be underlined that in cases where the contractor files a case under TCO no. 6098, article 480/ II, the judge will not be bound by the submitted claims and requests. In a case for adaptation of contract filed by the contractor requesting either an increase in the lump sum fee or termination of the contract, it is the judge that will decide on which right is to be exercised within the framework stipulated in TCO no. 6098, article 480/ II (first adaptation, if not applicable, rescission).[28] Although in article 26/ I of the Turkish Code of Civil Procedure, it is stated that the judge is bound by the claims and requests of parties, in the

26 Tunçomağ, p. 1061; Baysal, Uyarlama [Adaptation], p. 268.

27 Tunçomağ, p. 1061-1062; Baygın, p. 108.

28 Baygın, p. 109-110; Tandoğan, p. 254-255 and in particular fn 40. For the opposing view accepting that judge is bound by the claims of parties, see Zevkliler/Gökyayla, p. 429, fn. 461. Compare Gürpınar, p. 151.
According to a view, if in a court case he files, contractor requests termination of contract, judge may decide for increasing the lump sum fee instead of termination of the contract where necessary, by exercising his discretionary power. Notwithstanding this, in a court case where an increase in the fee is requested only, judge may not order termination of contract instead of it. See Erman, p. 118; Öz, Yönetim Sözleşmesi [Management Contract], p. 154-155; also in relation to TCO no.6098 article 138, see Oğuzman/Öz, p. 212.

second paragraph of the article it is expressly set out that such dependence of the judge is eradicated by some provisions of the substantive law. TCO no. 6098, article 480/ II is one of the provisions conferring such power on the judge. Yet, certainly the parties may agree on either adaptation or rescission request; in that case, judge must decide in accordance with this agreement of parties, which is in the nature of settlement and conclude the proceedings accordingly.[29]

C. Consequences of Adaptation and Rescission

Where an increase in the lump sum fee is at issue within the scope of adaptation of contract, increases in costs outside the contractor's ordinary risk will be taken into account.[30] For ordinary risks are related to the sphere of activity of the contractor and are not taken into account within the framework of TCO no. 6098, article 480/ II. On the other hand, cost increases in excess of ordinary risks are to be shared between parties in an equitable manner (on a fifty-fifty basis as a rule).[31] However, characteristics of the concrete event may also require a different apportionment (e.g. if the economic powers of the contractor and the owner are different or if the contractor is faulty[32]); contractor may still not obtain any profit or even make loss despite the increase in the lump sum fee.[33]

Since, unlike TCO no.818, article 365/ II, in TCO no. 6098, article 480/ II adaptation of contract is expressly specified, it is also possible to

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29 Gauch, Rn. 1121; Zindel/Pulver, Art. 373, Rn. 31; Gümüş, p. 176-177.

30 It is a debated issue whether or not owner may exercise right of rescission of contract relying on TCO no. 6098 article 482 by way of analogy in cases where increase of lump sum fee on the basis of TCO no.6098 article 480/ II is at issue. As rightfully stated in the doctrine, where increase of lump sum fee on the basis of TCO no.6098 article 480/ II is at issue, owner should not be entitled to rescind the contract relying on TCO no. 6098 article 482. Otherwise TCO no.6098 article 480/ II will turn into a provision with no meaning; because in circumstances where contractor relies on TCO no.6098 article 480/ II, owner will block the way of adaptation of contract by rescinding the contract in accordance with TCO no. 6098 article 482. See Öz, Eser Sözleşmesi [Contract for Work], p. 78-80; Baygın, p. 116-117; for opposite view, see Kaplan, p. 155; Torun, p. 579.
Nevertheless, undoubtedly, owner is entitled to terminate the contract for work as per TCO no. 6098 article 484 before the completion of the work provided that he pays the fees for the portion of the work performed and compensates all damages of the contractor.

31 Gürsoy, p. 200; Baygın, p. 113; Gülekli, p. 67; Gürpınar, p. 153. Compare Zindel/Pulver, Art. 373, Rn. 28.

32 Fault on the part of contractor prevents his reliance on TCO no. 6098 article 480/ II. Yet, where the fault of the contractor is far less than the hardship that emerges, he may benefit from this right.

33 Tandoğan, p. 256; Baygın, p. 113-114. Compare Erman, p.113.

extend the performance period or make some changes etc. in the form of performance instead of increasing the lump sum fee.[34] In each individual case, the mutual state of interests of parties should be weighed and the new terms of contract should be established equitably.[35]

If the contractor exercises his right of rescission of contract due to the impossibility of adaptation of contract or since the owner cannot be expected to accept adaptation, the contractual relationship will terminate retroactively.[36] Considering the contract for work as a contract of instant performance in parallel with the predominant view in the doctrine[37] and the Court of Appeals precedents, lawmaker expressly specified that termination of contract will be through rescission.

Whether or not the owner is entitled to claim damages upon rescission of contract by contractor is not regulated in the law. Yet, in the doctrine,[38] it is accepted that judge may order payment of an equitable fee in order to eliminate the drawbacks of assumption of all risks (performance damages) by the owner where contractor rescinds the contract due to hardship. Here, the fee payable by the contractor to the owner is in fact not compensation of damages but it is in the nature of *"risk fee*" or "*fee*

34 Since TCO no.818 article 365/II cited only increase of lump sum fee and termination of contract, some authors argued that judge could not decide on a different way of solution without agreement of parties to the contrary. See Gauch, Rn. 1108; 1126; Tandoğan, p. 256; Baygın, p. 114-115; Torun, p. 578; Gümüş, p. 176.
For the view accepting that judge may take other measures for adaptation of contract without being bound by the wording of TCO no.818 article 365/ II, see Erman, p. 110-111; Kartal, p. 140; Öz, Yönetim Sözleşmesi [Management Contract], p. 155.

35 Yavuz/Acar/Özen, p. 469; Gökyayla, Eser Sözleşmesine İlişkin Hükümlerin Değerlendirilmesi [Evaluation of Provisions Governing Contracts for Work], p. 587.

36 Legal consequences of rescission of contract are disputed in the doctrine. See Serozan, p. 502 et seq.; Vedat Buz, Borçlunun Temerrüdünde Sözleşmeden Dönme [Rescission of Contract in Default of Debtor], Ankara 1998, p. 117 et seq.; Oğuzman/Öz, p. 548 et seq.; Selâhhatin S. Tekinay/Sermet Akman/Halûk Burcuoğlu/Atillâ Altop, Tekinay Borçlar Hukuku Genel Hükümler [Law of Obligations General Provisions], 7. Edition, İstanbul 1993, p. 967-968; Fikret Eren, Borçlar Hukuku Genel Hükümler [Law of Obligations General Provisions], 12. Edition, İstanbul 2010, p. 1075 et seq.; Özer Seliçi, Borçlar Kanuna Göre Sözleşmeden Doğan Sürekli Borç İlişkilerinin Sona Ermesi [Termination of Continuous Contractual Obligation Relationships Under the Code of Obligations], İstanbul 1977, p. 208 et seq.

37 Whether contract for work involves an instant performance or it creates a continuous obligation relationship has been debated for a long time in the doctrine. See Öz, Contract for Work, p. 12 et seq.; Seliçi, Sürekli Borç İlişkilerinin Sona Ermesi [Termination of Continuous Obligation Relationships], p. 26; Aral, p. 316-317; Baygın, p. 19-21; Erman, p. 9-11; Zevkliler/Gökyayla, p. 359-361.

38 Gauch, Rn. 1118; Oftinger, p. 619; Gürsoy, p. 203-204; Dural, p. 73; Serozan, p. 354-355; Gülekli, p. 67; Baygın, p. 124-127. Compare Arat, p. 196.

for escape from contract".[39] In this way, the contractor will participate in an equitable manner in the damages incurred by the owner due to rescission of contract. In this way, any expenses made by the owner in reliance on that the contract will be performed will be covered; yet since compensation of reliance damages is not in question, recovery of any missed convenient opportunities and profits will not be at issue.[40]

Termination of contract by the contractor where required by the rule of objective good faith can only be effective ex nunc. This is because according to the last sentence of TCO no.6098, article 480/ II, *"In cases where required by the rule of objective good faith, contractor may exercise his right of termination only."* This sentence not provided in TCO no.818, article 365/ II was added to TCO no.6098, article 480/ II upon inspiration by the Court of Appeals Decision for Unification of Conflicting Judgments dated 25.01.1984 and File no. 1983/3, Decision no.1984/1 as also stated in the ratio legis of the article. With this, it was intended to prevent inequitable consequences that may emerge in individual cases due to the reason that contract for work is an obligation relationship involving instant performance. According to this, termination of the contract for work will be in the form of rescission as a rule and will be effective ex tunc; however, if in the concrete event, termination of the contract with ex tunc effect will be inequitable (Turkish Civil Code, article 2), termination right shall replace rescission. In that case, contractor's termination of the contract for work will be effective ex nunc as a continuous obligation relationship.[41] For instance, if the contractor fell in hardship after completing a substantial part of the work and he had to terminate the contract since the conditions for adaptation were not present, then, termination will have ex nunc effect. In such a case, the part of work completed until the termination of contract will be considered as partial performance and the contractor will be able to claim

39 Regarding the view that the basis of this payment is the principle of burden sharing, see Baygın, p. 126-127; Baysal, Uyarlama [Adaptation], p. 264.

40 Regarding liability for reliance damages, see Mehmet Serkan Ergüne, Olumsuz Zarar [Reliance Damages], İstanbul 2008, p. 36 et seq.

41 The general regulations in the TCO no. 818 were drafted in view of contracts involving instant performance and these do not quite apply to the characteristics of continuous obligation relationships. Considering the criticism made in the doctrine, the lawmaker introduced into the TCO no.6098 provisions that apply to the characteristics of continuous obligation relationships. In TCO no. 6098, article 126, it is expressly set forth that in contracts involving continuous performance, performance of which has begun, termination of contract is in the nature of termination with ex nunc effect. Regarding this regulation, see Oğuzman/Öz, p. 557-559.

a fee (portion of the lump sum fee agreed in the contract corresponding to the partial performance) for this from the owner. If in this case, the contract is terminated with ex tunc effect, owner will have obtained an unjust interest to the detriment of the contractor; for the contractor will not be able to claim payment of a fee for the substantial part of the work he has completed due to the rescission of contract, –particularly in construction contracts – he may raise claims from the owner within the framework of provisions of unjust enrichment only (i.e. cost of workmanship, materials, etc. excluding any profit).

D. Owner's Ability to Benefit From TCO no.6098, article 480/ II by way of Analogy

Since only the contractor is entitled to benefit from TCO no.6098, article 480/ II, whether or not owner can also rely on this provision is disputable. I am of the opinion that the fact that TCO no.6098, article 480/ II provides this option for the contractor only does not result from its intention of not granting the owner the right of adaptation; in other words, here, lawmaker's qualified silence is not at issue. Lawmaker drafted TCO no.6098, article 480/ II taking the contractor as the main subject since according to experiences of life, hardship events occur mostly on the part of contractor. It should be accepted that the owner may benefit from TCO no.6098, article 480/ II as well by way of analogy where the conditions for adaptation are present for the owner, who is required to pay the lump sum fee (e.g. if the construction costs of the work decreased considerably due to unforeseen or foreseen yet disregarded reasons), although it is a rare possibility. There is no good reason to deprive the owner of this right where the balance between performances is impaired to the detriment of the owner.[42] Given that the contractor is entitled to claim adaptation although he bears the risk of the lump sum fee, not allowing the owner to benefit from this right would be against the purpose of the law and eventually the frustration of contract purpose theory *[Wegfall der Geschäftsgrundlage]*. Article 138 governing hardship, which is one of the new provisions introduced by the TCO no. 6098, affirms this conclusion. This is because TCO no. 6098, article 138 entitles either contract party going through hardship due to an unforeseen and even unforeseeable extraordinary circumstance to claim adaptation. Assuming that there is a legal gap in TCO no. 6098, article 480/ II (and

[42] Gauch, Rn. 1145-1146; Erman, p. 119; Gümüş, p. 174; Gürpınar, p. 154-155. For opposing view, see Tandoğan, p. 257; Baygın, p. 128; Torun, p. 579; Zevkliler/Gökyayla, p. 429-430.

no qualified silence)[43], the owner may benefit from TCO no.6098, article 138 by way of analogy as well as TCO no.6098, article 480/ II.[44]

CONCLUSION

Determination or determinability in a definite manner in advance of the amount of fee to be claimed by contractor from owner in return for his obligation to produce a work in a contract for work is called lump sum fee. The balance between performances of parties in a contract for work may be disrupted intolerably to the detriment of the contractor due to some later events. In such cases, it may be against the principle of objective good faith to expect the contractor to abide by the lump sum fee and perform his obligation in accordance with the previously agreed terms (contracts must be honored). In fact, this possibility brought in favor of the contractor in TCO no. 6098, article 480/II is not a new provision but a repetition of TCO no. 818, article 365/ II. This provision set out in TCO no. 6098, article 480/II is based on the clausula rebus sic stantibus theory, which makes performance of contracts conditional upon the persistence of circumstances and which is based on the principle of objective good faith.

TCO no.6098 introduced no new regulation governing the conditions for the contractor to be able to claim adaptation where lump sum fee is agreed in contracts for work. Therefore, the principles set forth in the doctrine and practice in respect of TCO no. 818, article 365/ II will be applicable to TCO no.6098, article 480/II. When conditions of clausula rebus sic stantibus theory are met, the contractor will have a formative right relieving him from the restrictive nature of the lump sum fee. We see the fundamental amendment introduced by TCO no.6098, article 480/

[43] Should it be argued that lawmaker is intentionally silent in TCO no.6098 article 480/ II, since this article is a special provision, the owner will not be able to rely on TCO no.6098 article 138, which is a general provision.

[44] Here, it needs to be noted that TCO no. 6098 article 138 does not govern reasons for adaptation other than hardship. The event of disturbance of equilibrium between performances due to a decrease in the value of the counter performance, even if it does not constitute hardship, is left outside the scope of TCO no. 6098 article 138. In the ratio legis of the article, it is stated that the matter is left to theory and practice on the basis of Turkish Civil Code article 1/ II or article 2. Thus, owner may benefit from TCO no. 6098 article 138, by way of analogy only. See and compare Gökyayla, Eser Sözleşmesine İlişkin Hükümlerin Değerlendirilmesi [Evaluation of Provisions Governing Contracts for Work], p. 587-588; Baysal, 6098 Sayılı Türk Borçlar Kanunu'nun 480. Maddesinin Değerlendirilmesi [Evaluation of Article 480 of Turkish Code of Obligations no. 6098], p. 479-480.

II at this point; for the lawmaker brought in a regulation that will end discussions on how the contractor will exercise this right.

Comparing the wording of the two provisions, we see that TCO no.6098, article 480/ II is different from TCO no. 818, article 365/ II. While TCO no. 818, article 365/ II reads *" ... by reason of his discretionary power, judge shall either increase the agreed fee or terminate the contract"*, in TCO no.6098, article 480/ II discretionary power of the judge is not mentioned. Due to such wording of TCO no. 818, article 365/ II, whether or not contractor is required to exercise his formative right by applying to court gave rise to discussions in the doctrine. Lawmaker sides with the predominant view in its regulation of TCO no. 6098, article 480/ II. Accordingly, when a contractor in hardship seeks to claim adaptation of contract, it will no more be possible to assert that this right must be exercised through a court case.

Contractor's formative rights of adaptation and rescission of contract, which are applicable where the conditions of TCO no. 6098, article 480/ II are present, are not alternative rights. As expressly set forth in the article, contractor must first exercise his right of claiming adaptation of the contract to the new circumstances. Contractor's exercise of rescission right is made subject to satisfaction of certain conditions. Accordingly, if adaptation of the contract to the new circumstances is not possible or the owner cannot be expected to accept the contractor's adaptation claim, the contractor will be entitled to exercise his right of rescission of contract.

Considering the contract for work as a contract of instant performance in parallel with the predominant view in the doctrine and the Court of Appeals precedents, lawmaker expressly specified that termination of contract will be through rescission. Termination of contract by the contractor where required by the rule of objective good faith can only be effective ex nunc.

It should be accepted that the owner may benefit from TCO no.6098, article 480/ II as well by way of analogy where the conditions for adaptation are present for the owner, who is required to pay the lump sum fee, although it is a rare possibility.

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THE RULE OF LAW CONDITIONALITY OF THE EUROPEAN UNION AND DEVELOPMENTS IN TURKISH JUDICIARY

Mahmut ŞEN*

ABSTRACT

The concept of the rule of law is one of the core principles of the European Union legal order .It requires a functioning, effective, independent and impartial judiciary. According to the Copenhagen-related documents, judicial systems of the candidate countries should be independent, impartial, well-staffed, well-trained and easily accessible to the citizens. Therefore, in the course course of pre-accession period, legal systems of candidate countries have significantly been transformed in complience with the European Union standarts. Turkish judicial system has experienced institutional, legal and structural developments during this period as well.

Keywords: Turkey, conditionality, rule of law, judiciary, European Union, independence and impartiality, legitimacy

ÖZET

Hukukun üstünlüğü kavramı Avrupa Birliği hukuk düzeninin temel prensiplerinden biri olup,bu kavram işleyen ,etkili,tarafsız ve bağımsız bir yargının varlığını gerektirir.Kopenhag kriterleriyle ilgili belgelerde,yargı sistemlerinin tarafsız,bağımsız,yeterli kadroya sahip,iyi eğitilmiş mesleğinde uzmanlaşmış kişilerden oluşması ve vatandaşların kolayca ulaşabilecekleri tarzda örgütlenmesi aday ülkelere tavsiye edilmiştir.Bu nedenle,birliğe katılım öncesi dönemde aday ülkelerin yargı sistemleri Avrupa Birliği standartlarına uygun olarak önemli yapısal değişiklikler geçirmiştir.Türk yargı sistemide bu dönemde kurumsal,yasal ve yapısal değişiklikler geçirmiştir.

Anahtar Kelimeler: Türkiye, şartlılık, hukukun üstünlüğü, yargı, Avrupa Birliği, bağımsızlık ve tarafsızlık, meşruiyet.

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INTRODUCTION

Turkey's prospective membership to the European Union is one of the most controversial topics that have been discussed not only in the domestic politics of Turkey but also in the EU institutions and the domestic level of its member states. While some support Turkey's bid for

* Chief Judge of 10th Ankara Administrative Court

membership due to a number of economic, political or social reasons, others raise concerns about this potential membership. The economic reasons given as arguments by those in favour of Turkey's membership are; complete economic integration of Turkey to the EU, to strengthen economic structures by making sure there is competitiveness in a variety of sectors, to increase exportation to the EU, to solve the question of unemployment and to improve social welfare of the Turkish people. On the other side of the argument, a number of risks have been expressed by opponents of the membership such as Turkey would become an open market for the companies of the EU member states or Turkish that the economy is not strong enough to survive under the competitive pressure of European economy. According to this point of view, economic integration to the Community is likely to have a harmful effect on the Turkish economy rather than solving its structural shortcomings.

With regard to political reasons, the supporters of the membership, from Turkish and the EU circles, emphasize that Turkey has already been integrated into Europe, taking into account her membership to a number of European institutions. In fact, after its foundation in 1923, Turkish elites consider Turkey a European country and Turkey has participated in almost all European institution such as NATO, OECD and the Council of Europe. Turkey has been a member of the Council of Europe since 1949 and a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms. In reality, the European Union is the only major European institution that Turkey is not a member of.[1] However, despite this, the relationship between Turkey and the European Economic Community began with association agreement, signed in 1963 and entered into force 1964. Turkey's prospective membership was recognised by the European Economic Community in the association agreement .Taking into consideration the language of the Association agreement, it is difficult to challenge Turkey's application for the EU membership. [2]

After the official declaration of its candidacy to the European Union, democratic consolidation in Turkey has been supported by the EU. It is stated that the democratization process which was triggered by the announcement of Turkey's official candidacy in the Helsinki summit in

1 Frank Schimmelfenning, Stefan Engerdt and Heiko Knobel,The Europeanization of Central and Eastern Europe,Cornell University Press, 2005, p 42

2 Roger J. Goebel, Joining the European Union:The accession procedure for the central European and Mediterranean states,International Law Review,volume 1, issue 1,2003-2004

1999 have resulted in significant developments in the area of fundamental rights protection and the rule of law. From then onwards, progress made by Turkey in variety of fields ought not to be underestimated. As mentioned in the annual Progress Reports, many structural and institutional reforms ranging from the abolishment of the death penalty to improving judicial independence and from the removal of legal provisions that restrict freedom of expression to the prohibition of torture in detention centres, have been achieved thanks to the membership perspective. Thus, some believe that Turkey's prospective membership has already reinforced democratic consolidation and the protection of human rights as well as contributing to the proper application of the rule of law.

On the other hand, some argue that Turkey's membership would undermine the future of the European Union for a number of reasons such as its population, different cultural and historical identity or its geographical location. Eurosceptics in Turkey came up with similar objections for different reasons. They argue that Turkish people have their own identity and culture so that possible membership would have a negative impact on Turkish culture and national sovereignty.

As mentioned above, even if its candidacy was officially declared on the basis of the same criteria applied to the other candidate states and Turkey has undergone a significant reform process in order to comply with political and economic accession conditions, being optimistic about Turkey's prospective membership in the mid-term is difficult. Although it is argued that Turkey's membership heavily depends on the fulfilment of economic and democratic criteria, time frame for accession is indefinite.[3] After the opening of accession negotiations in 2005, the possibility of Turkey's membership has been questioned continuously by some EU leaders. These attitudes have undermined the credibility of the EU membership conditionality among the Turkish public.[4] It is also argued that the opening of the accession negotiations with Turkey is one of the most controversial external relations decisions of the European Union due to Turkey's relatively weak economic structure compared to the EU members', its large population that would trigger labour migration to other members of the European Union, its different identity in terms of

3 Goebel, supra note 2 ,p 17
4 Emiliano Alessandri ,Democratization and Europeanization in Turkey after the September 12 referendum, Insight Turkey,vol 12, October 2010,p 23-30

religion, culture and geography, and the question of human rights protection. [5]

The scope of this work, however, is limited to the developments in the Turkish judicial system in the course of pre-accession period. The main focus of this work will be on the effects of the rule of law conditionality of the European Union on the Turkish judicial system. All discussions and arguments over the benefits or negative effects of Turkey's prospective membership or the possibility of whether Turkey would be a member of the EU in a mid-term will not be discussed.

The structure of this dissertation is divided into four main sections. In the first section, the mechanism of the European Union political conditionality for accession will be evaluated. In the second section, the notion of the rule of law will be discussed. A general description of the concept and its core elements will be assessed and the European understanding of the concept and its requirements will be looked at. In this section, the principle of rule of law as one of the conditions for accession and necessity of judicial reform in candidate countries will also be argued. The brief history of the relationship between the European Union and Turkey will be given in the third section. Institutional, legal and structural developments in Turkish judicial system in the course of pre-accession period will be evaluated in the final section. Subjects that have been specified as priorities of Turkish judiciary by the EU representatives are to be assessed from 1999 onwards, when Turkey's candidacy was officially declared.

CHAPTER I

THE EUROPEAN UNION POLITICAL CONDITIONALITY

It is generally accepted that international organizations have a substantial impact on domestic reform processes of transnational countries. Although the ability of organizations to facilitate this change vary significantly, the European Union is considered the most successful ones in the area of democracy and the rule of law consolidation. After 1990s, the EU intensified its efforts in promoting democracy, rule of law and respect for human rights by introducing democracy and human rights clauses in all

5 Frank Schimmelfenning, Entrapped again:The way to EU membership negotiations with Turkey,International Politics,2009,46, p 413-431

its agreements with third countries. [6]After the Copenhagen European Council, the EU has encouraged candidate countries and their neighbours to promote democracy and the rule of law in order to achieve regional integration, peace and security. The EU has affected countries by imposing rules relating to economic and democratic standards both in pre-negotiation stage and in the accession negotiation period.

Political conditionality is an instrument used by international organizations such as the EU and NATO to promote democracy, human rights and the rule of law in different regions by offering some rewards including financial aid, military protection, prospective membership or participation in the decision-making process of the international organization, and so on. As mentioned earlier, the objectives of conditionality can be listed as the consolidation of democracy, the improvement of the rule of law including provision of an effective judicial system for target countries, to establish sustainable administrative system and to enhance human rights standards.[7] Taking into consideration its contributions to the promotion of democracy, the rule of law and human rights protection, the enlargement policy of the European Union is deemed one of the most significance achievements of the EU foreign policy.[8]

The European Union as a supranational institutions enjoys a set of norms and values that is common for member states and that is obliged to be satisfied by candidate countries who intend to join the Community. The accession of the candidate countries to the European Union is regulated by the article 49 of TEU stating that any European state that respects principles set out in article 6(1) may apply to become a member of the Union. According to the article 6(1) of the TEU, any European State that respects the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law is entitled to apply for the EU accession. Under these provisions, in order to become a member of the EU, applicants have to be a state in Europe and respect the principles of liberty, democracy, human rights and fundamental freedoms and the

6 Tanja A. Börzel and Thomas Risse ,One Size Fits All! EU Policies for the Promotion of Human Rights, Democracy and the Rule of Law ,http://cddrl.stanford.edu/publications/20747/,accessed in 17.07.2011

7 Anneli Albi,Ironies in Human Rights Protection in the EU:Pre-accession conditionality and Post-accession Conundrums,European Law Journal,vol. 15 no. 1,2009,pp 46-69

8 Frank Schimmelfenning,EU political accession conditionality after the 2004 enlargement:consistency and effectiveness, Journal of European Public Policy,15:6, 2008, 918-937

rule of law. If an applicant fails to meet one of the criteria that is determined by the Treaty, it is likely to be disqualified automatically. For instances, the application of Morocco was dismissed in 1987 due to the fact that Morocco was not a European state. Therefore, it is understood from this decision that the geographic location of applicant countries must be in Europe. From the European Commission's point of view, European consists of geographical, cultural and historical elements.[9] The level of Turkey's Europeanness in terms of geographical or cultural context has been discussed by European academic circles. It is argued that Turkey is partly situated in Europe and its culture and identity are different from European ones. However, Turkey's Europeanness has been officially recognised by several European Union documents. Long before the Helsinki European Council which granted Turkey the status of a candidate country, the Association Agreement between the European Economic Community and Turkey in 1963 recognised that Turkey was entitled to make an application for the EC membership.[10]

In addition to the requirement of being a state in Europe, some economic and political rules and norms were determined as conditions for EU membership in the Copenhagen European Council in order to prepare candidate countries for accession. These criteria are: the existence of a functioning market economy; the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities as well as the fulfilment of obligations of membership.[11] It is accepted that the principles of rule of law, respect for human rights and fundamental freedoms are the cornerstones of the European Union legal order, and after the Copenhagen European Council all candidate countries must satisfy these criteria before the opening of accession negotiations. It is argued that the rationale of these strict conditions are to ensure that candidate countries make necessary reforms in their social, economic and legal systems in order to smooth integration to the EU. From 1997 onwards, in order to prepare candidate countries for accession, the European Commission has been monitoring the performance of candidate countries and has been making recommendations. Annual reports which also include an assessment of

9 Dimitry Kochenov, EU Enlargement and the Failure of Conditionality. Pre-accession Conditionality in the fields of democracy and the rule of law, Kluwer Law International,2008, p 28

10 İbid, p 29

11 European Council in Copenhagen ,21-22 June 1993, Conclusions of the Presidency,p 13.http://www.europarl.europa.eu/summits/copenhagen/co_en.pdf.

the development in terms of the rule of law, have been issued by the Commission.

Thanks to the political and economic conditions which were determined as prerequisites in the Copenhagen European Council for membership, the EU has increased its impact on domestic policy-making process in candidate countries. It is generally accepted that the European Union has transferred its rules, norms, values and policies to candidate countries by using political and economic conditionality as a policy of carrot and stick. In the course of the transition period, a number of rewards such as financial aids or cooperation are offered by the EU to the candidate countries for rule adoption. However, the most inspiring reward for the transformation of the economic, social and legal system of the candidate states is the accession to the Union.

It is argued that the success of the conditionality policy depends on some factors such as the credibility of conditionality, the reward for compliance to the conditions and the domestic costs of rules adoption and the transformation of institutions.[12] When the stick of conditionality is combined with the carrot of membership of the EU, the impact of this policy on candidate countries would be more effective.[13] It is generally accepted that if the reward offered by international organizations exceeds the cost of transformation of domestic system of target countries, the commitment of domestic actors to democracy and the rule of law promotion is higher. It is argued that the cost of compliance to the EU conditionality varies from one candidate country to another, ranging from transformation of state structure to emergence of a new state bureaucracy, from losing pride to being a target of the opposition. In addition, the willingness and readiness of state institutions to implement adopted rules and the legitimacy of the conditions have a substantial effect on the process. [14]

In Turkey's case, rule adoption for democracy and human rights promotion in compliance with the EU conditionality are perceived as a

12 Frank Schimmelfenning, European Regional Organizations,Political Conditionality, and Democratic Transformation in Eastern Europe, East European Politics & Societies, February 2007 vol. 21 no. 1, 126-141

13 Leonardo Morlino, Amichai Magen, EU Rule of law Promotion in Romania,Turkey and Serbia-Montenegro:Domestic elites and Responsiveness to Differentiated External Influence,http://cddrl.stanford.edu/publications, accessed in 29.06.2011

14 Birsen Erdoğan, Complience with EU Democratic Conditionality :Turkey and Political Criteria of EU,http://www.jhubc.it/ecpr-istanbul/virtualpaperroom/042.pdf,accessed in 17.07.2011

threat to national security by some pressure groups and scholars. [15] They argue that Turkey as a country, which has combated terrorism for nearly three decades, needs to take more effective measures against terrorist activities, even if these measures are likely to undermine some fundamental rights. The establishment of special criminal courts, with different rules of procedure to try perpetrators of offences against national security, is one of the solutions offered. Due to the fact that adopting rules and regulations means that a candidate country has to transform its domestic political, legal, economic and even social systems to comply with European Union rules, such changes are likely to attract criticism. Therefore, due to the domestic cost of rule adoption and resistance from a range of pressure groups and establishments who are reluctant to change their old habits, national authorities may look for another way which is less costly and this policy may result in limiting the effectiveness of conditionality.[16] Thus, the domestic political cost of rule adoption is considered one of the factors that affect on the success of the conditionality.

Although it is difficult to say that there is a causal link between the successful transfer of rules and the presence of conditionality, it can be seen from the experienced of central and eastern European countries and Turkey that after the opening of accession negotiation, the impact of the EU on domestic policy and decision making process is more visible. Therefore, the credibility of conditions and rewards is vital for the commitment to democracy and human rights promotion process. When domestic actors consider that even if conditions are fulfilled, rewards promised are likely not to be paid or applications of the conditions to the different countries are inconsistent, target governments would not be willing to undertake the cost of the transformation and rule adoption. It can be seen from the experiences of different international organizations that rewards or conditions determine the prospective development in the areas of democracy and fundamental rights. For instance, after NATO announced that improvement in minority rights in Latvia and Estonia is a precondition of membership, there has been seen some advancement in these rights.[17] After the Helsinki European Council in which Turkey

15 Schimmelfenning, Engerdt and Knobel, supra note 1, p 50
16 Frank Schimmelfening, Ulrich Sedelmeier, Governance by conditionality:EU rule transfer to the canditate countries of central and eastern Europe,Journal of European Public Policy,2004,669-687
17 Schimmelfenning, supra note 12, p 126-141

became a candidate country for EU membership, the most significant democratic reform process that has been experienced in Turkey since the Ankara Agreement which was signed in 1963 and established the EU-Turkey association occurred. Although the question of human rights protection in Turkey has been criticised by the EU for a long time, progress in fundamental rights and freedoms has been seen after Turkey became a candidate member. It is argued that the reform progress in Turkey is considered one of the most successful applications of political conditionality of the EU and the power of external agents of democratization.[18] Therefore, it is clear that the transfer of rules and institutions from the EU to candidate countries would be achieved when conditionality approach is credible. However, as it can be seen from Turkey, the lack of EU commitment to incorporate member countries would likely to have negative impact on reform process. Although Turkey's membership possibilities had been determined by association agreement in 1964 and the EU' commitment to Turkey's membership has not been withdrawn, doubts have been raised on the credibility of this promise.[19] It is argued that even if Turkey achieve significant progress in the field of democracy, human rights and the rule of law in order to meet Copenhagen criteria for EU accession, some contested to Turkey's cultural or religious identity.[20]

When international organizations put forward new prerequisites for the membership such as absorption capacity of the EU, friendly relationship with its neighbours or cultural and religious considerations, there is evidence that the incentive of democracy consolidation in candidate countries would diminish. Due to some prerequisites that have been demanded by the EU, apart from the Copenhagen political criteria, doubts have been raised in Turkish domestic politics over the credibility of conditionality. Despite concerns expressed by those in favour of Turkey's membership, it is argued that adopting new rules and organizations in compliance with the Copenhagen political criteria do not guarantee EU membership automatically. The economic cost of the candidate countries to the EU is as important as the fulfilment of the obligations. According to this point of view, the cost of Turkey's prospective membership would be extremely high in comparison to

18 Paul Kubicek,The European Union and Democratization 'From Below' in Turkey, http://aei.pitt.edu/3018/, accessed in 29.06.2011
19 Schimmelfenning, Engerdt and Knobel,supra note 1 p 41
20 İbid,p 42

central and eastern European Countries. Due to the possible implications of Turkey's membership for the EU after its accession, EU authorities set out informal conditions for Turkey. Therefore, doubt is raised whether European integration is driven by norm-based approach or by political, geopolitical, economic interests of the member states.[21] One of the people who expressed concern on the subject of Turkey's membership perspective was Turkey's ambassador in the European Union. He urged that the EU has lost its impact on Turkish democratization process due to uncertainties in the membership process.[22] In addition, the Prime Minister of Turkey raised his concerns over the future of the Turkish-EU relationship during the Cypriot' presidency period in 2012. [23] Thus, the argument that Turkey's prospective membership is ambiguous in a short-term since the EU suffers from enlargement fatigue has also increased Euroskeptics' doubts in Turkey. [24]

Although there has been criticism that the political conditions have been applied inconsistently to each candidate, it is agreed that the impact of pre-accession conditions on the domestic legal and political system of candidate countries are significant.[25] Secondly, during the pre-accession period, the EU monitors candidate countries' fulfilment of the conditions closely. However, some mechanisms that scrutinise member states' human rights records and their compliance to the pre-accession condition of the EU do not exist internally within the Union.[26] Some even argue that if some conditions are applied to current member states, they would fail to meet some economic or legal criteria to become a member.[27]

21 Beken Saatcioglu, How Closely Does the European Union's Membership Conditionality Reflect the Copenhagen Criteria? Insights from Turkey, Turkish Studies Volume 10, Issue 4, 2009, Pages 559 - 576

22 Interview with Selim Kuneralp in 20 june 2011, http://www.todayszaman.com/news Detail_getNewsById.action?newsId=247941

23 Erdogan Threatens freeze with the EU during Cypriot presidency, http://www.eubusiness.com/news-eu/cyprus-turkey.bex/,19.07.2011

24 Florian Trauner, From membership conditionality to policy conditionality: EU external governance in South Eastern Europe ,Journal of European Public Policy,16:5,2009,774-790

25 Ulrich Sedelmeier, After conditionality:Cost-accession Compliance with EU law in East Central Europe,Journal of European Public Policy,15:6,2008,p 806-825

26 Anneli Albi, supra note 7,pp 46-69

27 Heather Grabbe, European Union Conditionality and Acquis Communautaire, International Political Science Review,2002, vol 23 no 3,249-268

CHAPTER II

THE RULE OF LAW CONDITIONALITY

2.1. The concept of the rule of law

It is generally accepted that the rule of law is one of the cardinal principles of democracy. It is considered a necessity for effective protection of fundamental rights and freedoms of the individual. The concept is recognised by all international human rights conventions or treaties:

The Universal Declaration of Human Rights states that human rights should be protected by the rule of law. It also combines some elements of the concept such as equality before the law,[28] right to an effective remedy by the competent national tribunal,[29] the prohibition of arbitrary arrest or detention,[30] right to be tried by an independent and impartial tribunal,[31] right to be presumed innocent until proven guilty and so on. Article 6 of the European Convention of Human Rights consist of some necessary components of the rule of law emphasizing that everyone has the right to a fair trial before an independent and impartial tribunal within reasonable time. In addition, it provides the right to have adequate time and facilities to prepare a defence, and access to legal representation. Similar procedural guarantees are also provided by Article 14 of the International Covenant on Civil and Political Rights. It is understood from the wording of the major international conventions that are mentioned above, there does not exist any standard and common definition of the rule of law. A number of definitions that include a list of its core elements have been offered by legal experts or human right conventions for the rule of law. Therefore, it can be said that the concept of rule of law consists of a variety of components such as a functioning independent and impartial judiciary, civilian control over military power, respect for and protection of fundamental rights, equality before the law, combating corruption and so on.[32] However, the existence of an independent judiciary is usually accepted as the most important one owing to the fact that the only institution that can ensure the restriction of

28 Article 7 of the Universal Declaration of Human Rights
29 Article 8 of the Universal Declaration of Human Rights
30 Article 9 of the Universal Declaration of Human Rights
31 Article 10 of the Universal Declaration of Human Rights
32 Senem Aydin, Ali Cakiroglu,EU Conditionality and Democratic Rule of Law in Turkey, http://cddrl.stanford.edu/publications/eu conditionality and democratic rule of law in turkey/,p 3

arbitrary use of state power is an effective, functioning judiciary.[33] Thus, all international human rights conventions have provisions that require judicial independence in order to ensure the rights and freedoms of individuals from state parties.

It can be said that in a system governed by the rule of law, not only the members of society and private organizations but also legislative and executive branches of state and judiciary should consider that their act, attitudes and behaviours should comply with law and there is nothing above the law.[34] Under a broad definition of the concept, the rule of law requires that government should be constrained by judicial power, individuals are treated fairly and equally by the legal system without any discrimination. In other words, in a country which is governed by the rule of law, arbitrary power of the state agents and discriminatory practice in law enforcement should be prohibited by law. Thus, one of the core elements of the principle is that the exercise of public and private power must be limited by law. Public officials may exercise their authority within the limits defined by law and their discretion is restricted enough to prevent the arbitrary action.[35] In a system that guarantees the principle of the rule of law, ordinary courts must have jurisdiction to review administrative and executive action in order to provide people with legal remedies against arbitrary action. It is argued that democratic rule of law should ensure political rights, civil liberties and the mechanisms of accountability which requires that all state institutions and agencies are subject to limitation by law. From this argument, a situation under which the rule of law cannot guarantee fundamental rights and freedoms, human dignity would be at risk. Therefore, in order to ensure the protection of rights and freedoms, the concept of rule of law should comprise some necessary components: Law should be prospective, stable, open and clear; judicial institutions ought to be independent to ensure a proper review of decisions of executive and legislative powers in conformity

33 Julio Rios -Figueroa, Jeffry K. Staton, Unpacking the Rule of Law:A review of Judicial Independence Measures, http://papers.ssrn.Com/sol3/papers.cfm?abstract_id=1434234, accessed in 30.06.2011

34 Licht, Amir N., Goldschmidt, Chanan and Schwartz, Shalom H., Culture Rules: The Foundations of the Rule of Law and Other Norms of Governance, 2006, http://ssrn.com/abstract=314559 or doi:10.2139/ssrn.314559

35 John C. Reitz, Export of the rule of law,Transnational Law & Contemporary Problems Transnational Law & Contemporary Problems,429,2003

with law, the principle of natural justice must be recognised, courts must be easily accessible and right to fair trial should be provided.[36]

Therefore, with regard to the judiciary, there are several institutional features that are required by the principle of the rule of law. The most important one is an independent and impartiality of the judiciary. Judicial independence requires that judges must be free from all kinds of influences that come from the parties to disputes, from political authority or internal or external pressure groups. Every country may have different legal system in the way of appointment, removal, transfer or promotion of judges on condition that safeguards judicial independence. Since being at the core of the rule of law concept, judicial independence should be ensured by a number of constitutional guarantees and institutional practices such as reducing the impact of the executive branch of power on the recruitment, selection, promotion and transfer of the judges or establishing an independent body which is responsible for court management.[37]

In terms of judiciary, it is agreed that the rule of law has required procedural and substantive components:

Formal and procedural components of the rule of law entails that everyone should be tried by an independent and impartial court or tribunal. In addition, procedural guarantees ought to be provided for individual such as easy access to justice including legal aid and legal council, non-retroactivity of laws, the presumption of innocence or proportionality of punishment. For court proceedings, right to a fair trial also requires some basic guarantees for individuals namely being free from arbitrary arrest, not to be subject to torture to extract confessions; giving each party equal procedural rights and so on.[38]

On the other hand, substantive requirements of the rule of law are related to the moral values including human dignity, individual autonomy and social justice. It is argued that procedural elements of the notion should serve substantive ones. Thus, the concept is comprised with a set of legal and moral values that fulfil valuable functions in a democratic society.[39]

36 Guillermo A. O'Donnel, Why the Rule of Law Matters?, Journal of Democracy, volume 15, 2004,p 32-46
37 Reitz, supra note 35,429
38 İbid, 429
39 Laurent Pech, The rule of Law as a Constitutional Principle of the European Union,Jean-Monnet Working Paper 04/09,p 46 www.JeanMonnetprogram.org,accessed in 15.06.2011

To sum up, since a proper application of the rule of law is considered essential for human rights protection, the promotion of the rule of law in transitional countries is targeted by non-governmental organizations, state authorities and international institutions including the European Union. In order to make sure that the legal, economic, social systems of the target country can function properly in conformity with the rule of law, judicial reform is deemed very important due to the fact that it affects all reform process in transitional period. Therefore, it is agreed that reform processes in transitional countries should aim to ensure a functioning independent judicial system so as to achieve the implementation of the rule of law.

2.2. The concept of the rule of law in the Community legal order

Legal scholars have agreed that the concept of the rule of law is one of the core principles of the Community legal order since its first creation despite the fact that the concept did not exist in any treaty of the European Community until the Maastrich Treaty entered into force. The importance of the principle can be seen in the case-law of the European Court of Justice emphasizing that the rule of law is the cardinal principle that the Community is based on.[40] According to the ECJ in Les Verts judgement, in order to make sure the proper application of the principle, right to acquire effective legal remedy before a competent court is provided for any person whose rights or interests are violated by public authorities. From the European Court's point of view, an effective judicial review should exist to supervise public authorities' measures in terms of legality to ensure individual's rights and interests. In other words, the initial interpretation of the notion by the ECJ was legalistic and procedural since emphasizing the importance of legality, judicial review and judicial protection. Therefore, in the Community context, the notion of the rule of law had initially been understood as the reviewability of acts and actions of public power by independence courts.[41] However, most scholars agree that in a system governed by the rule of law, public power should be subjected to substantive and formal legal constrains by an independent and effective judicial authority with the aim of protecting individual rights against arbitrary or unlawful action.[42] In other words, the reason of existence of formal components of the rule of law is to

40 Case 294/83 Les Verts v. Parliament (1986)ECR,para.23
41 Pech, supra note 40, p 18
42 Ibid,p 46

protect rights and freedoms of the individual. The judgements of the ECJ have reinforced this argument. Following the Les Verts ruling, there have been multiple references made by the ECJ to the substantive components of the rule of law emphasizing that the protection of fundamental rights should be taken into consideration while assessing the rule of law. [43] In other cases, the ECJ referred to access to justice and the availability of an effective remedy as the fundamental right in the Community based on the rule of law.[44] It is argued that ensuring the rule of law in the European Union is required for many reasons such as providing the EU citizens with a secure and safe environment in which they can move freely, establish business and trade with each other. The failure for the proper implementation of the rule of law would likely undermine the European Union as a united economic and political power.[45]

Taking into account its case-law regarding the rule of law, the concept is interpreted by the ECJ as a source of Community legal order.[46] Therefore, it is accepted that the ECJ has played significant role for the rule of law to be incorporated into Treaties. According to the Court, the aim of the rule of law is to regulate the exercise of public power in Community legal order. [47]

With regard to the today's legal order of the European Union, there are several references to the rule of law in the Union Treaties:

According to the article 2 of the Treaty of the European Union, the rule of law is one of the foundational principles of the Union. Article 6 of the Treaty makes clear that the rule of law is a defining principle by stressing that the EU is founded on the principles of liberty, democracy, respect for fundamental rights and the rule of law. It is argued that the EU is founded on these principles simultaneously and violation of any of them means that the other cannot be satisfactorily complied with.[48] Thus, it can be accepted that founding Treaties have given significant importance to the

43 Joined Cases C-402/05 P and C-405/05 P Kadi and Al- Barakaat (2008)
44 Case C 131/03 P Reynolds Tobacco et al. v. Commission (2006) ECR 1-7795
45 Susie Alegre,Ivanka Ivanova and Dana Denis- Smith, Safeguarding the rule of law in an enlarged Europe, The case of Bulgaria and Romania,CEPS special report,2009,p 6 www.ceps.eu, accessed in 30.06.2011
46 Dimitry Kochenov, The rule of law:Cutting path through confusion, Erasmus Law Review,volume 2, 2009
47 Laurent Peach, A union founded on the rule of law:meaning and reality of the rule of law as a constitutional principle of the EU law,European Constitutional Law Review,6, 359-396,2010
48 Pech, ,supra note 40, p 55

concept of the rule of law alongside the principles of democracy and fundamental rights protection.

Article 7 of the Amsterdam Treaty stressed that the Council has the jurisdiction to take sanctions against members of the Union if they breach seriously and persistently one of the cardinal principles laid down in Article 6 of TEU. The article also enables the Council to impose preventive sanctions in some circumstances where there is clear risk of a serious breach. The Lisbon Treaty describes the rule of law as one of the values that the EU is based as well. Although the importance of the concept is emphasized by major Treaties of the European Union, its components and description do not exist in the Treaties. Thus, the scope and core elements of the concept rely heavily on the European Court's Treaty interpretation. With respect to candidate countries, Article 49 of the TEU states that any European state which respects these principles may apply for the membership of the Union.

When it comes to the meaning and scope of the rule of law in the EU context, it is possible to find a great deal of description. Some argues that the rule of law is an umbrella legal principle with formal and substantive elements and it is used as a legal benchmark regarding current and prospective member states and as a policy objective with regard to third countries and other international organizations.[49]

As noted above that the rule of law is one of the principles on which European Union has been founded. It has been applied by the EU not only to the internal relationship between Community institutions but also to its external actions as a tool of enlargement and neighbourhood policy. It is determined by the EU within the framework of Copenhagen Political Criteria as one of the conditions that candidate countries must satisfy before opening accession negotiations as well. Despite its importance in the Community legal order, what exactly is required for candidate countries to meet the rule of law conditionality is uncertain. Since the scope and meaning of the concept can be vary from one member country to another due to different legal traditions of members, that formulation of general elements of notion on the Union level is important. The essential components of the notion in the Community level can be seen in the Copenhagen-related documents. In progress reports of candidate countries, one of the sections is assigned to developments in the field of

49 Ibid,p 17

the rule of law. Improvements made by candidates countries in the application of the concept are evaluated by the EU Commission each year. There are several subjects in the progress reports which are assessed by the EU Commission regarding the rule of law ranging from military-civilian relations to combating corruption, from the principle of separation of power to judicial reform. It is contested that since it has capacity to influence whole reform process in the course of pre-accession period, judicial reform in the candidate countries is the most important ones.

2. 3. Pre-accession requirements of judicial reform

It is agreed that a functioning, effective, independent and impartial judiciary is the core element of the democratic system which is governed by the rule of law. According to the Copenhagen-related documents, judicial systems of the candidate countries should be independent, impartial, well-staffed, well-trained, well-paid, efficient, respected and easily accessible to the citizens.[50] Taking into account to annual progress reports, it can be argued that requirements of reforming national judicial systems are considered by the European Commission to be very broad. It can ranged from legislative amendments including constitutional changes, to the enforcement of court rulings, from ensuring efficiency of the judicial system and independence, impartiality and professionalism of the judicial actors to procedural rules and the establishment of the court management systems.[51]

Due to the relationship between national courts and European Union Courts, the transformation of judicial systems of candidate countries in conformity with EU standards is essential in order to ensure a smooth transition of prospective members. [52] After official accession of a candidate country to the Union, national courts would become the most important institution to make sure there is a proper implementation of the Community law. It is agreed that when there is a clash between the Community law and national law, the independent national court is the only authority to solve conflict and to ensure the application of Community law at the domestic level. Furthermore, successful transformation of other branches is dependant on a functioning

50 Tanya Marktler, The power of the Copenhagen Criteria,Croatian Yearbook of European Law and Policy,vol 2 ,2006,
51 Kochenov, supra note 9 , p 247
52 Ibid, p 227

independent judiciary. Taking into consideration the unexpected economic and social complications of the transformation of candidate countries' domestic systems, roles played by the national judiciary in this process would be significant. For instance, the implementation of competition policy of the EU in domestic level is likely to bring about increase in unemployment rates. Facing a number of cases asking to ignore the EU policy, if national courts are unwilling to apply these provisions, economic integration would be at risk. Therefore, a great deal of reform process has been experienced in the judicial system of the candidate countries in compliance with obligations arising from membership perspective. It can be seen from the Copenhagen-related Documents that in order to ensure the achievement of democratic reform processes in transitional countries, the shortcomings of the judiciary such as understaffing, and excessive workload must be solved. In addition, obstacles that prevent an easy access to justice should be removed and an effective judicial remedy ought to be provided.

According to a strategy paper issued by the European Commission in 2002, the aim of the judicial reforms in candidate countries is to ensure proper application of the rule of law. In democratic countries, the judiciary is considered not only as an independent adjudicator that is responsible for solving disputes between the individuals and the state, but also as a guardian of fundamental rights and freedoms. Therefore, it can be expected that the judiciary should expand the rights of individuals in interpretation of law.

In order to achieve this objective, some measures should be taken by candidate countries such as adopting basic legislations, strengthening human resources, improving working conditions, enhancing access to justice and tackling the problem of judicial backlogs.[53] In addition to these measures which should be taken by the authorities of the candidate states to ensure the rule of law, it is emphasized that judicial independence, the training of the judges in the field of human rights and Community law and predictability and efficiency of the judicial system are required for accession as well.[54] For instance, in Bulgarian Case, it was recommended that some provision of the constitution be amended in

53 Towards to Enlarged Union Strategy Paper and Report of the European Commission on the Progress towards accession by each of the candidate countries,09.10.2002, p 14 , http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0700:FIN:EN:PDF

54 European Commission Strategy Paper 2001,http://ec.europa.eu/enlargement/archives/key_documents/reports_en.htmpaper2001

order to ensure accountability and independence of the justice system. It is noted that judicial reform is needed for independent, transparent and efficient judicial process before accession to the EU.[55]

2.4. The Independence of Judiciary in the Pre-accession Period

The independence of the judiciary is recognised by not only the Copenhagen-related Documents but also all major international conventions:

The importance of the principle is emphasized by the UN Basic Principles on the Independence of Judiciary, Article 14 of the International Covenant on Civil and Political Rights and Article 6 of the European Convention on Human Rights. According to the latter, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. It is argued that the right to be tried by an independent and impartial tribunal is absolute and derogation from this right is not possible.[56] Therefore, state parties to the human rights conventions are obliged to ensure judicial independence.

Although there are plenty of requirements relating to judiciary that must be fulfilled by candidate countries to complete judicial reform process in the course of the pre- accession process, the independence of the judiciary is deemed by the EU Commission as the most important ones. According to the Copenhagen-related documents, judicial independence requires three functions that are the institutional independence of the judiciary, the independence of individual judges and the budgetary independence of the judiciary.[57]

As mentioned above that the principle of independence and impartiality of the judiciary is vital due to the fact that it guarantees the effective judicial review of the decisions of the legislative and executive branches. Judicial independence allows judges to make judgements according to their personnel conviction in compliance with the constitution and the law rather than third party interests. When judiciary is under the influence of executive or legislative branches of power, it is likely to

55 Alegre, Ivanova and Denis- Smith,supra note 50,p 28
56 Communication No. 263/1987,Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights,http://www1.umn.edu/humanrts/undocs/html/dec263.htm
57 Kochenov, supra note 9, p 247

lose its ability to safeguard fundamental rights and freedoms. The independence of judiciary requires that court must not be influenced by both external factors such as the political branch of government, the executive, civil society organizations, the parties to conflict and internal factors such as his/her colleagues.[58] In order to ensure the independence of the judiciary, recruitment, transfer, promotion, disciplinary action and removal of the judges are considered to be free from any kinds of political influence. In the course of the pre-accession period, candidate countries judicial systems should be self-governed and institutional independence from the executive branch of the power must be realised. However during pre-accession period, the majority of the candidate countries, including Turkey, have judicial system that the ministries of justice have played a significant role in the management of. The assessment of judges, the establishment of the courts, the allocation of their budgets are the examples of the tasks conducted by the ministries of justice in different candidate countries.[59] In order to prevent external influences on judicial system, the European Commission makes recommendations to candidate countries to establish a self-governing body for the judiciary. It has been advised that judicial self-governing organs should have their own budgets, own agendas and its composition ought not to be controlled by the executive.[60] In the course of pre-accession periods of the central and Eastern Europe countries, among all of the problems regarding the judiciary, insufficient judicial independence, undue executive involvement in the administration of judiciary and weak legal culture can be listed as common. The role of the judges in these countries was considered not to be independent adjudicators between conflicted parties, judges are deemed as one of the well-paid civil servants who implement state policies.[61]

The establishment of a judicial council as an independent body which is responsible for the recruitment, selection, promotion, transfer and removal of the judges has been recommended to the Central and Eastern European countries in order to provide a judiciary with insulation from

58 The Bangalore Principles of Judicial Conduct of November 2002
59 Kochenov, supra note 9, p 247
60 2002 Regular Report From the Commission on Estonia's Progress Towards Accession, http://ec.europa.eu/enlargement/archives/key_documents/reports_en.htm#1. Progress ReportsEstonian Report.
61 Monitoring the EU Accession Process, Judicial independence,EU accession monitoring program,2001,www.eumap.org accessed in 24.06.2011

the executive power or parliamentary majority.[62] In the course of pre-accession period of the Central and Eastern Europe countries, the majority of the candidate countries have satisfied the obligation of providing an institutional independent judiciary by creating a judicial council that is composed of the representatives of judges. However, some candidate states such as Czech Republic had not fulfilled the requirement of establishing judicial council which should be institutionally independent. [63] The compositions of these Councils have been dominated by judges and executive involvement has been limited. As it can be seen from the experiences of candidate countries during transition periods, the establishment of judicial councils which have jurisdiction on matters such as court management, promotion, transfer and appointment of judges has appeared as a solution to circumscribe executive interference. However, in some candidate countries, despite a judicial council existing, the European Commission has criticised the judicial council's composition and ability to represent judiciary.[64] Therefore, the existence of a judicial governing body is not sufficient to provide institutional independence. Meaningful court participation in these Councils should also be ensured.[65] In addition, judicial governing bodies should have control of their own budgets and their own agendas.

Apart from Copenhagen-related documents, the European Charter on the Statute for judges emphasizes that the judicial councils that are responsible for selection, recruitment, appointment of judges , the development of their careers or termination of their office should be sufficiently independent from executive or legislative power. In order to ensure independence, half of its members should be elected judges.[66]

In addition to institutional independence of the judiciary, individual judges should also be independent. It is argued in Copenhagen-related documents that judges should be exempt from unjustified transfer by the executive power and ought to have the right of irremovability. According to the European Commission, the principle of irremovability is one of the

62 Pedro C. Magalhaes, The politics of Judicial Reform in Eastern Europe, Comparative Politics, vol 32,1999,p 43-62

63 Michal Bobek, The fortress of Judicial Independence and the Mental Transition of the Central European Judiciary, European Public Law, vol 14, 2008

64 2001 Regular Report From the Commission on Romania's Progress Towards Accession, http://ec.europa.eu/enlargement/archives/key_documents/reports_en.htm#1. Progress Reports

65 Supra note 62,p 31

66 The European Charter on the Statute for judges ,section 1.3,1998

core elements of judicial independence.[67] In order to ensure individual judges' independence, judges should have right of immunities for minor offence related to their work on condition that not being excessive.[68] Another measure to ensure individual independence is that judges should enjoy the means necessary to accomplish their tasks properly.

It is argued that the selection of judges is also vital in order to guarantee judicial independence. In terms of the selection of the judges, it is expected from candidate countries that selection process should be competitive, transparent and based on objective set of criteria applied equally to all applicants. In order to achieve objective selection, assessment processes ought to be away from third party interference including executive and legislative branches.[69]

The impartiality of judiciary is also a cornerstone principle of effective functioning of the judicial system. It means that courts or tribunals must perform their duties without any favour, bias and prejudice. While conducting their duties, judges should not only be impartial but be seen as impartial from public perception as well.[70]

Furthermore, due to quite a sophisticated structure of the European Union's judicial system, judges and lawyers should be professional or expert in their field to ensure workability of the system after accession. In a functioning judicial system, judges should be able to deal with conflict not only by applying certain provisions of domestic law, but also by interpreting universal principles of law and legal developments.[71] Therefore, the EU has paid special attention to legal education as well as pre-service and in-service training in the field of the Community law. In the course of pre-accession periods, one of the main priorities of the reform processes is to improve the professional qualifications of the member of judiciaries.[72] Thus, technical and financial aids are provided by the EU to candidate countries for education or training of the judges, lawyers, academics and auxiliary staff of the courts to improve their understanding in the field of human rights and the Community law. After

67 Kochenov, supra note 9, p 270
68 2001 Regular Report on Bulgaria's Progress Towards Accession, p 18, http://www.eic.bcci.bg/docs/bg_eu_report2001.pdf
69 Kochenov, supra note 9, p 272
70 İbid,273
71 Daniela Piana, Unpacking Policy Transfer, Discovering Actors:The French Model of Judicial Education Between Enlargement and Judicial Cooperation in the EU, French Politics,2007, 5, 33-65
72 Alegre, Ivanova and Denis- Smith, supra note 50,p 38

accession periods, since national courts of the member states become a part of the Community legal system, in order to ensure functioning of legal order of the Union, facilitating national courts with universal standards to deliver justice are extremely important. According to the article 14 of International Covenant on Civil and Political Rights, the competency of judges is considered to be one of the basic human rights that everyone shall be entitled to.[73] In order to ensure the competent, independent and impartial adjudicators who are responsible for resolution of conflicts between parties in the prospective members of the Community, candidate countries have been asked to deliver education and training programmes for legal professionals including judges, public prosecutors and lawyers. From the EU Commissions' point of view, the lack of pre-service and in-service training programmes which should be provided for legal professionals have a significant impact on the reform processes of the judiciaries in the candidate countries due to the fact that judges may play a substantial role in the successful transformation of the system. In a situation where the level of the competence of judges is satisfactory in candidate countries, it may guarantee better understanding of the necessities of integration. [74] Thus, not only the requirements of the rule of law, but also the achievement of integration processes require a functioning judicial system which is composed of competent judges. When judges and other professionals are given legal understanding in line with the universal standards, it is likely to prevent future conflict between Community courts and national ones. However, as it is experienced in the post-communist states that then became members of the European Union, even if rules and regulations related to the judicial system are transformed in transitional countries, it is difficult to change the mentality and understanding of the legal professionals overnight. [75] When the poor quality of legal professionals in the field of human rights and Community law in the candidate countries is combined with the question of lack of staffing, the situation has worsened. The majority of the candidate countries' judiciaries, including the judiciary of Turkey, have suffered from being understaffed which brings about backlogs of cases and the overturning of a number lower courts judgements at

73 Article 14 of the ICCPR stressed that 'everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law', http://www2.ohchr.org/english/law/ccpr.htm, accessed in 27.06.2011

74 Kochenov, supra note 9, p 277

75 Ibid, p 228

appeal.[76] Therefore, it is argued that in the course of the pre-accession periods, the European Commission concentrates mainly on judicial reform in the candidate country and one of its top priorities is the training of judges so as to ensure the full application of the Community law after enlargement.[77]

As it can be seen from the annual reports, issued by the EU Commission to evaluate progress made by candidate countries in a variety of fields, the establishment of institutions which have responsibility to deliver training programmes for legal professionals is given special importance.[78] According to Copenhagen- related documents, these institutions should have the main responsibility and resources to deliver special programmes that provide systematic and well-planned training for judges.[79] It is emphasized by the annual progress reports that the institutions for judicial training should be independent from executive power as well.[80]

One of the main priorities of the national judicial systems during the pre-accession period is to enhance the access to justice. The European Commission gives special attention to this subject and recommends removing obstacles to create easy access to justice. It is considered as one of the fundamental rights of individual as well. With regard to access to justice, candidate countries have an obligation that arises from accession negotiations to provide legal framework for legal aid and representation.[81]

Another obligation that must be satisfied by the candidate countries before signing accession treaties is to ensure the establishment of enforcement system for court decisions. It is accepted by the Copenhagen-related documents that the failure to implement court judgements would be likely to undermine a democratic system and the

76 Ibid, p 278
77 Ibid, p 237
78 2000 Regular Report From the Commission on Romania's Progress Towards Accession, http://ec.europa.eu/enlargement/archives/key_documents/reports_en.htm#1. Progress Reports
79 1999 Regular Report From the Commission on Romania's Progress Towards Accession, http://ec.europa.eu/enlargement/archives/key_documents/reports_en.htm#1. Progress Reports
80 2002 Regular Report From the Commission on Romania's Progress Towards Accession, http://ec.europa.eu/enlargement/archives/key_documents/reports_en.htm#1. Progress Reports
81 2002 Regular Report From the Commission on Bulgaria's Progress Towards Accession, http://ec.europa.eu/enlargement/archives/key_documents/reports_en.htm#1.

principle of rule of law.[82] However, non-obedience of court decisions is a widespread practice in some candidate countries in the course of pre-accession process.[83] In some candidate countries, even constitutional court rulings have been ignored by the executive and legislative power.[84] It is argued that in a situation where the enforcement of court decisions are routinely ignored or poorly implemented, the legal system of the country cannot be considered to ensure judicial independence.[85] Therefore, judicial independence necessitate full implementation of court rulings as well. In order to ensure the efficient implementation of court decision at the domestic level of candidate countries, the EU Commission has recommended that the legislation should be adopted by bailiffs that have the status of professional court assistants.[86]

With regard to the proceedings of cases in courts, it has been recommended that candidate countries transform their system. The European Court of Human Rights has ruled against countries whose judicial systems are unable to provide effective legal remedies for people. Due to the fact that some candidate countries have not established a judicial system that deals with cases, without a long delay, they have faced the ECHR judgements against them on the ground that they are in a violation of the right to speedy trial. Therefore, in a situation where court proceedings cannot provide legal remedies for the parties of conflict in a reasonable time, candidate countries are likely to face both criticism from the EU Commission due to being non-compliant with the rule of law condition and a ruling against them from the ECHR on the ground that they breach the right of effective remedy.

On the other hand, there have been a variety of solutions offered by the EU Commission to the candidate countries to handle backlogs of the pending case and to speed proceedings ranging from computerising the courts to shortening appeal procedures, from appointing legal assistants in order to reduce workload of judges to introducing financial incentives

82 2000 Regular Report From the Commission on Latvia's Progress Towards Accession, http://ec.europa.eu/enlargement/archives/key_documents/reports_en.htm#1. Progress Reports,

83 1998 Regular Report From the Commission on Slovakia's Progress Towards Accession, http://ec.europa.eu/enlargement/archives/key_documents/reports_en.htm#1. Progress Reports

84 Kochenov, supra note 9, p 288

85 Rios -Figueroa and Staton, supra note 33,p 21

86 2000 Regular Report From the Commission on Lithuania's Progress Towards Accession, http://ec.europa.eu/enlargement/archives/key_documents/reports_en.htm#1. Progress Reports

to increase the productivity of courts. It is argued by the EU Commission that the use of modern technology in court management systems has an ability to solve some problems that judicial systems have suffered. [87] Establishing a court information system and publishing court decisions for consistent application of the law are also advised.

As a conclusion, it can be said that in the Community context, the rule of law is understood as judicial protection of the people and the right to an effective remedy, right to have legal aid if it is necessary, right to be tried by impartial and independent tribunal, right to be judged in a reasonable time.[88] The judiciary at all levels is neutral and independent from any political influence. But the core aspect of the rule of law mainly lies in the independence of Judiciary and the fight against corruption [89]

According to the ECJ's point of view, any person whose right is breached by public authorities is entitled to bring a case before a competent judge to obtain effective judicial remedy. Citizens have equal and unhindered access to the justice system to defend their rights and to contest lawsuits between private citizens or between private citizens and public institutions. Government should facilitate access to justice and provide legal defence for poor, illiterate people.

CHAPTER III

THE HISTORY OF TURKEY-EUROPEAN UNION RELATIONS

Turkey's relationship with the European Economic Community began with the Association Agreement signed in 1963 and entered into force in1964. Article 28 of the association agreement states that "as soon as the operation of this agreement has advanced far enough to justify envisaging full acceptance of Turkey of the obligations arising out of the Treaty establishing the Community, the Contracting parties shall examine the possibility of the accession of Turkey to the Community." The aim of the Agreement is to secure Turkey's full membership in the European Economic Community through the establishment of a customs union

87 Kochenov, supra note 9, p 289
88 Peach, supra note 23,p 359-396
89 Leonardo Morlino, Amichai Magen, EU Rule of Law Promotion in Romania, Turkey and Serbia-Montenegro: Domestic Elites and Responsiveness to Differentiated External Influence, http://cddrl.stanford.edu/publications/eu rule of law promotion in romania turkey and serbia montenegro_domestic_elites_and_responsiveness_to_differentiated_external_influence/

which would be able to result in integration between the EEC and Turkey. [90]

It is argued that it is difficult to challenge against Turkey's application for EU membership when taking into account the language of the Association agreement. [91] However, Turkey's official application for membership which was made in 1987 deferred for a number of economic and political reasons such as high level of inflation and unemployment, inadequate human rights protection or its longstanding problems with Greece despite the fact that Turkey's eligibility for membership was underlined.

After Turkey's application for membership, the most important development in the relationship between Turkey and the EU is the Customs Union agreement which was entered into force in 1995. From then onwards, Turkey abolished all duties and equivalent charges on imports of industrial goods from the European Union and Turkey's economy has been integrated to Europe. Economic policies of Turkey has been decided in compliance with the EU standards in a variety of field ranging from competition policy to taxation, from state aids to food standards regulations. [92]

With the entry into force of the Custom Union, there has been a significant improvement in the EU-Turkey relationship. As a result, the Helsinki European Council in 1999 declared that Turkey is a candidate state destined to join the Union on the basis of same criteria as applied to the other candidate states.[93]

The Accession Partnership, which was declared on March 8, 2001, identified short and medium term priorities to be fulfilled by Turkey for the EU accession. It also set up monitoring mechanisms to assess progress made by Turkey in the course of the pre-accession period. Therefore, the Accession Partnership constitutes the roadmap for Turkey to follow in its bid for membership. In response to the Accession

90 History of Turkey-EU relations, http://www.abgs.gov.tr/index.php?p=111&l=2,accessed in 07.08.2011

91 Roger J. Goebel, Joining the European Union: The accession procedure for the central European and Mediterranean states, International Law Review, volume 1, issue 1,2003-2004

92 A.A. Magen, 'EU Membership Conditionality and Democratization in Turkey: The. Abolition of the Death Penalty as a Case Study,http://iis-db.stanford.edu/evnts/3779/CDDRL-Turkey-seminar.pdf

93 Helsinki European Council December 1999, presidency conclusions, para. 12,http://www.europarl.europa.eu/summits/hel1_en.htm

Partnership; the Turkish government announced its own National Program which confirmed Turkey's commitment to implement necessary reforms including transformation of the judicial system and improvement in human rights standards in compliance with the pre-accession requirements.[94] In order to realize its commitments, the Turkish government prepared a number of harmonisation packages that consisted of significant constitutional amendments in a variety of field ranging from human rights and fundamental freedoms to judicial reform, from combating against corruption to implementing competition policy.

Following the National Programme, it was declared by European Council in December 2002 that if the European Council decides that Turkey fulfils all political conditions for the EU accession, accession negotiations with Turkey would be opened without delay. In the 2004 Brussels European Council, it concluded that Turkey sufficiently fulfils the Copenhagen political criteria for EU membership and the European Union would open accession negotiations with Turkey on 3 October 2005[95] . It is argued that this decision was a real breakthrough due to the fact that it stated Turkey had fulfilled the Copenhagen political Criteria for membership.[96]

Taking into consideration the history of the relationship between the European Community and Turkey, it can be said that there is no other country in the word that has economically and politically integrated to the European Union apart from Turkey. However, being optimistic about Turkey's prospective membership is difficult due to the fact that there exist a number of economic and political challenges encountered in the course of accession process.

CHAPTER IV

THE IMPACT OF THE RULE OF LAW CONDITION ON TURKISH JUDICIARY

The promotion of democratic governance and the rule of law via offering membership is one of the EU strategies before starting accession negotiations with Turkey. [97] Most legal experts argue that membership conditionality is the key factor leading Turkey to reform democratic and

94 The National Program for the Adoption of the Acquis,
95 Brussels European Council, December 2004,Presidency conclusions, para 22
96 Kubicek, supra note 18,p 22
97 Ibid,p 3

human rights standards. Due to its strong desire to be a member of the European Union, Turkish authorities undertook legal reform process in which a number of mechanism and institutions have been changed in compliance with the EU standards. After opening of the accession negotiations, there has been a great deal of amendment in the judicial system as well. It is accepted that with the commencement of accession negotiations, Turkey has undertaken the most far-reaching constitutional reform process in its existing constitutional order. As a country that has struggled against terrorism for nearly four three decades, Turkey has abolished capital punishment that is generally considered as one of the important indicator of the democratic society governed by the rule of law. After the abolishment of the death penalty, criticism was raised by some civil society and institutions against government policies in national security field. Therefore, it is easily seen that European Union membership conditionality has an impact on shaping internal political dynamics.

It can be said that the most important improvements made by Turkey with the impact of membership perspectives are in the Turkish judicial system. Since Turkey needs to fulfil the Copenhagen Political criteria including respect for the principle of rule of law in order to complete accession negotiations, a number of constitutional amendments regarding the judiciary have been adopted by Turkish Parliament in the course of the pre-accession period. The Turkish Constitution was drafted under the supervision of the military regime and in many respects reflected its authoritarian approach. It gives the state actors and institutions a significant discretion to restrict some fundamental rights of individuals under certain circumstances. [98] Although it has been amended several times to comply with contemporary universal standards, legal scholars have still continued to criticize the Constitution stating that it needs further modification.

In order to see to what extent the EU membership conditionality has impacted the Turkish judicial system; it is worth mentioning the Accession Partnership documents. The first Accession Partnership of 2001 indicates the priorities for Turkey's membership preparations including the rule of law priorities. Among political criteria, it is stressed that enhancing the right to a fair trial in a state security court, strengthening opportunity for legal redress against violation of

98 Ibid, p 24

fundamental rights, improving the functioning and efficiency of the judiciary, training judges and prosecutors on the EU legislation and human rights are short term priorities.[99]

In the Accession Partnership of 2003, the improvement of independence and efficiency of judicial system, providing state security court with universal standards for fair trial and the establishment of the regional court of appeal are listed as the short-term priorities.[100]

In 2006, ensuring consistent interpretation of legal provisions, including articles related to human rights and fundamental freedoms by all judicial authorities in line with the case-law of the ECHR is described one of the shortcomings that the Turkish judiciary should be dealing with. In addition, enhancing judicial independence in terms of a High Judicial Council and improving legal aid and access to justice are specified as the priorities. [101]

In the Accession Partnership of 2008 with Turkey, the establishments of ombudsman system and regional intermediate court of appeal are determined as one of the main priorities in the democracy and the rule of law section. The composition of the High judicial Council should be more representative and inspection system should be reviewed to ensure proper implementation of judicial independence. Ensuring that the case-law of the ECHR ought to be taken into account by all judicial authorities through training of judges and public prosecutors in the area of human rights is important. [102]

In order for these priorities to be realized, Turkey has undergone a significant reform process driven by Turkish-EU dynamics. In order to

99 The Council of the European Union Decision of 3 March 2001 on the principles, priorities, intermediate objectives and conditions contained in the accession partnership with the Republic of Turkey,http://www.abgm.adalet.gov.tr/katilim_ortakligi.html,accessed in 12.07.2011

100 The Council of the European Union Decision of 19 May 2003 on the principles, priorities, intermediate objectives and conditions contained in the accession partnership with the Republic of Turkey,http://www.abgm.adalet.gov.tr/katilim_ortakligi.html,accessed in 12.07.2011

101 The Council of the European Union Decision of 23 January 2006 on the principles, priorities, intermediate objectives and conditions contained in the accession partnership with the Republic of Turkey,http://www.abgm.adalet.gov.tr/katilim_ortakligi.html,accessed in 12.07.2011

102 The Council of the European Union Decision on 18 February 2008,on the principles, priorities, intermediate objectives and conditions contained in the accession partnership with the Republic of Turkey,http://www.abgm.adalet.gov.tr/katilim_ortakligi.html,accessed in 12.07.2011

see to what extent the impact of the EU pre-accession conditionality on Turkish Judiciary, it would be useful to consider the outcomes of the advisory reports. There were 82 recommendation in the first advisory visit report that was related to the functioning of the judicial system of Turkey in 2003. It was noted in the second advisory report which was issued just a year later that the Ministry of Justice accepted fully 58 of them and began to take the necessary measures for implementation.[103] Following the first advisory report, Turkish judiciary has experienced a number of structural innovations such as the establishment of an intermediate court of appeal, providing people with individual applications to the Constitutional Court regarding human right violations, service training of judges and prosecutors in the field of human rights and European Union law, launching national a judicial network system that facilitates people access to justice easier than before and the establishment of ombudsman system. Furthermore, state security courts, which were considered one of the main obstacles before the proper application of the rule of law, were abolished and the competence of the military courts has been reduced. Moreover, an independent justice academy which is a pre-service and in-service provider for all judicial systems has been established and the composition of the High Judicial Council has been changed in order to improve independence of judiciary. Therefore, the impact of the accession process in Turkish judicial system should not be underestimated. In evaluating improvements that have been made in Turkish judiciary in order to satisfy the requirements of the membership of the EU, the most emphasized shortcomings in the advisory reports for judiciary and in the annual progress reports have been selected. Thus, a number of institutional and structural modifications in judicial system from the abolishment of state security courts to making high judicial council more representative will be assessed.

4.1. The legal provisions ensuring judicial independence

The establishment and functioning of the Turkish Judicial system are regulated by the articles 9, 136, 137 and 140 and 142 of the Turkish Constitution. Article 9 of the Constitution states that judicial power shall be exercised by independent courts on behalf of the Turkish nation. Under the article 142 of the Constitution, the organizations, functions and

103 Report of an advisory visit on the functioning of the judicial system in the Republic of Turkey, July 2004,p 10

the jurisdictions of the courts, their functioning and trial procedures shall be regulated by law. According to this article, general courts and administrative courts were established by law.

Independence of the judiciary is recognised as a Constitutional principle in the Turkish judicial system. Article 138 of the Constitution safeguards the independence of courts and the security of tenure of judges. According to article 138 of the Constitution no organ, authority or individual may give order or instruction to judges related to the exercise of judicial power. In addition executive and legislative power and administration are obliged to comply with court decisions. Judges shall be independent in conducting their duties; they shall not be dismissed or retired before the age determined by the Constitution. Furthermore, it is ensured by this article that judges shall not be deprived of their salaries or their rights relating to their status. However, since health problems which prevent judges in performing their duties or certain convictions that require the dismissal of judges from the profession are listed as exceptions for judicial guarantees to provide independence for judges in the Constitution.

Although there exist some safeguards in the Turkish Constitutions related to independence and impartiality, some concerns have been raised by the EU.[104] While the article 140 of the Constitution emphasized that judges and public prosecutors shall be attached to the Minister of Justice insofar as their administrative functions are concerned, this provision was also criticised by the European Union representatives[105] stating that this article undermines the independence of the judiciary since it enables the Ministry to make decisions on the allocation of funds, the management of court building or the selection of auxiliary stuff. Therefore, in a system based on the separation of powers, the determination of courts' budget should be within the jurisdiction of the judiciary itself according to its needs and requirements. Thus, it was recommended that this provision ought to be removed from the Constitution. In the face of criticism, the Turkish Parliament amended this article in line with the EU recommendations.

104 Advisory visit report on independence, impartiality and administration of judiciary,2008,http://www.avrupa.info.tr/Files/Independence,%20Impartiality%20and%20Administration%20of%20the%20Judiciary.pdf

105 ibid 9

4.2. High Judicial Council

The High Judicial Council had been criticised due to its composition, the extent of its power and the absence of the judicial review for its decisions since its first establishment. It consisted of three members from the court of Cassation, two members from the Council of State and The Minister of Justice as a chairman and his undersecretary and this structure was recommended to change in order to permit adequate representation of the lower court and bar associations. Some argue that the participation of the Ministry of Justice and its undersecretary into the Council undermines the principle of independence. On the other hand, the fact that only senior judges from the Court of Cassation and The Council of State were the members of the Council also resulted in controversy over the representativeness of its composition and the lack of democratic legitimacy and immunity of its decision from judicial review.[106]

In advisory reports[107], it was recommended that the members of the High Judicial Council of Judges and Public Prosecutors who are elected by their colleagues should be considerably increased in order to prevent external influence on judicial independence. In compliance with this recommendation, the members of the High Judicial Council of Judges and Prosecutors has increased from 7 to 22.Under the new system, its members have been elected by the first instance courts, the judicial academy, bar association and academics as well as by court of cassation and the council of state among their members. The Ministry of Justice and his undersecretary will also continue being president and member of the Council. According to 2010 Progress Report, the amendment has made High Judicial Council more representative of the judiciary as a whole.[108] Following the Constitutional amendments, judges and public prosecutors working in general and administrative judiciary are provided with determining their own representatives in the High Judicial Council.

One of the recommendations in the 2008 advisory report to ensure judicial independence is that High Judicial Council should have its own budget and secretariat. The role of Ministry of justice in the administration of judiciary was deemed as a threat that would undermine

106 Ali Rıza Çoban, The Rule of Law in Turkey, http://wikis.fu-berlin.de/download/attachments/29557481/Coban+Turkey.pdf,accessed in 17.07.2011

107 supra note 105,p 13

108 2010 Regular Report From the Commission on Turkey's Progress Towards Accession, http://ec.europa.eu/enlargement/archives/key_documents/reports_en.htm#1. Progress Reports, p 13

judicial independence[109] and it was recommended that independence of the judges must be reinforced. With the Constitutional amendments, the role of the High Judicial Council in the Court management has significantly been increased. While the general directorate of Personnel affair of the Ministry of justice functioned as the secretariat of the High Judicial Council before the amendments, High Judicial Council has been granted its own budget and secretariat by Constitutional changes in order to reduce executive interference in the court management system.

In addition, the board of inspectors under which judicial inspectors evaluate the performance of judges and report them to the board has been attached to the High Council. The change of this provision was advised by the EU authorities in order to enhance judicial independence as well. Until Constitutional amendments, judicial inspectors had carried out their duty of supervising and assessing judges and Prosecutor's performance according to the law on a regular basis on behalf of the Ministry of Justice. Since the reports of inspectors had significant impact on the decisions of the High Judicial Council on promotion, discipline or transfer of judges, the previous situation has been considered unacceptable with regard to judicial independence. It is emphasized that the promotion of judges should be based on objective criteria. Therefore, the fact that the inspection board is under the authority of the executive power is incompatible with the basic principle of judicial independence. Thus, it was advised that the inspection board that is responsible for evaluating judges' performance should be attached to the High Judicial Council. The inspectors also ought to be reassigned to conduct their duty under the authority of the High Council.[110]

With regard to effective remedy, an appeal to any judicial instance was not possible against the High Judicial Council decisions' about suspension, disciplinary actions or removal of judges from their duties. It can be argued that in a situation where judges unable to appeal against a decision which affects their own professional life negatively, it would be hard for them to provide with independent adjudication. It was noted that lack of mechanism which could be appealed for reviewing the decisions

109 1998 Regular Report From the Commission on Turkey's Progress Towards Accession, http://ec.europa.eu/enlargement/archives/key_documents/reports_en.htm#1. Progress Reports

110 Report of an advisory visit on the functioning of the judicial system in the Republic of Turkey,2003,p 49

of the Council is also not compatible with the EU practice[111] as well as principle 20 of the UN Basic Principles on the Independence of Judiciary.[112]

This situation has been changed to be in compliance with universal principles and Constitutional amendments in 2010 have provided legal bases for application against decisions of the High Judicial Council concerning dismissal of judges from their profession. There is no doubt that the rule of law entails acts and actions of the state institutions should be taken in conformity with the law. In order to ensure this, acts, actions and decisions of the authorities ought to be subject to the review of independent and impartial judicial authorities for their legality. Therefore, due to the fact that the absence of judicial review over the High Judicial Council decisions is incompatible with the principle of rule of law, providing judges and public prosecutors with the possibility of appeal against a decision which breaches their rights arising from their professionals to the Council of State represents a significant step taken towards enhancing independence.[113]

Taking into account the judgements of the European Court of Human Rights ruled against Turkey regarding the right to an effective remedy, the amendment has a positive impact on consolidation of human rights in Turkey as well. According to the article 46 of the European Convention on Human Rights, providing legal remedy against the decisions of High Judicial Council in compliance with the judgement of the ECHR is an obligation for Turkey. Thus, in order to implement the ruling of the European Court of Human Rights on Kayasu case, [114] the High Judicial Council reversed its earlier decision to disbar former public prosecutor on 27 April 2011.

4.3. Military court

The jurisdiction of military court over civilians in Turkey has been heavily criticised by the EU authorities. According to 2002 progress

111 Ibid, p 50

112 The principle 20 of the UN Basic Principles on the Independence of Judiciary states that decision in disciplinary, suspension or removal proceedings should be subject to an independent review.

113 Serap Yazıcı, 'Judicial Reform Project :High Council of Judges and Prosecutors' in A judicial conundrum:opinions and recommendations on constitutional reform in Turkey,http://www.tesev.org.tr/UD_OBJS/PDF/DEMP/ENG/EngYargi1WEB.pdf,accessed in 17.07.2011

114 Kayasu v. Turkey application no , 64119/00, 76292/01 ,20 November 2008 ECHR

report, the number of applications to the ECHR against Turkey, relating to violations of fair trial, were 1125 in 2001-2002.[115] The fact that civilians are to be tried in the military court is one of the contributors to the applications to the ECHR against Turkey. Therefore, in the Advisory Report 2003, one of the changes welcomed by the EU Commission was to limit the jurisdiction of military court to try civilians for some criminal offences such as inciting soldiers and discouraging public from undertaking compulsory military service. Before the reform package adopted on 7 August 2003, the military court was competent to try civilians who committed the crimes mentioned above.[116] Despite the fact that this amendments has been considered as an important progress in the area of the rule of law, in 4th advisory report[117] it is stressed that the jurisdiction of the military courts should be restricted to military personnel and under no circumstances should they be able to try civilians, whereas military personnel's who commit a crime against civilians no matter whether on duty or off duty should be tried by civilian court. In addition, the jurisdiction of the military court was criticised by the 2009 progress report stating that it was excessive and in need of reform to comply with EU practice. Following this report, Constitutional amendments package has also restricted the jurisdiction of the military courts. According to the amendments, military court has jurisdiction to deal with case relating only to military services and military duties. Some cases which had previously been handled by military court such as crime against state security or constitutional order will be adjudicated by civilian court after the amendments. Furthermore, a provision will be added to the Constitution which prohibits civilian to be tried before military courts. There is no doubt that this is an important step taken to comply with the Copenhagen Political Criteria.

With regard to the military, Constitutional amendments in 2010 enabled military officers to appeal against the decisions of the supreme military council regarding removal from duty. It can be said that this is one of the major improvements in the field of the rule of law due to the fact that providing everyone with effective judicial remedy is an obligation for Turkey arising from human rights conventions that Turkey is also a party.

115 2002 progress report
116 Supra note 111, p 62
117 Report on independence, impartiality and administration of the judiciary,April 2009,p.29

In addition to the improvements which were noted above, the constitutional immunity for the perpetrators of the military intervention in 1980 has been removed as well. As a country which has experienced military interventions three times in 50 years, it argued that this has a symbolic importance to strengthen the rule of law.

It is argued that constitutional amendments make Turkey a more democratic country due to the fact that they improve human rights protection, strengthen civilian control of the military, and transform judicial system by narrowing the jurisdiction of military courts.

The changes that have been introduced by Constitutional referendum are considered key for Turkey in moving forward with the EU accession process. The amendments are praised by both the EU Commission and the representatives of the Venice Commission which is the Council of Europe's advisory body on constitutional matters. [118]

4.4. The abolishment of State Security Courts

It was established by Article 143 of the Constitution as a special court to deal with crimes against national security, integrity of the state and democratic order. According to the justification of the article, in order to be able to deal with the serious crimes against national security and public order, a court whose procedures are different from the general ones is necessary.[119] Until 1999, SSC panels were combined with two civilian judges and one military judge. In the face of criticism from human rights institutions and the EU authorities, the military judges were replaced by civilian ones. The main criticism was that the presence of the military officers who were under the oversight of their military superiors was against the right to be tried by independent and impartial tribunal.

In Incal v. Turkey judgement[120],the ECHR ruled that although the status of military judges provided certain guarantees of independence and impartiality, they are still military officers who take their orders from the executive as well as remaining subject to military discipline and their appointment are taken by the army's administrative authorities.Therefore, the presence of the military judge as a member of the state security court

118 Emiliano Alessandri , Democratization and Europeanization in Turkey after the September 12 referendum, Insight Turkey, vol 12, October 2010,p 23-30

119 Oğuz Onaran and Koray Karasu, Quality and Justice in Turkey, in the Administration of Justice in Europe: Towards the development of Quality Standards, 2003, p 4

120 Incal v. Turkey ECHR 41/1997/825/1031,Judgement 9/6/1998,

was against the article 6 of the ECHR that enshrines the right to a fair trial. After an amendment in the article 143 of the Constitution in 1999, the military judges was removed from the state security court and from that time on, all members of the court had been appointed among the civilian judges. The removal of the military judge from the state security court was in order to comply with the EU standards was welcomed by the EU authorities.[121]

Apart from its structure and the combination of panel of judges, State Security Courts had been attracting much criticism from the EU authorities on the basis of not providing fair trial. It is argued that specialized criminal court with a separate rule of procedure would violate the right to a fair trial and the principle of the rule of law.[122] The main criticism was the extent of limitations imposed on the safeguard of the procedural fairness in the name of state security or public order. Their special rules of criminal procedure provide fewer protections of fairness and due process: hearings may be secret, legal representation denied and periods of detention without trial may be longer than in ordinary criminal cases.[123] It is argued that this would undermine the proper functioning of the ordinary criminal justice.[124] Therefore, it is noted that state security courts represents one of the major obstacles for Turkey to satisfy Copenhagen political criteria.[125]

In the face of continuing criticism about its procedure and function, further modification had been experienced in the jurisdiction and trial process of the state security code throughout the 2000's in compliance with the EU recommendations. The Turkish Parliament adopted a law which narrowed the jurisdiction of the state security courts. Previously, it had jurisdiction to try some offence that should have been within the jurisdiction of ordinary criminal courts such as violation of the law on demonstration and rallies, forming societies with the aim of committing a crime or fraud in banking system .After the amendment to the law which regulated the establishment and prosecution procedures of the state security courts, these crimes had been removed from the jurisdiction of

121 Supra note 111,p 28
122 Onaran and Karasu, supra note 120,p 5
123 Magen, supra note 93,16
124 Mindia Vashakmadze, National Security Courts: A European Perspective, Pace International Law Review online, April 2010 at 137
125 Dınesh D. Banani, Reforming History: Turkey's Legal Regime and its Potential Accession to the European Union, Boston College International and Comparative Law Review, volume 26, 2003

state security courts and its jurisdiction was restricted to some offences which was considered as the significant threat against state security and public order such as terrorist activities or drug and weapon trafficking.

In addition to the amendments regarding the combination of its members and its jurisdiction, due to the criticism arguing that specialized court with separate rules of procedures is against the right to a fair trial and the rule of law,[126] further modification had been seen in the rule of procedures in state security court cases. Before the amendment, the rules applied in criminal procedure were significantly different from the procedures applied in ordinary criminal court. For instance, there was a substantial distinction between the procedures in ordinary courts and the state security court concerning the length of pre-trial detention, the period of presentation of detainee before a judge or access to legal counsel. As an example, the amendments had improved the right to access to legal council by providing that all defendants were entitled to have immediate access to council while previously defendants had the right to access a defence council after the expiry of 48 hours for individual crimes and 4 days for collective crimes. With regard to pre-trial detention period, the maximum period of detention without formal arrest for a suspect committing an individual crime had reduced to 24 hours from 48 hours, for an offence which was committed collectively from 4 days to 24 hours.

With the adoption of the law no: 4928, the procedural safeguards for state security court defendants had been brought to the same standards of the rules applied in ordinary court proceedings.[127] Turkey's effort in order to bring state security courts to international standards was praised by the EU representatives stating that modifications of the state security court's structure, its jurisdiction and procedural rules had contributed to the application of the rule of law.[128] However, taking into consideration the language of the provisions of Turkish Constitutions which established the state security courts and regulated its function and jurisdiction, some concern had been raised in terms of independence and impartiality of the court. It was argued that these provisions had been adopted in favour of safeguarding national security and indivisible integrity of the state at the expense of fundamental rights and freedoms of individuals. Therefore, even if some cases such as crime against national security or terrorist

126 Onaran and Karasu, supra note 120, p 12
127 Article 31 of the Law on State Security Courts amended by the article 7 of the Law no:4928
128 Report of an advisory visit on the functioning of the judicial system in the Republic of Turkey,2003,p 29

activities are more complex to be solved, it was advised to be handled by the ordinary criminal court, provided that they are equipped with the necessary competence to do so.[129] In order to ensure the proper application of fair trial and the rule of law, everyone shall be entitled to be tried by an ordinary court that uses ordinary procedures. Thus, state security courts should be abolished and cases which were dealt with by state security courts should be transferred to ordinary criminal courts which functioned within the regular system.

After the advisory report was published, state security court was abolished by the law no: 5190 that was adopted in 2004. In the place of state security court, a number of heavy penal courts have been established as the specialized courts to try relatively serious crimes such as crimes against national security, public order, terrorist activity or organized crimes. When compared to the state security court, the jurisdiction of heavy penal court has been narrowed and some offences have been removed within the competence of these courts. After the establishment of the heavy panel courts, for instance, article 312 of the Turkish Panel Code which is related to incite to hatred on the basis of different ethnic origin or religion has been within the competence of ordinary criminal court. This modification has been welcomed by the EU stating that it was a positive step taken in compliance with the recommendations.[130]

4.5. The Establishment of Justice Academy

The European Union has given special attention to the improvement of qualifications of the member of the judiciary including judges, prosecutors, and lawyer and court staff. The creation of an independent body which would be responsible for preparing all training programmes is one of the obligations that must be satisfied by candidate countries before accession to the EU. In the Bulgarian case, for example, the National Institute of Justice was established in compliance with the EU recommendation during the pre-accession period as an independent service provider for judicial professionals.[131]

In Turkish practice, the Ministry of Justice had been responsible for preparing the content of the training programmes of candidate judges

129 İbid,p 34
130 Report of an advisory visit on the functioning of the judicial system in the Republic of Turkey, July 2004,p 14
131 Alegre, Ivanova and Denis- Smith, supra note 50, p 38

until 2004. We could see some criticism in Progress Reports stating that pre-service and in-service training of the judges should be independent from executive or legislative powers. It was recommended that the content of the training programmes ought to be under the control of the judiciary itself.[132] Therefore, in order to ensure judicial independence, one of the measures that should be taken by the corresponding government is to establish a justice academy which is independent from the executive power as a service provider to all legal professionals. After issuing this report, the Turkish Parliament adopted the law on the Establishment of Justice Academy in 2004 and The Academy has become a service provider for not only judges and public prosecutors but also other judicial professionals such as lawyers. From that time on, the Academy has been provided with financial, administrative and scientific autonomy. Therefore, the preparation of the curriculum for pre-service training for candidate judges and public prosecutors has been the responsibility of the Academy itself and lectures have been given by academics and jurists. In the justice academy, lectures and seminars related to human rights, the Bangalore Principle of Judicial Conduct and judicial ethics are provided to all candidate judges and prosecutors as part of the curriculum.[133]

4.6. The Efficiency of the Judiciary and National Judicial Network Project

It is stressed that Turkish judiciary is faced with excessive backlog and the average duration of judicial proceedings lasts long.[134] In order to deal with these problems, one of the solutions offered by the EU officials is to modernise the judiciary through the improvement of information and communication technology. In compliance with this recommendation, the national judicial network project was established in 2001 to enhance efficiency of judicial system. National Justice Network Project started to establish an electronic network system covering all Courts, Offices of Public Prosecutors, Law Enforcement Offices and prisons to realize the modernisation of Turkish Judicial system. The project has provided these institutions with computers, network and internet connection. It has enabled them to access all the legislation, the decisions of the Court of

132 İbid,42

133 2006 Regular Report From the Commission on Turkey's Progress Towards Accession, http://ec.europa.eu/enlargement/archives/key_documents/reports_en.htm#1. Progress Reports

134 Supra note 131,p 90

Cassation, judicial records, judicial data of the police and army records.[135] In addition, the Project enables judges and prosecutors to connect electronically with other state institutions.

From that time on, courts and public prosecution offices have been connected to a central network. Thanks to the Project, all necessary data, statistics and information about court proceedings can be acquired by not only judges and prosecutors but also lawyers and citizens concerning their individual cases. In addition, electronic case management system is used by some courts. Cases are attributed among the courts and judges electronically by this system as well. This provides not only equal distribution of workload among judges, but also reduces external impact on attribution. According to 2008 European Commission for the Efficiency of Justice (CEPEJ) Report, Turkey has one of the most computerized judiciaries in the Europe.[136] The project consists of several sub-systems such as a citizen information system, personal management system, penal code system, administrative law system, enforcement system and so on. According to the official data, 134 Heavy Penal Court Centres, 25 Administrative Regional Courts, 575 small county courts and the Penitentiary and Detention Houses have been using this system in their daily processes. 47.439 judges, prosecutors and other court staff do their all judicious job by using the system. From the beginning, more than 57 millions files have been entered into the system and all proceedings on these files have been carried out through the system. In addition to the judges, public prosecutors and auxiliary court staff, 37.710 lawyers have been registered to lawyer's portal using the system actively.[137] Furthermore, citizens have are able to be informed about their court proceedings. As a result of positive outcome of the Project, it was awarded in 2009 by the European Commission.

It can be said that from the establishment of the National Judicial Network Project, its contribution to the efficiency of the Turkish judicial system has been substantial. In addition, it has potential to reduce applications against Turkey to the ECHR on the basis of not providing fair trial in a reasonable time.

135 The History of UYAP,http://www.e-justice.gov.tr/presentation/history.html,accessed in 11.07.2011

136 European Commission for the Efficiency of Justice Report on efficiency and quality of justice,p 17,http://www.justice.gov.tr/news/2009/overview2008_en.pdf,accessed in 12.07.2011

137 The infrastructure of UYAP,http://www.e-justice.gov.tr/presentation/infrastructure.html

4.7. Establishment of the Regional Intermediate Court of Appeal

It is accepted that membership process has an important impact on Turkish national judicial system. One of the innovations that were introduced to Turkish Judiciary is the Establishment of the Court of appeal. It is argued that it would be an important step to improve the principle of fair trial and access to justice. In the course of pre-accession process, introduction of a three-tier judicial system is recommended to the candidate countries by the EU Commission in order to ensure the right to a fair trial in a reasonable time. In other words, the judicial system should be consisting of first instance courts, appeal courts and cassation court.

According to the advisory report, introduction of a regional court of appeal has an ability both to decrease the workload of the High Court of appeals and to increase speed and efficiency of the judiciary.[138] Therefore, establishment of the regional courts of appeal is considered as one of the solutions that can improve efficiency of judiciary and reduce average duration of court proceedings.

In compliance with recommendations, law on the establishment of the court of appeal entered into force in 2005.It is argued that after functioning of these courts, the court of cassation would concentrate on its main function that provides guidance to lower courts.[139]

4.8. Alternative Mechanisms for Dispute Resolution

The establishment of ombudsman system as an alternative mechanism for dispute resolution in order to increase efficiency of judiciary is recommended to Turkey by the EU.

Ombudsman is a public officer who has strong guarantee of independence and whose decisions are not binding contrary to the court. Complaints can be made to the ombudsman directly without any formal condition or cost. In comparison to the traditional legal action that requires some formal proceedings, cost and length of ombudsman is easy to access. Therefore, it is described as 'soft justice'. [140] In the EU legal

138 Supra note 135, p 60

139 2005 Regular Report From the Commission on Turkey's Progress Towards Accession ,http://ec.europa.eu/enlargement/archives/key_documents/reports_en.htm#1. Progress Reports

140 Paul Magnette, Between Parliamentary Control and the Rule of Law: The Political Role of the Ombudsman in the European Union, Journal of European Public Policy 10:5 2003 p 667-694

order, ombudsmen were established by the treaty of Maastricht in order to provide citizens with a new mechanism that enables them to make official complaints against a decision taken the EU institutions. It is considered as the independent guardian of citizens rights.[141] It is accepted that ombudsmen contribute not only to the promotion of open and transparent administration, but also to reduce case-load of judiciary by resolving some conflict before the judicial process. In the course of pre-accession process, the establishment of the ombudsman is determined as a pre-condition for candidate countries. It can be seen from the experiences of the Central and Eastern Europe countries that the ombudsman institution as one of the key institutions for protection of citizens' rights, has played a significant role in democratic consolidation of transitional countries.[142] Its role is considered in a democratic society as so substantial not only for providing public administration with transparency and accountability but also improving rule of law by enabling citizens a mechanism to challenge against an administrative act or action that violated their rights and interests. Therefore, the introduction of an ombudsman institution is determined as a pre condition for Turkey that has to be fulfilled in the course of accession process.[143]

With the Constitutional referendum in 2010, the ombudsman service has been introduced for the first time in Turkish judicial history. It is stressed by the Progress Report in 2010 that Constitutional amendments are a step in the right direction.[144]

4.9. Juvenile Courts

It is recommended by the EU representatives in the advisory report that the number of juvenile courts needs to be increased throughout Turkey. In addition, judges working in these courts should benefit from expert opinions. Thus, psychologists, psychiatrists, pedagogues and social

141 İbid p 681

142 Evgeny Finkel, Defending rights, promoting democracy: The institutions of ombudsman in Poland, Russia and Bulgaria,http://www.ef.huji.ac.il/publications/finkel.pdf,accessed in 17.07.2011

143 2006 Regular Report From the Commission on Turkey's Progress Towards Accession, http://ec.europa.eu/enlargement/archives/key_documents/reports_en.htm#1. Progress Reports

144 2010 Regular Report From the Commission on Turkey's Progress Towards Accession, http://ec.europa.eu/enlargement/archives/key_documents/reports_en.htm#1. Progress Reports,

service experts ought to be appointed to the juvenile courts in order to prepare specialist reports in an efficient and timely manner.[145]

Following advisory report, a Law on the establishment of juvenile courts was amended in order to provide for the establishment of courts in all provinces with a population of at least 100,000 and as a result of this amendment, the number of the juvenile court in Turkey has been increased and experts mentioned above have been appointed to these courts.

4.10. Extending the Jurisdiction of Constitutional Court

The competence of the Constitutional Court has been redefined by the constitutional amendments adopted by parliament and entered into force after public referendum. After amendments, the Constitutional Court was able to accept individual complaints of infringement of the fundamental rights and freedoms.

This mechanism is considered as a last domestic remedy before the application to the European Court of Human Rights. Taking into consideration the caseload of the European Court of Human Rights, amendments relating to constitutional complaint mechanisms are in compliance with the proposals which have been offered to reduce caseload of the Court[146] and enable it to be more effective in its judicial proceedings. In addition to reduce the pressure on EctHR's overburdened caseload, it is also likely to prevent some judgements from being taken against Turkey if the Turkish Constitutional Court solved conflicts in compliance with European Convention on Human Rights and case-law of the European Court.

4.11. The Annulment of Judicial Immunities

In the Turkish Constitution, there were several provisions that provide legal basis for judicial immunity. In the absence of independent judicial institutions that can review decisions taken by a variety of state institutions ranging from High Judicial Council to Supreme Military Council, criticisms have been raised with regard to the principle of fair trial and effective remedy stating that anyone should be ensured a mechanism to challenge decisions of state power. The amendments

145 Supra note 131, p 114

146 Laurence R. Helfer, Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime, The European Journal of International law, vol 19 no 1 2008,125-159

abolish the judicial immunity of the Supreme Military Council decisions regarding the expulsion of the members of the armed forces from their professionals.

Another judicial immunity that was abolished by Constitutional amendments is the warnings and reprimands for civil servant under the article 129 of Constitution. Due to the lack of judicial review of these warning and reprimands, civil servants have been likely to suffer from unlawful transfer from their posts or duties. In assessing a conflict between public administration and civil servants relating to the transfer or removal from duty, warning and reprimands in their personnel files have been taken into account by the administrative courts as a legal basis. Therefore, the abolishment of this limitation on the right of appeal can be seen as a significant improvement in the rights of civil servants.

One innovation of the Constitutional amendment is that there was no competent authority in the Turkish Judicial system that is entitled to try the chief of the General Staff and Force Commanders for offences regarding their duty. It is provided by new provision adopted that Constitutional Court has competence to try these officers.

One article has symbolic importance in the amendment package for the strengthening of the rule of law that it ends judicial immunity for those who conducted military coup d'état in 1980. Although, it is argued that it can be difficult for perpetrators of military intervention to be tried for the crimes committed more than 30 years before the constitutional amendments due to the statute of limitations, abolishing immunities would at least contribute to public confident to the judiciary and the application of principle of equality before the law.[147] These amendments in the Turkish Constitution represent a positive step towards the proper application of the rule of law enshrined in the article 2 of the Constitution and international conventions that Turkey is a party.[148]

CONCLUSION

The provisions of the Turkish Constitution guarantee fundamental universal principles of the judiciary such as the independence and

147 Serap Yazıcı, 'A Short Review of the Proposed Constitutional Amendments, ' in A judicial conundrum: opinions and recommendations on constitutional reform in Turkey, http://www.tesev.org.tr/UD_OBJS/PDF/DEMP/ENG/EngYargi1WEB.pdf,accessed in 17.07.2011

148 Ibid, p 11

impartiality of the judges, right to a fair trial and presumption of innocence. Article 2 of the Constitution describes the Turkish state as a democratic, secular, social state governed by the rule of law. However, some problems that are likely to undermine the rule of law have been experienced in the proper applications of these principles. The main problems of the Turkish judiciary can be listed as inconsistent interpretation of law, excessive workload that hampers efficiency, and doubt about independence and impartiality and the lack of competence of judicial professionals. [149] According to the 2002 progress report, the lack of clarity, transparency and legal certainty have a significant impact on different interpretation of provisions. This leads to different court decisions on similar cases. Some were acquitted and some were convicted despite judge's invoking the same provisions.[150]

Excessive workload brings about other problems that have an impact on the right to a fair trial such as dropping a case because of the statute of limitations. It is argued that the backlog of cases in Turkish courts is one of the main factors that undermines access to justice and erodes public confidence in the judiciary. [151]The main reasons for this workload are considered to be the lack of alternative dispute solution mechanisms that can deal with conflicts before bringing them to the Court and insufficient number of judges, public prosecutors and auxiliary court staff.

Despite these shortcomings, it can be argued that the Turkish judicial system has managed to comply with the rule of law conditionality of the European Union. Despite the fact that some of the innovations such as the establishment of ombudsman system as an alternative dispute resolution mechanism and the establishment of regional court of appeal, it is likely to take time to evaluate their impacts on efficiency of judicial proceedings, it is accepted that developments in Turkish judicial system in compliance with the obligations arising from membership perspective has already affected the institutional structure of the judiciary. There is no doubt that the independence and impartiality of judges has been reinforced by Constitutional amendments due to the fact that they enable judges to appeal against the decisions of the High Judicial Council regarding the removal from duty. Moreover, the abolishment of state

149 Aydin and Cakiroglu, supra note 32, p 13

150 2002 Regular Report From the Commission on Turkey's Progress Towards Accession ,http://ec.europa.eu/enlargement/archives/key_documents/reports_en.htm#1. Progress Reports,

151 A.A. Magen, supra note 93, p 32

security courts and reducing the competence of military courts over civilians have provided with enhancing the right to fair trial. A constitutional right to a fair trial and the possibility of retrial for criminal and civil cases have been introduced in the course of pre-accession period as well.

With regard to the efficiency and effectiveness of the judicial system, it is worth mentioning the contributions of National Judicial Network Project to the easy access to justice and the right to a fair trial in a reasonable time by enabling judicial professionals to reach necessary data ranging from criminal records to the case law of ECHR.

The increase in the jurisdiction of the Constitutional Court regarding human rights and fundamental freedoms would also reflect Turkey's determination to improve human rights standards and to reduce the possibility of more applications to the ECHR.

As a conclusion, it can be argued that the Turkish judiciary has been provided with a number of Constitutional and legal guarantees in order to improve the proper application of the rule of law in the course of pre-accession period. The declaration of Turkey's official candidacy and the opening of accession negotiations have resulted in the recognition of fair trial as a constitutional principle, the improvement of judicial independence and impartiality and enhancing access to justice. Despite the fact that the Turkish judiciary has been transformed in order to satisfy the pre-accession requirements of EU membership, innovations that have been introduced to Turkish judiciary over the negotiation period would increase the standards of judicial system.

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PRIVILEGED RIGHTS OF TURKISH WORKERS IN EU PROVIDED BY DECISION NO. 1/80 OF THE ASSOCIATION COUNCIL IN THE LIGHT OF COURT OF JUSTICE OF THE EUROPEAN UNION CASE-LAW

Başar YILMAZ*

ABSTRACT

This paper presents the main principles of the Court of Justice of the European Union's case-law on the Decision No. 1/80 of the Association Council related to the rights of Turkish workers and their family members within the European Union.A considerable number of judgments for thirty years were given by the ECJ on the Decision No. 1/80 and they contributed a lot to the interpretation of the wording of the latter. Therefore, the regime set out in this Decision can be understood upon a review of this case-law. The Court has granted direct effect status to some articles of the Decision No. 1/80 but also clarified on the conditions to be met in order to benefit from this favourable arrangement compared to other third country nationals.

Keywords: Turkish workers in the EU, Ankara Agreement, Decision No.1/80, immigration, labour market, residence

ÖZET

Bu makale, Avrupa Birliği Adalet Divanı ya da eski adıyla Avrupa Toplulukları Adalet Divanı'nın, Türkiye-Avrupa Topluluğu Ortaklık Konseyi'nin 1/80 sayılı Kararına ilişkin içtihadı ışığında, Avrupa'da maaşlı çalışan ya da iş sahibi sıfatıyla bulunan Türk vatandaşlarının ve ailelerinin, çalışma ve yerleşme statülerine ilişkin olarak Avrupa Birliği ülkelerindeki hukuki haklarını konu almaktadır.1/80 sayılı Ortaklık Konseyi Kararının yürürlüğe girmesinden sonraki dönemde, Avrupa Topluluğu Adalet Divanı tarafından bu konuda azımsanamayacak sayıda karar verilerek belli bir içtihat meydana getirilmiş ve bu sayede 1/80 sayılı Ortaklık Konseyi Kararının lafzının ne şekilde yorumlanması gerektiği hususunda önemli bir yol katedilmiştir. Bu nedenle, 1/80 sayılı Karar ile Türk vatandaşlarının hukuki statülerine ilişkin olarak ortaya konan rejimin anlaşılabilmesi için, Avrupa Birliği'nin yargı organının içtihadının incelenmesi ihtiyacı hasıl olmaktadır. Mahkeme, anılan kararın bazı hükümlerine doğrudan uygulanabilirlik bahşetmiş ise de, Türk vatandaşlarına, AB üyesi olmayan diğer üçüncü ülke vatandaşlarına göre avantajlı bir statü sağlayan bu kararın hükümlerinden yararlanılması, bazı koşulların yerine getirilmesine bağlıdır.

* LL.M. Lawyer at the European Court of Human Rights Attorney-at-law

Anahtar Kelimeler: AB ülkelerinde çalışan Türk işçileri, Ankara Anlaşması, Ortaklık Konseyi'nin 1/80 sayılı Kararı, işgücü pazarı, oturum ve çalışma izni

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INTRODUCTION

General Overview and the Presentation of the Subject

During the 1950s and 1960s, in order to meet the increasing labour demand in post-war era, European countries recruited labour from developing countries, in particular from their former colonies and Southern Europe.Germany, Sweden, Denmark and also the Netherlands adopted guest-worker policies, recruiting migrant workers from Southern Europe, Turkey and North Africa.

Turkey was one of the main workers provider to European countries via bilateral labour recruitment agreements signed between the governments. It has signed the first labour recruitment agreement with Germany on 30th October, 1961.

Turkey concluded then similar labour recruitment agreements with Austria on 15th May of 1964, with Belgium on 16th July, 1964, with France on 8th April, 1965, with the Netherlands on 19th August, 1964, with Sweden on 10th March, 1967.

As the term indicates, guest-workers were supposed to return to their country of origin after a certain period of time. For example, the article 9 of the Labour Recruitment Agreement signed with Federal Republic of Germany, provides that Turkish workers would have a work permit of maximum two years. Similarly, the agreement with Austria provides in Art.9 (4) that the "return tickets of the workers shall be paid by the employer". Contrarily, the agreement with Belgium foresees in its article 12 some possibilities for Turkish workers to remain in that country after a certain period of time and to have gradually access to the entire labour market.

The time limit clauses were then amended by the governments, an excessive majority of the Turkish workers continued to work in European countries and thousands more went in 70s, mainly to Germany. In 1970s, the number of foreigners amounted to four million in Germany, and their share of the population reached 6.7 percent of Germany's total population. Some 2.6 million foreigners were employed — a level which has not been seen since then. By 1973, the most important country of

origin was no longer Italy, but rather Turkey, which accounted for 23 percent of all foreigners. Other countries of origin included Yugoslavia (17 percent), Italy (16 percent), Greece (10 percent), and Spain (7 percent).

During the period of economic recession in early 1970s, the demand for foreign workers decreased. The government declared a ban on the recruitment of foreign workers, and began to wrestle with how to deal with the still-increasing number of foreigners in the country. Concerns of not being able to re-enter in case they decided to return to their countries of origin had the effect of transforming many labour migrants, who had planned to stay in Europe temporarily, into permanent settlers.

Even though the European countries aimed to reduce the number of foreign workers, the migration flow remained very significant because of the family unifications.

Turkish labour force, constitutes now one of the largest foreigners' community in Europe. According to the Turkish Ministry of Foreing Affairs, here are the numbers of Turkish nationals in main European countries by 31th December, 2006.

Country	**Turkish nationals**	**Turkish workers**
Germany	1.738.831	461.753
France	423.471	92.992
Netherlands	364.333	104.000
United Kingdom	52.893	22.458
Austria	113.635	52.839
Switzerland	73.861	34.200
Belgium	39.664	15.155

This table does not show however the number of the people having Turkish origins but acquired the nationality of member states of European Union. Thus, the number of residents having Turkish origins is more than the data shown above.

Legal Documents Governing the Status of Turkish Workers in the EU

As shown in these examples, *guest workers* of 1960s are today present in Europe with third generation and constitute a considerable labour force in EU countries.

This was possible by the favourable legal framework granted to Turkish citizens. The main legal document related to Turkish labour force in Europe is the EEC-Turkey Association Agreement (Ankara Agreement) signed on 12 September, 1963. This constitutes one of the legal sources providing the most extensive rights for Turkish workers and their family members within the EU. The Ankara Agreement signed on the basis of article 310 of the Treaty Founding European Union is still in force.

This Agreement and related legal documents create for Turkish citizens more privileged rights than other third country nationals but does not confer the same extensive 'free movement rights' provided in the articles 39, 40 and 41 of the Treaty on the Functioning of the European Union.The most relevant articles of Ankara Agreement concerning the free movement of Turkish workers, freedom of establishmnt and freedom to provide services are articles 12 to 14. Article 12 provides, 'The Contracting Parties agree to be guided by Articles 48, 49 and 50 (Art. 39, 40, 41 in the Treaty on the Functioning of European Union, respectively) the Treaty establishing the Community for the purpose of progressively securing freedom of movement for workers between them.'

Ankara Agreement provides as well for an Association Council. Article 22 states: 'In order to attain the objectives of this Agreement the Council of Association shall have the power to take decisions in the cases provided for therein. Each of the Parties shall take the measures necessary to implement the decisions taken. The Council of Association implement the decisions taken. The Council of Association may also make appropriate recommendations.'

Then, an additional Protocol to the Association Agreement was signed on 23 November, 1970, containing also a part on the free movement of workers and the goal to achieve this free mobility of workers between 1976 and 1986.

Article 36 of the additional Protocol and article 22 of the Ankara Agreement constitute the legal basis for the decisions of the Council of

Association, namely Decision No. 2/76, Decision No. 1/80 and Decision No. 3/80 which provide more detailed and extensive framework for the establishment and free movement of Turkish workers as well as concerning their social security rights within the EU.

The first decision, namely the decision 2/76, establishes for a first stage the detailed rules for the implementation of Article 36 of the Additional Protocol. This first stage shall last four years, as from 1 December, 1976. Then it has been replaced by the decision No. 1/80.

In this contribution, we will present the main points of the Decision No.1/80 of the Association Council under the light of the extensive ECJ case law on the matter.

Decision No. 1/80 contains two chapters. Chapter 1 is related to 'Agriculture' and will not be dealt. We will concentrate on chapter 2 'Social Provisions' and especially on its section 1 'Questions relating to employment and the free movement of workers'.

The legal provisions of this decision have given rise to a large case-law inspired by the articles 39, 40 and 41 of the TFEU and assured a legal stability for Turkish workers.

1. PROGRESSIVE RIGHTS OF THE TURKISH WORKERS TO THE LABOUR MARKET AND THEIR RESIDENCE RIGHTS WITHIN THE HOST MEMBER STATE

Article 6 provides that 'a Turkish worker duly registered as belonging to the labour force of a Member State:

-shall be entitled in that Member State, after one year's legal employment, to the renewal of his permit to work for the same employer, if a job is available;

-shall be entitled in that Member State, after three years of legal employment and subject to the priority to be given to workers of Member States of the Community, to respond to another offer of employment, with an employer of his choice, made under normal conditions and registered with the employment services of that State, for the same occupation;

- shall enjoy free access in that Member State to any paid employment of his choice, after four years of legal employment.'

In my opinion, the first remark about that provision is to mention that only a Turkish worker "duly registered as belonging to the labour force of a Member State' can rely on these rights. In other terms, the subject of these rights are the Turkish workers legally employed in Member States. According to the Court, 'it should be pointed out that such a situation would merely reflect the fact that Decision No 1/80 does not encroach upon the competence retained by the Member States to regulate both the entry into their territories of Turkish nationals and the conditions under which they may take up their first employment, but merely regulates, particularly in Article 6, the situation of Turkish workers already integrated into the labour force of a Member State.'

The Court, before presenting the main principles to be followed to establish the gradual rights system for Turkish workers, dealt with the issue of jurisdiction.

1.1. Jurisdiction of the Court of Justice of the European Union over the Association Agreement and Decisions of the Association Council

In *Demirel*, the Government of the Federal Republic of Germany and the United Kingdom called in question the jurisdiction of the court to interpret the provisions of the agreement and the protocol regarding the freedom of movement for workers. They considered that there were a mixed agreement between Turkey and EEC which was concluded by the virtue of the "own powers" of the Member States and at that point the jurisdiction of the ECJ was not crystal clear.

The Court rejected this argument by mentioning *Haegeman* in which its competence was established for agreements concluded by the council by stating that 'an agreement concluded by the council under Articles 310 of the treaty is, as far as the community is concerned, an act of one of the institutions of the community (...) as from its entry into force, the provisions of such an agreement form an integral part of the community legal system within the framework of that system'. The Court explained then 'the agreement in question is an association agreement creating special, privileged links with a non-member country which must(…), take part in the community system, Article 238 (310) must necessarily empower the community to guarantee commitments towards non-member countries in all the fields covered by the treaty. Since freedom of movement for workers is, by virtue of Article 48 et seq. (39 et seq.) of the EEC Treaty, one of the fields covered by that treaty, it follows that

commitments regarding freedom of movement fall within the powers conferred on the community by Article 238 (310)'.

In Sevince, the Raad van State, had a doubt about the jurisdiction of the Court as the current case was related to decisions of Council of Association, an organe provided by Ankara Agreement. The Court, 'The Court has also held that, since they are *directly connected with the Agreement to which they give effect*, the decisions of the Council of Association, in the same way as the Agreement itself, form an integral part, as from their entry into force, of the Community legal system.' This was an application of *"théorie de rattachement"*.

Since the Court has jurisdiction to give preliminary rulings on the Agreement, in so far as it is an act adopted by one of the institutions of the Community *(by making reference to Case 181/73 Haegeman [1974])*, it also has jurisdiction to give rulings on the interpretation of the decisions adopted by the authority established by the Agreement and entrusted with responsibility for its implementation.'

As described above, via its case law, the Court in early decisions established its jurisdiction and then enlarged it.

Once the Court established its jurisdiction to interpret the Association Agreement and the decisions taken by Association Council, it has been taken to answer whether the Association Agreement and decisions have "direct effect" and thus the Turkish workers and family members can rely on them to make use of their gradual right of access to labour market.

1.2. Recognition of Direct Effect to the Article 6(1) of the Decision No. 1/80

In *Demirel*, the Verwaltungsgericht Stuttgart, to which application was made for annulment of the order that Mrs. Demirel leave the country, asked to the Court, whether the 'article 12 of the Association Agreement and Article 36 of the Additional Protocol thereto, in conjunction with article 7 of the Association Agreement, already lay down a prohibition that under community law is directly applicable in the Member States (...)'.

The Court replied negatively that question as these provisions essentially serve to set out a programme and are not sufficiently precise and unconditional to be capable of governing directly the movement of workers.

We can however interpret this argument *a contrario* and point out that in case of sufficiently precise and unconditional clauses, a set of rights for Turkish nationals could be of direct effect. That was the case in famous judgments of *Sevince* and *Kus*.

In *Sevince*, Raad van State asked to the Court if the following provisions have the direct effect:

-Article 2 (1) (b) of Decision No. 2/76 and/or Article 6 (1) of Decision No. 1/80 (which provide unrestricted access to labour market after a certain period of time);

-Article 7 of Decision No. 2/76 and/or Article 13 of Decision No. 1/80 have direct effect in the Member States of the European Community (which are "standstill"clauses and prohibits the introduction of new on theconditions of access to employment applicable to workers and members of their families legally resident and employed in their respective territories).The Court, by using the same criteria, that time ruled that these provisions have direct effect.

Decisions Nos: 2/76 and 1/80 were adopted by the Council of Association in order to implement Article 12 of the Agreement and Article 36 of the Additional Protocol which, were recognized as being intended essentially to set out a programme.

In the preamble to Decision No. 2/76 reference is expressly made to Article 12 of the Agreement and Article 36 of the Additional Protocol and Article 1 of the decision lays down the detailed arrangements for the first stage of implementation of Article 36 of the Additional Protocol. Thus, they give effect in specific respects to the programmes envisaged in the Agreement and fulfill the criteria of being unconditional and sufficiently precise.

Since *Sevince*, it has been confirmed many times that article 6 (1) of the Decision No. 1/80 can be directly relied upon by Turkish citizens.

In *Kus*, the Court confirmed its judgment in *Sevince*. In *Kus*, the national court desired to ascertain whether a Turkish worker who fulfils the requirements of the first or third indent of Article 6 (1) of Decision No. 1/80 may rely directly on those provisions in order to obtain the renewal not only of his work permit but also of his residence permit.

The Court replied affirmatively to this question by making reference to the relevant paragraphes of Sevince case.

1.3. Right of Residence as a Component Part of the Right of Work in the Member State

The Court underlined that the Article 6 merely govern the circumstances of the Turkish worker as regards employment and make no reference to his circumstances concerning the right of residence.

'The legality of the employment within the meaning of those provisions, even assuming that it is not necessarily conditional upon possession of a properly issued residence permit, nevertheless presupposes a stable and secure situation as a member of the labour force'. It was, of no avail to Mr. Sevince because he was not deemed to have 'legal employment' within the meaning of Article 2 (1) (b) of Decision No. 2/76 and Article 6 (1), third indent, of Decision 1/80.

Turkish worker who satisfies the conditions laid down in Article 6 – thus fulfilled also the time requirements - get access to any paid employment of his choice.

So, the Court ruled that 'the provisions in question necessarily imply - since otherwise the right granted by them to the Turkish worker would be deprived of any effect - the existence, at least at that time, of a right of residence for the person concerned'.

The Court confirmed in *Kus* that 'since without a right of residence the grant to the Turkish worker, after one year' s legal employment, of the right to renewal of his permit to work for the same employer would likewise be deprived of any effect'.

The recognition of direct effect of the article 6 (1) of the Decision No. 1/80 does not solely suffice to Turkish workers to enjoy the rights of access to the labour market but they must fulfill some other conditions which are also interpreted by ECJ.

1.4. Conditions Related to Work in order to Benefit from the Rights Provided by the Decision No. 1/80

Article 6 (1) provides in the first sentence that '(…) a Turkish worker duly registered as belonging to the labour force of a Member State: shall be entitled (…)' to the gradual access to the labour market.

According to this provision and the case law, three conditions are required: Holding the status of "worker"(1.4.1) pursuing a 'legal employment'(1.4.2) and being 'duly registered as belonging to the labour force of a Member State'(1.4.3).

1.4.1. Holding the Status of 'Worker'

The cornerstone case law concerning this condition is *Birden*. In that respect, the Court has consistently held that the concept of worker has a specific Community meaning and must not be interpreted narrowly.

The nature of the legal relationship between the worker and the employer is not decisive for the purposes of determining whether a person is a worker within the meaning of Community law and the interpretations must be in conformity with the Article 39 EC.

It must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. In order to be treated as a worker, a person must pursue an activity which is *effective and genuine*, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary.

The essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person (*élément de subordination*, according to French Civil Law) in return for which he receives remuneration. This is also the classical definition of a labour contract in contracts law.

In *Kurz*, a Turkish national who entered to Germany to pursue vocational training there and who has also enrolled in remunerated economic activities has been considered as a worker.

On the other hand, if we consider the "worker" status from the point of view of the national authorities, it has to be underlined that the wording of Article 6 (1) is general and unconditional: It does not permit the Member States to deprive certain categories of Turkish workers of the rights which that provision confers directly on them or to restrict or attach conditions to such rights.

Ertanir, was about a Turkish chef specialized on Turkish cuisine who holds a work and residence permit for three years and only allowed to work for a named employer, a Turkish restaurant.

Then, the competent authorities refused to extend his residence permit on the ground that, under German law, specialist chefs permitted to work in Germany must be nationals of the country in the cuisine of which the restaurant specializes, whereas Mr. Ertanir was working at that time in a restaurant specialized essentially in Greek cuisine.

The Court ruled that such restrictions are unilaterally measures preventing certain categories of workers who already satisfy the conditions of Article 6 (1) from benefiting from the progressively more extensive rights enshrined in the three indents of that paragraph.

According to the Court, 'The effect of such an interpretation would be to render Decision No. 1/80 meaningless and deprive it of any practical effect. Likewise, its purpose would not be achieved if restrictions imposed by a Member State could result in denying Turkish workers the rights which the three indents of Article 6 (1) confer on them progressively once they have been in gainful employment in the host Member State for a certain time'.

Finally, the German national law limiting the right to work to a precise employer and to specific activity was found incompatible with the Decision No. 1/80.

It has to be emphasized that national laws shall not impose other conditions than the requirements set out in the Decision 6 (1) in order to grant work and residence permits to Turkish nationals.A Turkish worker who was employed by Siemens in Germany and who had been granted exclusively for the purpose of introducing its holder to the commercial and working methods of the company in question, was denied the residence permit when he changed his mind and decided to settle in Germany.

The Court stressed that it should be borne in mind that, Article 6 (1) cannot be construed as permitting a Member State to modify unilaterally the scope of the system of gradual integration of Turkish workers in the host State's labour force, by denying a worker who has been permitted to enter its territory and who has lawfully pursued a genuine and effective economic activity for more than three-and-a-half years the rights which the three indents of that provision confer on him progressively according to the duration of his employment.

That's why, irrespective of the initial ground of the Turkish worker when he first came to Germany, if he meets the time requirements and if he can be considered as a "worker"according to settled case-law of the ECJ, who is in legal employment and duly registered to the labour force of the Member State, he cannot be deprived of his rights under the article 6.

Legal Employment

The case *Sevince* is also relevant for this condition. In that case, the questions were raised in proceedings brought by Mr. Sevince, a Turkish national, against the Staatssecretaris van Justitie (State Secretary of Justice) concerning the latter' s refusal to grant him a permit allowing him to reside in the Netherlands.

Mr. Sevince was refused an extension to the residence permit on the ground that the family circumstances which had justified the grant of the permit no longer existed. The appeal lodged against that decision, which had full suspensive effect, was definitively dismissed by the Raad van State. During the period in which he benefited from the suspensory effect of the appeal, Mr. Sevince obtained an employment certificate which remained valid until that judgment of the Raad van State.

Claiming that he had been in paid employment for a number of years in the Netherlands, Mr. Sevince applied for a residence permit. In support of his application, he relied on Article 2 (1) (b) of Decision No. 2/76, according to which a Turkish worker who has been in *legal employment* for five years in a Member State of the Community is to enjoy free access in that Member State to any paid employment of his choice, and on the third indent of Article 6 (1) of Decision No. 1/80, according to which a Turkish worker duly registered as belonging to the labour force of a Member State is to enjoy free access in that Member State to any paid employment of his choice after four years' legal employment.

Raad van State asked, amongst others, what is to be understood by the term 'legal employment' in Article 2 (1) (b) of Decision No. 2/76 and/or Article 6 (1) of Decision No. 1/80 (in the light of Article 7 of Decision No. 2/76 and/or Article 13 of Decision No. 1/80).

The Court has clarified that the legality of the employment within the meaning of those provisions, presupposes a stable and secure situation as a member of the labour force.

The fact that he could reside and work in this Member State during the appeal was only possible thanks to the suspensory effect of this procedure and on a provisional basis.

Consequently, the expression *legal employment* cannot cover the situation of a Turkish worker who has been legally able to continue in employment only by reason of the suspensory effect deriving from his appeal pending a final decision by the national court thereon, provided always, however, that that court dismisses his appeal.

Therefore, the legal employment 'does not cover the situation of a Turkish worker authorized to engage in employment for such time as the effect of a decision refusing him a right of residence, against which he has lodged an appeal which has been dismissed, is suspended'.

The same must apply to a case such as that in the main proceedings where suspension is not an automatic consequence, by operation of law, of judicial proceedings but is ordered with retroactive effect by a court. It is again mentioned that the suspension is effective only for the duration of the proceedings and has the effect of allowing the person who initiated them to remain and work on a provisional basis pending a final decision on his right of residence.

In that case, Mr. Kus obtained a judgment at first instance which upholds his right of residence. In *Sevince*, the first instance denied the extension of the residence permit and it was subject to appeal. But the common point is that since a judgment is challenged on appeal, may be set aside and therefore does not definitively regulate the situation of the claimant.

Thus, Mr. Kus cannot be considered as been engaged in legal employment for at least four years, where he was employed on the basis of a right of residence conferred on him only by the operation of national legislation.

In *Kol*, however, Mr. Kol and his spouse of German nationality had declared that they lived together as man and wife in the marital home, and the former obtained a German residence permit of unlimited duration. Then, that declaration proved to be false.

The Court ruled that 'periods of employment after a residence permit has been obtained only by means of fraudulent conduct which has led to a conviction cannot be regarded as legal for the purposes of application of Article 6 (1) of Decision No. 1/80, since the Turkish national did not

fulfil the conditions for the grant of such a permit which was, accordingly, liable to be rescinded when the fraud was discovered.'

Consequently, the periods in which that Turkish national was employed under a residence permit obtained in those circumstances were not based on a stable situation and Article 6 (1) of Decision No. 1/80 is to be interpreted as meaning that a Turkish worker does not satisfy the condition of having been in legal employment.

The notion of legal employment does not necessarily require the possession of a residence permit. In *Bozkurt* it has been pointed out that non-possession of residence permit cannot deprive Turkish nationals of the rights of Article 6.

Article 6 (1) of Decision No. 1/80 does not subject recognition of those rights to the condition that Turkish nationals must establish the legality of their employment by possession of any specific administrative document, such as a work permit or residence permit, issued by the authorities of the host country.

It follows that the rights conferred under Article 6 (1) on Turkish nationals who are already duly integrated into the labour force of a Member State are accorded to such nationals irrespective of whether or not the competent authorities have issued administrative documents which, in this context, can only be declaratory of the existence of those rights and cannot constitute a condition for their existence.

As another explanation on the calculation of periods of "legal employment", the Court clarified in *Ertanir* that short periods during which the Turkish worker did not hold a valid residence or work permit in the host Member State must be included in the period of legal employment.

We can conclude that a Turkish worker is entitled to a temporary interruption of his employment relationship. In spite of such an interruption he continues to be duly registered as belonging to the labour force in the host Member State, within the meaning of Article 6 (1) of Decision No. 1/80.

For example in case of a worker who lost his/her job, the latter may claim an extension of his residence permit in order to find another job within a reasonable time.

That interpretation, must apply regardless of the cause of the absence of the person concerned from the labour force of the host Member State, provided that that absence is temporary.

Also, if the failure to work arises from the worker's imprisonment, since the absence of the Turkish national concerned from the labour market is for a limited period, it does not prevent the latter to rely on the rights conferred in the Article 6. More particularly, the fact that the imprisonment prevents the person concerned from working, even for a long period, is irrelevant if it does not preclude his subsequent return to working life.

In those circumstances, except where the person concerned has definitively ceased to be duly registered as belonging to the labour force of the host Member State because objectively he no longer has any chance of rejoining the labour force or has exceeded a reasonable time-limit for finding new employment after the end of his prison term, the national authorities can restrict the rights which he derives from Article 6 (1), third indent, of Decision No. 1/80 as regards residence and employment only on the basis of Article 14 (1) of that decision.

On the legal employment issue, we can make another remark. A person initially entered in a Member State to work temporarily but then fulfilled the time requirement in the article 6 cannot be prevented to rely on these rights.

1.4.3. Being "Duly Registered in as Belonging to the Labour Force of a Member State"

In *Bozkurt*, the legal question to be resolved was *to determine whether a Turkish worker employed as an international lorry-driver belongs to the legitimate labour force of a Member State. Mr. Ahmet Bozkurt,* as an international lorry-driver on routes to the Middle East by Rynart Transport B.V., a company incorporated under Netherlands law, with its head office at Klundert in the Netherlands. His contract of employment was concluded under Netherlands law. In the periods between his journeys and during his periods of leave he lived in the Netherlands and all these being in compliance under Dutch law.

In order to determine, for the purposes of the application of Article 6 (1), whether a Turkish worker is to be regarded as belonging to the labour force of a Member State, it must, in accordance with the principle laid

down in Article 12 of the Agreement and by analogy with the situation of a worker who is a national of a Member State employed in another Member State, be ascertained whether the legal relationship of employment can be located within the territory of a Member State or retains a sufficiently close link with that territory.

It is for the national court to determine whether the employment relationship of the applicant in the main proceedings as an international lorry-driver retained a sufficiently close link with the territory of the Netherlands, and, in so doing, to take account in particular of the place where he was hired, the territory on which the paid employment was based and the applicable national legislation in the field of employment and social security law.

The Court of Justice of the European Union had held in other judgments with similar facts, for example in case of a worker who is permanently employed on board a ship flying the flag of another Member State; that persons pursuing such activities had the status of workers employed in the territory of a Member State if the legal relationship of employment could be located within the territory of the Community or retained a sufficiently close link with that territory.

To conclude, the concept of `being duly registered as belonging to the labour force' must be regarded as applying to all workers who have complied with the requirements laid down by law and regulation in the Member State concerned and are thus entitled to pursue an occupation in its territory.

1.5. Right of Equal Treatment

Article 10 (1) of the Decision No. 1/80 lays down a right of equal treatment, which prohibits any Member State from discriminating against Turkish workers on the basis of their nationality and other working conditions.

In Wählergruppe Gemeinsam, some Turkish workers were deleted from a list of candidates for membership in chambers of workers in Austria because of a national legislation which requires the Austrian nationality for holding such a status.

The Court first decided on the direct effect of that clause as it was an unconditional and precise provision. Therefore, it also found incompatible a national legislation (Austria) which excludes Turkish

workers duly registered as belonging to the labour force of the host Member State from eligibility for election to the general assembly of a body representing and defending the interests of workers, such as the chambers of workers.

This case has to be dealt within the meaning of the Article 10, as the participation to chambers of workers were considered as belonging to the definition of "other conditions of work" stated in this Article.

The Decision No. 1/80 does not only provide privileged rights about Turkish workers but also other provisions to be relied on by family members of Turkish workers.

2. THE RIGHTS CONFERRED TO FAMILY MEMBERS OF A TURKISH WORKER

Article 7 (1) of Decision No. 1/80 extends the right to take up employment to the family members who have been authorized to join a Turkish worker duly registered as belonging to the labour force of a Member State.

2.1. Recognition of Direct Effect to the Article 7 (1) of the Decision No. 1/80

The Article 7 (1) states that 'The members of the family of a Turkish worker duly registered as belonging to the labour force of a Member State, who have been authorized to join him: shall be entitled – subject to the priority to be given to workers of Member States of the Community – to respond to any offer of employment after they have been legally resident for at least three years in that Member State (…)'.

The issue about this provision is whether the family members can also rely on directly on it, in order to have a residence right in the Member State. The Court ruled in *Kadiman*, referring to *Sevince* and *Eroglu*, that like Article 6 (1) the first paragraph of Article 7 of Decision No. 1/80 has direct effect in the Member States, so that Turkish nationals fulfilling the conditions which it lays down may directly rely on the rights conferred on them by that provision as that decision, confer, in clear, precise and unconditional terms, the right on the members of the family of a Turkish worker duly registered as belonging to the labour force of the host Member State to respond, subject to priority being granted to workers of the Member States, to any offer of employment after being legally resident there for at least three years, and the right freely to take up paid

employment of their choice in the Member State in whose territory they have been legally resident for at least five years.The direct effect has been confirmed also few more times by the Court of Justice of the European Union.

Concerning the right of residence, it has been cleared that the specific periods of legal residence referred to in the first paragraph of Article 7 necessarily imply the existence, as regards the members of the family of a Turkish worker who are authorized to join him in the host Member State, of a right of residence during such periods, since the effect of withholding such a right would be to negate the possibility offered to the persons concerned of residing in that Member State. Moreover, without a right of residence, the authorization granted to the family members concerned in order to join the Turkish worker in the territory of the host Member State would itself be rendered entirely inoperative.

However, it has been pointed out that the first paragraph of Article 7 of Decision No. 1/80 requires that the unity of the family, in pursuit of which the person concerned entered the territory of the host Member State, should be evidenced for a specified period by actual cohabitation in a household with the worker and that this must be so until he or she becomes entitled to enter the labour market in that State.

Another question arises in the context of Article 7 of Decision No. 1/80, whether the period during which the residence permit has ceased to be valid, has to be considered by the authorities of the hosting Member State as a legal period of residence.

The Court ruled in *Ergat* that a Turkish national, who has been authorised to enter a Member State for the purpose of re-uniting the family of a Turkish worker belonging to the legal labour force of that State, and who has been legally resident there for more than five years and has been in legal employment of various kinds, with interruptions, does not lose the benefit of the rights conferred on him by the second indent of the first paragraph of Article 7 of Decision No. 1/80 and, in particular, the right to extend his residence permit in the host Member State, even where his residence permit had expired before the date on which he lodged an application to extend it which was refused by the competent national authorities.

The ECJ had ruled that the conditions laid down in Article 7 are only conditions for acquiring the rights granted by the provisions. Once these

conditions have been met, the host State must recognize the rights granted by Article 7 and is no longer entitled to impose any conditions. Beneficiaries acquire an independent legal status. Their rights can only be restricted on two grounds. Firstly, a Member State can do so in case the person concerned has left the national territory without good reason and, secondly, when the presence and personal conduct of him or her constitute a real and serious danger for public order, public security or public health.

2.2. A More Favourable Regime for the Children of Turkish Workers

The second paragraph in the Article 7 refers explicitly to children of Turkish workers who have completed a course of vocational training in the host country and give them the right to respond to any offer of employment there, irrespective of the length of time they have been resident in that Member State, provided one of their parents has been legally employed in the Member State concerned for at least three years.

In *Akman*, German authorities argued that the conditions laid down by that provision are not met in Mr. Akman's case because his father, whilst having been legally employed in the Member State concerned for over 14 years, was no longer working there at the time when his son wished to gain access to the employment market.

The Court of Justice of the European Union, considered that this specific provision applying to the children is less strict then the Article 7 (1). The second paragraph of Article 7 is a more favourable provision than the first and is intended to provide specific treatment for children, as opposed to other members of the family of a Turkish worker, with a view to facilitating their entry into the employment market following completion of a course of vocational training, the objective being the achievement by progressive stages of freedom of movement for workers, in accordance with the aims of Decision No. 1/80.

Therefore, the provision must not be interpreted strictly and cannot, failing any clear indication to that effect, be construed as requiring the Turkish migrant worker still to be employed in the host Member State at the time when his child wishes to gain access to the employment market there.

2.3. Recognition of Direct Effect to the Article 7 (2) of the Decision No. 1/80

Like Article 6 (1) of Decision No. 1/80, Article 7 clearly, precisely and unconditionally embodies the rights of those children of Turkish workers who have completed a course of vocational training in the host country to respond to any offer of employment there, irrespective of the length of time they have been resident in that Member State, provided one of their parents has been legally employed in the Member State concerned for at least three years. Like Article 6 (1), the second paragraph of Article 7 has direct effect in the Member States of the European Community.The Article 7 (2) stands also for the right of residence which is inherent in most of the cases to the right of access to the labour market of the Member State.

The Court ruled that 'Since the right of residence is essential to access to and the pursuit of any paid employment, whether for the same employer in connection with renewal of a work permit or for another employer, chosen freely or subject to the priority given to workers of the Member States of the Community, it must also be accepted that the right conferred on a person by the second paragraph of Article 7 of Decision No. 1/80 to respond to any offer of employment necessarily implies the recognition of a right of residence for that person.'

2.4. Recognition of Direct Effect to the Article 9 of the Decision No. 1/80

According to the Article 9, Turkish children residing legally in a Member State of the Community with their parents who are or have been legally employed in that Member State, shall have equal treatment in order to access to education.

In accordance with the Court's settled case-law, a provision in a decision of the EEC-Turkey Association Council must be regarded as having direct effect when, regard being had to its wording and to the purpose and nature of the decision of which it forms part and of the agreement to which it relates, that provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure. Thus, it has been pointed out that the Article 9 satisfies these conditions and has direct effect.

The Court emphasized as well that the right to equal access to education and vocational training subject to either any special rules of residence with parents during the period of education, such as the existence of a home common to children and parents, or to any special kind of residence during that period, such as a main residence rather than a secondary residence.

3.STANDSTILL CLAUSE OF THE DECISION NO. 1/80: ARTICLE 13

A standstill clause can be explained as a provision in an agreement prohibiting a party from modifying certain conditions from how they stand at the time when the agreement entered into force, so as to negatively affect the applicant.

Article 13 provides 'The Member States of the Community and Turkey may not introduce new restrictions on the conditions of access to employment applicable to workers and members of their families legally resident and employed in their respective territories.'

Sahin is one of the cases where that issue was dealt. The Court has ruled that the adoption of new rules which apply in the same way both to Turkish nationals and to Community nationals is not inconsistent with any of the standstill clauses laid down in the fields covered by the EEC-Turkey Association. The Court added, that, if such rules applied to nationals of Member States but not to Turkish nationals, Turkish nationals would be put in a more favourable position than Community nationals, which would be clearly contrary to the requirement of Article 59 of the Additional Protocol, according to which the Republic of Turkey may not receive more favourable treatment than that which Member States grant to one another pursuant to the EC Treaty.

It has been however noted that on the other hand Turkish nationals may not be subjected to new obligations which are disproportionate as compared with those established for Community nationals.

We can note that the Court insisted on a equal treatment principle between Turkish nationals and citizens of a Member state on the matter of new restrictions. One of the actual debates on the Article 13 is about the integration requirements. As these requirements did not exist at the time of signature of the Ankara Agreement and adoption of Decision No. 1/80, they may seem doubtful vis-à-vis the standstill clause.

After one year of legal employment, Turkish workers acquire a right of continued employment and a corollary right of residence in a Member State, which means that their rights under the Decision No. 1/80 will be violated if they are subjected to integration measures after the initial year of residence in a Member State.

But, as the competence to regulate both the entry into their territories of Turkish nationals and the conditions under which they may take up their first employment retained by the Member States, it can be rather argued that integration tests and similar measures are compatible with the general aim of the Ankara Agreement and of the Decision No. 1/80.

In *Abatay*, some Turkish lorry drivers were refused to have new work permits on the basis of a new law with stricter conditions to hold such a permit. The Court, underlined the prohibition for Member States to apply new measures to Turkish citizens legally employed in a Member State for relevant periods of time. On the other side, this does not prevent national authorities from intorducing more stringent measures for Turkish citizens who are not lawfully resident in the Member State.

In this case, the fact that Turkish workers were employed by a Turkish company having its seat in Turkey was discussed in order to determine if they can be considered as belonging to the labour force of a Member State. Bozkurt interpretation criterion *(sufficient close link with the territory)* has to be evaluated by national authorities.

The Advocate General pointed out that Turkish drivers may also invoke the protection of Article 41 (1) of the Additional Protocol by relying on the Articles 13 and 14 of the Association Agreement. Even this contribution deals with Decision No. 1/80, it is better to note it as another legal argument.

4. LIMITATIONS TO THE RIGHTS OF TURKISH NATIONALS

Article 14 provides that limitations justified on grounds of public policy, public security or public health can be applied to Turkish citizens.

In *Nazli*, the Court set out the principles to bear im mind when dealing with Article 14 (1).

When determining the scope of the public policy exception provided for by Article 14 (1) of Decision No. 1/80, reference should be made to the interpretation given to that exception in the field of freedom of movement

for workers who are nationals of a Member State of the Community. Such an approach is all the more justified because Article 14 (1) is formulated in almost identical terms to Article 48 (3) of the Treaty.

On this issue, it has been consistently held that the concept of public policy presupposes, in addition to the disturbance of the social order which any infringement of the law involves, the existence of a *genuine and sufficiently serious threat* to one of the fundamental interests of society.

Accordingly, a Turkish national can be denied, by means of expulsion, the rights which he derives directly from Decision No. 1/80 only if that measure is justified because his personal conduct indicates a specific risk of new and serious prejudice to the requirements of public policy.The Court stresses that a case-by-case basis examination of the personal conduct is necessary, solely criminal conviction is not enough for an expulsion on public grounds.

In the end, Turkish nationals can rely on the principles of community law when applying Article 14, which has to be interpreted restrictively so that it can merely be adhered to in serious cases.

CONCLUSION

The review of the case law on Decision No. 1/80 shows that it exists three categories of workers according to the level of their rights in labour market. Turkish workers constitute a *middle category* between nationals of Member States of EU and third country nationals. They do not enjoy the extensively interpreted rights of the nationals of Member States but they are not either subject to the same legal status with third country nationals. For example, Turkish workers do not have yet free movement rights between Member States, they rely on the rights provided by the Decision No. 1/80 only in the host Member State. An author defined the situation of Turkish workers as “a sandwich”, somewhere in the middle. The Court contributed extensively to the rights of Turkish workers and their family members, by an interpretation inspired by Article 39 et seq. EC.

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THE CONCEPT OF ORIGINALITY FROM A COMPARATIVE PERSPECTIVE

Batu KINIKOĞLU*

ABSTRACT

This paper is an attempt to provide a broad overview of the debates around the concept of originality with reference to common law, civil law and the European Union harmonization. Originality is an important and unresolved subject in copyright law. Common law and civil law jurisdictions handle the concept of originality differently even though it is a requirement for copyright protection in both of the jurisdictions. Not only is there no consistency in court decisions about the concept of originality at the national level, but also harmonization at the EU level is very limited. Considering the significance and indispensability of the concept in copyright law, this paper suggests that the meaning of originality should be clearly designated. Seeking to provide an overview of the debates around the concept, this paper first focuses on the concept of originality in the United Kingdom to understand its development in the common law jurisdiction and goes on with a discussion of the current situation in the EU. In the last part, it concentrates on the concept of originality in civil law jurisdiction with reference to the Turkish Law.

Keywords: Originality; copyright; intellectual property; common law; civil law; harmonization

ÖZET

Bu makale, Anglo-Sakson ve Kara Avrupası hukuk sistemleri ve Avrupa Birliği hukuk uyumlaştırması çerçevesinde, fikri haklarda eserin özgünlüğü kavramı hakkında genel bir inceleme sunmayı amaçlamaktadır. Özgünlük, fikri mülkiyet hukukunda önemli ve tartışmalı bir konu olmayı sürdürmektedir. Özgünlük kavramı, hem Anglo-Sakson hem de Kara Avrupası hukuk sistemlerinde eserin koruma kapsamına girebilmesi için bir şart olmasına karşın, sistemlerin bu kavrama yaklaşımları birbirlerinden farklıdır. Özgünlük kavramı ile ilgili ulusal çapta mahkeme kararlarında bir tutarlılık sağlanamamış olmasının yanı sıra, Avrupa Birliği çapında da konu çok kısıtlı bir şekilde uyumlaştırılmıştır. Bu makale, özgünlük kavramının fikri mülkiyet hukukundaki önemini göz önüne alarak, kavramın kapsamının açık bir şekilde belirlenmesi gerektiğini ileri sürmektedir. Kavram ile ilgili tartışmaları inceleyebilmek amacıyla, bu makale, öncelikle, fikri haklarda özgünlük kavramının Birleşik Krallık'taki durumunu ele alacak ve bu şekilde kavramın Anglo-Sakson hukukunda nasıl geliştiğini anlamaya çalışacaktır. Bunun ardından, Avrupa Birliğindeki mevcut durumu inceleyecek ve son olarak da

* Attorney-at-Law, Istanbul Bar Association

Türk Hukuku örneği üzerinden kavramın Kara Avrupası Hukukundaki ele alınışı üzerinde duracaktır.

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INTRODUCTION

Originality is an important, unresolved but somehow not much discussed concept in debates around copyright. In order for a work to be qualified for copyright protection, it has to be original. Originality is a requirement for copyright protection both in the common law and civil law jurisdictions, whether it is defined as being "*original*" or constituting "*author's own intellectual creation*"[1]. For example, in the United Kingdom, according to the Copyright, Designs and Patents Act 1988 section 1(a), copyright subsists in "*original literary, dramatic, musical or artistic works*". Likewise, in the United States, 17 USC 102 states that *"[c]opyright protection subsists… in original works of authorship.*" In Turkey, a civil law country, the Law on Intellectual and Artistic Works states that a "*work*" is "*any intellectual or artistic product*", which "*bear[s] the characteristic of its author*".[2]

While all cases indicate the indispensability of originality in defining copyright, they take the concept of originality at its face value. However, the controversial character of the concept becomes more visible in various cases in which the boundary between the original and a copy is very fuzzy. Therefore, this paper is a critical attempt to analyse the extent to which the concept of originality is clear and unproblematic through a discussion of cases from both common law and civil law jurisdictions. Accordingly, since the UK is a common law country, analysing originality in the UK requires the analysis of court cases where the concept of originality has been discussed and decided under the Copyright Act 1842, Copyright Act 1911, Copyright Act 1956 and Copyright, Designs and Patents Act 1988. To analyse the concept of originality in civil law jurisdiction, the case of Turkey will be elaborated with specific emphasis on the concept of originality in the Turkish Law of Intellectual and Artistic Works and Turkish Supreme Court decisions

1 Directive 2009/24/EC on the legal protection of computer programs, Directive 2006/116/EC on the term of protection of copyright and certain related rights, and Directive 96/9/EC on the legal protection of databases all use the term "author's own intellectual creation".

2 Law on Intellectual and Artistic Works, Article 1/B(a).

about originality. To understand whether harmonization exists at the EU level about originality, the current situation and relevant directives will be examined.

This paper aims to provide a broad overview of the debates around the concept with reference to common law, civil law and the EU harmonization. Thus, this paper is divided into three main parts. While the first part focuses on the concept of originality in the UK to understand its development in the common low jurisdiction, the second part offers a discussion of the current situation in the EU in terms of originality. The last part of the paper concentrates on the concept of originality in civil law jurisdiction with reference to the Turkish Law.

I. The Concept of Originality and its Development in the UK

The concept of originality has been apt to changes in the UK jurisdiction throughout history. As the law and the technology changed, so did the concept of originality. In some cases, it has been ruled that originality required labour, judgment and skill[3] while in some it has been stated that mere existence of labour, judgment or skill is not enough[4].

Originality does not mean being original in the sense of being not a copy or being novel. Originality deals more with the authorship rather than the work itself. Its main concern is author's input on the work that has been created. As Bently and Sherman state;

" 'Originality' is concerned with the relationship between an author or creator and the work. That is, originality is not concerned with whether the work is inventive, novel or unique. While the novelty requirement in patent law focuses on the relationship between the invention and the state of the art ...[w]hen copyright says that a work must be original, this means that the author must have exercised the requisite intellectual qualities ... in producing the work. More specifically, in determining whether a work is original, copyright law focuses on the input that the author contributed to the resulting work."[5]

Derivate and re-created works are good examples to show the relationship between copying and originality. Even though these works

3 *Ladbroke Football Ltd v William Hill Football Ltd* [1964] 1 WLR 273.
4 *Interlego v Tyco* [1988] R.P.C. 343.
5 Bently and Sherman, *Intellectual Property Law, 2nd edn* (2004), p.88, quoted in N P Gravells, "Authorship and originality: the persistent influence of Walter v Lane" (2007) *Intellectual Property Quarterly*, p.1

are derived from already existing works, if they meet certain requirements, they will be protected with copyright, notwithstanding the fact that they, to a certain extent, copied certain elements of existing works. In the UK, street directories[6], edited and published version of public speeches[7], list of advertisements[8] have all been decided worthy of copyright protection. One might even argue that photographs are, in fact, copies of existing and sometimes manufactured materials. For instance, when a photograph of a statue is taken, the photograph basically copies the statue, which itself is a work protected by copyright. If photographs are copies of material world, should they not be protected by copyright? On the contrary, they are protected by copyright even though they are "*copies of some object, such as a painting or statue*"[9].

It is therefore important to underline that everything that is not a "copy" is not necessarily an "original work", and likewise something that is an "original work" may be considered as a "copy".

It is also important to understand that being original does not mean being novel. Copyright does not protect inventions like patents do. In the famous *University of London Press v University Tutorial Press* case[10], it was stated by Peterson J. that;

"The word ``original'' does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought, and, in the case of ``literary work'', with the expression of thought in print or writing. The originality which is required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work — that it should originate from the author."[11]

The *University of London Press v University Tutorial Press* case was decided in 1916; after the 1911 Copyright Act had been enacted and the

6 *Kelly v Morris* [1866] L. R. 1 Eq. 697.
7 *Walter v Lane* [1900] A.C. 539.
8 *Lamb v Evans* [1893] 1 Ch. 218.
9 *Graves' Case* [1868-69] L.R. 4 Q.B. 715 at 722, quoted in B Ong, "Originality from copying: fitting recreative works into the copyright universe" (2010) *Intellectual Property Quarterly*, p.8
10 *University of London Press v University Tutorial Press* [1916] 2 Ch. 601 Ch D
11 Id., at 608-609

word "original" had been used in the Act.[12] The concept of originality, however, had been discussed well before the 1911 Act. A classic example of such a case, where the concept of originality has been discussed in detail, is the *Walter v Lane* case.[13] The case had been decided under the 1842 Copyright Act, when the word "original" was not used in the Act.[14]

Waisman argues that there are four characteristic standards for originality; "the sweat of the brow standard", "the skill and judgment standard", "the creativity standard" and "the personality standard".[15] According to Waisman, the "sweat of the brow standard" is concerned in whether the work is copied or not and "*considers original any work that is not copied*".[16] The other three standards are related with the "intellectual nature" of the work. Whereas "the skill and judgment standard" considers works which have the skill and judgment of the author as original, "the creativity standard" takes only creative works as original, and according to "the personality standard", only works, which represent the personality of the author, are worthy of copyright protection.[17]

However, in practice, it is hard to differentiate the last three standards, which, Waisman argues, deal with the intellectual nature of the work. For instance, many civil law jurisdictions adopted a standard similar to the "personality standard". Nevertheless, to understand whether the work reflects the personality of the author, the courts sometimes take into account the skill or the creativity of the author. For example, even if originality has been clearly stated as "bearing the characteristic of its author" in Turkish Law,[18] courts in Turkey have sometimes stated that a work should have "intellectual creativity" to be regarded as a work and thus get protected under the law, and these decisions have been discussed in the Turkish Supreme Court.[19] Therefore, even if the "personality standard" is followed in a jurisdiction, in practice, factors such as creativity are taken into account to designate whether the work in

12 Section 1(1) of the Copyright Act 1911 states that; *"...this Act extends for the term hereinafter mentioned in every original literary dramatic musical and artistic work..."*
13 *Walter v Lane* [1900] A.C. 539.
14 Because the case discussed the issue of originality in detail and was referred to in many cases afterwards, it will be further analysed in the following sections.
15 A Waisman "Revisiting originality" (2009) *European Intellectual Property Review*
16 Id., p.1
17 Id., pp.1-2
18 Law on Intellectual and Artistic Works, Article 1/B(a)
19 Supreme Court, 11th Civil Chamber, Decision No: 2007/8748, 07.06.2007

question bears the characteristic of its author. It is indeed hard to make strict differentiations between the standards, which deal with the intellectual nature of the work.

Even if originality is unclear in civil law jurisdiction, it might be argued that it is even more problematic in common law jurisdiction. In the UK, originality had been discussed before it was written in the Copyright Act. *Walter v Lane* is a classic example of such a discussion. In the *Walter v Lane*, briefly, The Times newspaper claimed that they have copyright on the edited and published version of the speeches of Lord Rosebery. The reporters of *The Times* attended to public speeches of Lord Rosebery and wrote the speeches of the Lord. After the necessary editing, these speeches were published by *The Times*. When the defendant published a book, which contained these speeches, *The Times* claimed that they had copyright on the speeches, which have been published in the newspaper.

Here, it is crucial to underline that at the time of the case, the 1842 Copyright Act was in force. The 1842 Act did not include the word "original" to be a feature of the work, which is worthy of copyright. According to the 1842 Act, "*the word "copyright" shall be construed to mean the sole and exclusive liberty of printing of otherwise multiplying copies of any subject to which the said word is herein applied*"[20].

The *Walter v Lane* case raised different opinions. Regarding the claims of copyright by *The Times* on the published speeches, Lord Brampton stated;

"A speech and the report of it are two different things, and the author of the one and the author of the other are presumably two different persons. The author of a speech is the author of language orally uttered by himself. The author of the report of a speech is the author of a writing containing the substance or the words of that speech. The speech must precede the report of it. The oral speech is not a 'book,' the written report is. The book is the subject of copyright under section 3, and the property in such copyright in a book is in its author."[21]

On the other hand, Lord James thought that a reporter should not be considered as an author, unless he shows enough skill that differentiates him from a "mere copyist". He asserted;

[20] Copyright Act 1842, s.2

[21] *Walter v Lane* [1900] A.C. 539 at 556-557 quoted in N P Gravells, "Authorship and originality: the persistent influence of Walter v Lane" (2007) *Intellectual Property Quarterly*, p.4

"A mere copyist of written matter is not an 'author' within the Act, but a translator from one language to another would be so. A person to whom words are dictated for the purpose of being written down is not an 'author'. He is the mere agent or clerk of the person dictating, and requires to possess no art beyond that of knowing how to write."[22]

Lord James's differentiation between "mere copyists" and "translators" is very significant, as he argued that a translator could be considered to be an author within the Act. It is possible that he came to this conclusion based on the level of skill contributed to the work by the copyist. According to Lord James, if a copyist interposes enough of her skill, than she should be considered an author (in the case of translators), and when she does not contribute enough skill, then she cannot be labelled as an author (in the case of mere copyists). Although "*an 'author' may come into existence without producing any original matter of his own*"[23] to be qualified as an author she has to contribute enough skill to the original work.

On the other hand, Lord Robertson did not agree with the majority and said that the reporters had done nothing worthy of having a copyright on their writings. The reason of this disagreement lies on the fact that those specific reporters did not show enough of their skills. In other words, he accepted the fact that the copyist can be considered an author if he shows enough skill, by stating that "*Lord Rosebery's speeches are so conceived and expressed as to require on the part of the reporter nothing but literal accuracy in order to [procure] their presentation to the public as literary compositions.*"[24]

Walter v Lane is a very important case; however, it is not the first case to handle the originality issue, and it certainly is not the first case, where copyright was granted to a "copied" work. As pointed out by Lord Davey, before the *Walter v Lane* case, copyright was granted to "the information given by a street directory: *Kelly v Morris*; or by a list of deeds of arrangement: *Cate v Devon and Exeter Constitutional Newspaper Co*; or in a list of advertisements: *Lamb v Evans*."[25]

22 Id.
23 Id.
24 Id.
25 Id., p.3

The Copyright Act 1911 did not only extend the copyright protection to dramatic, musical and artistic works, but also used the word "original". According to Section 1(1), the Act extended "*for the term hereinafter mentioned in every original literary dramatic musical and artistic work*".

Yet, derivative and re-created works continued to be a debated issue under the Copyright Act 1911. There were many cases about derivate and re-created works, which were decided under the Copyright Act 1911. These cases showed once more the vague and fuzzy nature of the concept of originality and authorship. In *Macmillan & Co Ltd v K&J Cooper*, the level of originality that derivate works should have was expressed as;

"To secure copyright for [a] product it is necessary that labour, skill and capital should be expended sufficiently to impart to the product some quality or character which the raw material did not possess, and which differentiates the product from the raw material."[26]

The debates about originality persisted under the Copyright Act 1956 and still continue under the Copyright, Designs and Patents Act 1988. *Interlego v Tyco* is an important case, which although "*was made in response to a narrow factual context*"[27] demonstrates that the skill, labour or judgment is not the sole originality standard that has been followed in the UK.[28] "*What looms behind the door marked 'originality' is a question that is rarely acknowledged by courts and never definitely answered*."[29]

What, then, should be the scope of originality? Waisman argues that the right standard is a double standard. According to Waisman, a work should be considered original when it is outcome of an intellectual work or creative work. Both deal with different aspects of the work and therefore each should separately be enough for the work to be protected.[30]

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26 *Macmillan & Co Ltd v K&J Cooper* [1924] 40 T.L.R. 186 at 188, quoted in N P Gravells, "Authorship and originality: the persistent influence of Walter v Lane" (2007) *Intellectual Property Quarterly*, p.8

27 B Ong, "Originality from copying: fitting recreative works into the copyright universe" (2010) *Intellectual Property Quarterly*, p.6

28 In *Interlego v Tyco* [1988] R.P.C. 343 PC, it has been stated that *"[s]kill, labour or judgment merely in the process of copying cannot confer originality."*

29 D Zimmerman, "It's an Original!' (?): In pursuit of Copyright's Elusive Essence" 28 Colum.J.L.&Arts 187 2004-2005, quoted in A Waisman "Revisiting originality" (2009) *European Intellectual Property Review*, p.5

30 A Waisman, "Revisiting originality" (2009) *European Intellectual Property Review*, p.5

II. Current Situation in the EU

Aforementioned, civil law jurisdictions and common law jurisdictions handle the concept of originality differently. Civil law jurisdictions do not consider "skill, labour and judgment" as the main requirement of copyright protection; they are more concerned with the characteristic of the author in the work.[31]

However, at the EU level the concept of originality has not attracted much discussion. The discussions about copyright at the EU level seem to be more about the limits of the rights granted to authors and the exceptions of copyright.[32]

Despite the limited scope of discussion, the cases of computer programs, photographs and databases necessitated harmonization at the EU level in terms of originality.

According to Article 1(3) of the Directive 2009/24/EC of the European Parliament and of the Council on the legal protection of computer programs (Computer Programs Directive), *"[a] computer program shall be protected if it is original in the sense that it is the author's own intellectual creation. No other criteria shall be applied to determine its eligibility for protection."* Similarly, Article 6 of the Directive 2006/116/EC of the European Parliament and of the Council on the term of protection of copyright and certain related rights (Copyright Term Directive) state that "*[p]hotographs which are original in the sense that they are the author's own intellectual creation shall be protected in accordance with Article 1. No other criteria shall be applied to determine their eligibility for protection.*" Harmonization at the EU level also exists for databases. According to Article 3(1) of the Directive 96/9/EC of the European Parliament and of the Council on the legal protection of databases (Database Directive), "*...databases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation shall be protected as such by copyright. No other criteria shall be applied to determine their eligibility for that protection.*"

31 E Rosati, "Originality in US and UK copyright experiences as a springboard for an EU-wide reform debate" (2010) *International Review of Intellectual Property and Competition Law*, pp.3-4

32 See, Green Paper – Copyright in the Knowledge Economy: Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights; E Rosati, "Originality in US and UK copyright experiences as a springboard for an EU-wide reform debate" (2010) *International Review of Intellectual Property and Competition Law*

The current limited harmonization for originality at the EU level seems to be framed by the civil law approach as the Computer Programs Directive, the Copyright Term Directive and the Database Directive all state that originality is "author's own intellectual creation".

However, apart from these three cases, there is no harmonization for originality at the EU level. On the contrary, this lack of harmonization for originality is seen as an unimportant issue, which does not affect the functioning of the Internal Market. This bypassing of originality was elaborated in the Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights (Working Paper) as;

"In theory, divergent requirements for the level of originality by Member States have the potential of posing barriers to intra-Community trade. In practice, however, there seems to be no convincing evidence to support this. The Community harmonisation was needed, and has been enacted, with respect to technology-related categories of works, notably computer programs and databases. However, there are no indications that the lack of harmonisation of the concept of originality would have caused any problems for the functioning of the Internal Market with respect to other categories of works, such as compositions, films or books. Therefore, legislative action does not appear necessary at this stage."[33]

The Working Paper states that harmonization for originality was needed only for technology-related categories of works; however it falls short of explaining the differences between "technology-related categories of works" and "other categories of works" and why a harmonization is needed only for the first one. It is also hard to see why the lack of harmonization on the limitations of copyright causes problems for the functioning of the Internal Market, while the issue of which work is worthy of copyright protection does not. Different rights granted to copyright owners may indeed pose barriers to intra-Community trade, but so can different concepts of originality. Taking copyright as only an issue that might cause disruptions in the functioning of the Internal Market is "*neglect[ing] the fact that economic rights descend, in the first place, from the entitlement to copyright protection*"[34]. When there is no

[33] Green Paper – Copyright in the Knowledge Economy:Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights, Section 3.1

[34] E Rosati, "Originality in US and UK copyright experiences as a springboard for an EU-wide reform debate" (2010) *International Review of Intellectual Property and Competition Law*, p.3

harmonization for the concept of originality in the EU level, the same work may be protected in one member state and not in another. Before designating the limits of the copyright protection, it is important to take one step back and designate which works are worthy to protect.

Google's release of Bionic library[35] for Android smartphones under the BSD license[36] is a perfect example on how different concepts of originality may be the basis of huge economic disputes. Even if the subject of the dispute is computer programs, for which the concept of originality has been harmonized in the EU, it still shows how different concepts of originality may be the reason of economic problems.

In an attempt to attract more developers, Google decided not to use GNU C Library for Android operating system, because they did not want the C Library in their phones to be subject to the limitations of the GNU Lesser General Public License[37] with which the GNU C Library was licensed. In order to "keep GPL out of user-space"[38], Google modified the Linux kernel header files and removed some information from the source code. According to Google, the information left in the code cannot be subject to copyright infringement. The information that is left "*only contain type and macro definitions, with the exception of a couple static inline functions used for performance reason*"[39]. Briefly, what Google did was "*strip[ping] out all copyrightable expression, so that the obligations of the GPL will no longer apply, and relicens[ing] the code under a non-copyleft, less restrictive license*"[40].

One might argue that the information left in the code cannot be considered as an "*author's own intellectual creation*"[41] and therefore, cannot be subject to copyright protection. Until now, there has not been a lawsuit on this dispute. However, in such a huge market, one might expect to see one in the near future. And more importantly, it shows us

35 The Bionic library is a derivation of the GNU C Library.

36 BSD licenses is a group of permissive open source software licenses. The name of "BSD" comes from Berkeley Software Distribution, a UNIX-like operating system.

37 GNU Lesser General Public License is a copyleft type open source software license, published by the Free Software Foundation and is more restrictive than the BSD license.

38 See, "Android Anatomy and Physiology", available at http://androidteam.googlecode.com/files/Anatomy-Physiology-of-an-Android.pdf

39 E J Naughton, "The Bionic Library: Did Google Work around the GPL?" (2011), Report of Brown Rudnick LLP, p.3

40 Id., p.4

41 As stated in the Directive 2009/24/EC of the European Parliament and of the Council on the legal protection of computer programs, Article 1(3).

how the outcome of the case could differ in different jurisdictions, with different approaches to the concept of originality.

III. Originality in Turkish Law

Aforesaid, the concept of originality is handled differently in common law and civil law jurisdictions. In civil law jurisdictions, skill, labour or judgment is not a requirement for a work to be regarded as original. They are more concerned with seeing the characteristic of the author in the work. One can argue that this approach is more in line with the "personality standard", stated by Weisman, which argues that "*a work is original if it reflects its author's personality or individuality; that is, it is premised on a belief that copyright protects a specific kind of relation between author and work.*"[42]

Turkey is a civil law jurisdiction and as far as copyright is concerned, it follows the footsteps of *droit d'auteur*, the French copyright concept. In the Turkish Law of Intellectual and Artistic Works, "work" is defined as, "*[a]ny intellectual or artistic product bearing the characteristic of its author, which is deemed a scientific and literary or musical work or work of fine arts or cinematographic work.*"[43] Thus, Turkish copyright law does not use the term "original" but rather employs the term "characteristic of its author" in understanding whether the work is original or not. Bearing "characteristic of its author" is a requirement for a piece to be regarded as a "work" and have copyright protection in due course.

The concept of originality did not raise much discussion in Turkish Law, since its meaning has already been designated by law. However, although few, there are important Supreme Court judgements, which dig into the concept of originality. In 2004, when a City Hall used and distributed maps of a topographical engineer without his consent, the Court of First Instance decided that the City Hall infringed the rights of the engineer. The Supreme Court, however, reversed the decision. In its decision, the Supreme Court stated that the Court of First Instance did not raise the issue whether the relevant maps are original and should be regarded as "work" in the meaning of the Law. In its decision, the Supreme Court stated;

42 A Waisman "Revisiting originality" (2009) *European Intellectual Property Review*, p.1
43 Law of Intellectual and Artistic Works, Article 1/B(a)

"The examinations of the legal experts are not enough for the settlement of the case. The report of the topographical engineer [legal expert] only state whether the maps in question are the same, and did not raise the issue whether they are original work… Therefore, while it should have examined whether the map is original, whether it bears the characteristic of its author, and if it does, stating what these characteristics are,…"[44]

The Supreme Court decided that before examining whether a work is "copied" from another, it should be examined whether the work bears the characteristic of its author, and therefore whether it is worthy of copyright protection.

In another decision about maps, the Supreme Court stated that;

"*Even if all kinds of maps can be considered as "work" according to Article 2/3 of the Law [of Intellectual and Artistic Works]; the decision whether [a map] is a work that is to be protected by law depends on its assessment with regards to Article 1/B, thus it should be determined whether it bears the characteristic of its author.*"[45]

The Supreme Court also discussed the issue further to decide if a petition, written by a lawyer is worthy of copyright protection. In the decision, the Supreme Court examined how the lawyer arranged and presented his legal opinions and the way he selected and compiled his ideas. After the examination, the Supreme Court decided that the petition did not bear the characteristic of its author and therefore was not worthy of copyright protection.[46]

The concept of originality is less problematic in most civil law jurisdictions because what should be understood from originality is already designated by law. The discussion in civil law jurisdiction focuses on the extent to which the work in question bears the characteristic of its author.

CONCLUSION

All in all, this paper tried to offer a critical approach to the concept of originality from a comparative perspective that takes into account not only civil and common law but also the harmonization at the EU level. The given cases indicate that the concept of originality is far from being

44 Supreme Court, 11th Civil Chamber, Decision No: 2004/12672, 21.12.2004
45 Supreme Court, 11th Civil Chamber, Decision No: 2002/8839, 11.10.2002
46 Supreme Court, 11th Civil Chamber, Decision No: 2007/8748, 07.06.2007

clear and coherent. In common law jurisdiction, courts evaluate originality case by case and may look for different aspects to decide whether originality exists. For example, in the UK, courts sometimes look for "skill, labour or judgment"[47], and sometimes decide that "*[s]kill, labour or judgment merely in the process of copying cannot confer originality*"[48]. In civil law jurisdiction, in theory, the concept of originality is clearer. However, in practice, courts may seek for different features to conclude whether the work is original. For instance, the court may focus on "intellectual creativity" to decide whether the work "bears the characteristic of its author."[49]

The indeterminacy of the concept of originality is extended when theoretical and practical differentiations at various levels are considered. There is no consensus on its meaning at the international or the regional level. In practice, courts evaluate it differently even at the national level. Yet, more importantly, the EU level complicates the issue further due to its limited harmonization of originality. For now, harmonization seems to be limited to computer programs, photographs and databases. There is also no short time plan to extend the harmonization for other categories of works because the Commission thinks that "*there are no indications that the lack of harmonisation of the concept of originality would have caused any problems for the functioning of the Internal Market*"[50] in respect of these works.

However, one might easily argue otherwise. In the Google Bionic Library event, it is clear that a lack of harmonization may be the reason of huge economic disputes. Even if harmonization has been realized for computer programs, there is no reason why other categories of works cannot be basis for economic disputes. Designating the rights of copyright owners is indeed important and should be harmonized, but we might start to think that the same can be true also for originality.

The meaning of originality should be designated clearly and harmonization at the EU level should be actualized for all kinds of work. This will not only enhance the functioning of the Internal Market at the

47 *Ladbroke Football Ltd v William Hill Football Ltd* [1964] 1 WLR 273
48 *Interlego v Tyco* [1988] R.P.C. 343 PC
49 Supreme Court, 11th Civil Chamber, Decision No: 2007/8748, 07.06.2007
50 Green Paper – Copyright in the Knowledge Economy:Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights, Section 3.1

EU level, but a clear definition will also provide consistency in court decisions at a national level.

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THE ENFORCEMENT OF THE PRINCIPLE OF NON-REFOULEMENT IN CASES MASS-INFLUX

İsmail AKSEL*

ABSTRACT

Following the civil unrest in Syria, the international community, particularly Turkey and other countries in the Middle East, faced with a mass-influx problem once again. The principle of "non-refoulement" which is one of the basic principles of international refugee law prevents refoulement of asylum seekers whose life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion in the case of being expelled or returned. This principle, which is undisputable in usual refugee cases, has a *sui generis* character in mass-influx cases. This requires that the principle of non-refoulement should be assessed in its own context. As well as the responsibilities of the receiving state, how and to what extent short-term and long-term economic and social burdens should be shared by international community unquestionably remains a remarkable issue in enforcement of this principle. The main aim of this article is to develop solutions for the effective enforcement of the principle of non-refoulement in cases mass-influx by analysing burdens of receiving states and responsibilities of the international community.

Keywords: Non-refoulement, mass-influx, refugee law, asylum seekers, Syria.

ÖZET

Suriye'de yaşanan iç karışıklığın ardından uluslararası toplum ve özellikle Türkiye ile diğer bölge ülkeleri bir defa daha kitlesel sığınma sorunu ile karşı karşıya kalmıştır. Uluslararası göçmen hukukunun temel ilkelerinden biri olan "geri göndermeme" ilkesi, geri gönderilmeleri halinde; ırkları, dinleri, milliyetleri ya da belirli bir sosyal gruba veya politik düşünceye aidiyetleri nedeniyle yaşam ya da özgürlükleri tehdit altına girecek uluslararası göçmenlerin geri gönderilmelerini yasaklamaktadır. Olağan göç durumlarında tartışmasız bir ilke olan bu ilke, kitlesel sığınma durumunda *sui generis* bir karaktere sahip olmaktadır. Bu durum geri göndermeme ilkesinin kitlesel sığınma durumlarında kendi bağlamı içerisinde değerlendirilmesini gerektirmektedir. Alıcı devletin sorumluluklarının yanı sıra, kısa ve uzun dönem ekonomik ve sosyal yükün uluslararası toplum tarafından ne şekilde ve ne ölçüde paylaşılması gerektiği bu prensibe bağlı kalınmasında tartışmasız biçimde başlıca konular olarak kalmaya devam etmektedir. Bu makalenin temel amacı, alıcı devletlere getirdiği yükleri ve uluslararası toplumun sorumluluklarını analiz ederek, kitlesel sığınma durumlarında geri göndermeme ilkesinin etkili biçimde uygulanması için çözüm önerileri geliştirmektir.

* Judge at Ministry of Justice of Turkey, Department for Strategy Development.

Anahtar kelimeler: Geri göndermeme, kitlesel sığınma, göçmen hukuku, sığınmacı, Suriye.

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INTRODUCTION

International refugee law has been developing as a reaction to problems which were caused by the armed conflicts in Europe, particularly world wars, since the beginning of 19th century. Because of these wars and especially the subsequent cold war, large amounts of people were forced to leave their lands making them asylum seekers. Western states' reactions to these atrocities were mostly shaped by this new situation. As a result, at the beginning of the process, they considered the issue as a regional problem for Europe, rather than global one. The Convention Relating to the Status of Refugees (the Convention) which was prepared in 1951 mirrored this understanding and so included regional provisions in its definition for the term of "refugee".

However, after the end of the colonisation asylum seekers have become more serious problem for states in Africa and Asia, particularly for developing states. Particularly, due to armed conflicts in their regions, they have constantly been dealing with the problems of asylum seekers since the ending of colonisation. It is indisputable to expect governments to respect fundamental freedoms and human rights and to adhere to basic principles in this field. Nevertheless, extraordinary cases must be assessed in their own context. Mass influx and the implementation of the principle of non-refoulement in cases of mass influx is one of these extraordinary situations.

The main aim of this article to analyse the major problems caused by mass influx and to assess the applicability of the principle of non-refoulement in cases mass influx and the role of the international community in this context. The article will also mainly focus on the concept of "responsibility and burden sharing" in cases of mass influx. The first part will explain the terms of mass influx and the principle of non-refoulement. Major problems and recommendations for a solution will be elaborated in the second part of the paper.

I. CONTEXT

A. The Principle of Non-Refoulement

The historical development of the term of "refugee" is one of the main reasons for discussions about the legal status of refugees. The problems of refugees had been considered a humanitarian issue before 1951. After the Convention Relating to the Status of Refugees in 1951 (the Convention), the definition of "refugee" gained significant importance. The "exclusive" definition of the Convention resulted in humanitarian refugees who are seeking asylum to be excluded from the protection of the Convention.[1] However, some articles of the Convention aim to protect refugees who are not officially granted refugee status with the aim of reducing the negative effects of this strict definitional approach. Article 33 of the Convention has the title of "Prohibition of Expulsion or Return" and it regulates the "the principle of non-refoulement". Article reads as follows;

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

The first paragraph of the article unquestionably prohibits refoulement of a refugee, if there is a risk of persecution. The second paragraph regulates the potential abuse of the principle by criminals who have committed a serious crime.

This regulation is largely paralleled with the definition of Article 1. The difference is that the principle of non-refoulement does not require refugee status which is formally recognized by the State to protect asylum seekers. In other words, those who came to a state's frontiers

[1] Kay Hailbronner, Non-Refoulement and Humanitarian Refugees: Customary International Law or Wishful Legal Thinking, *Virginia Journal of International Law,* Vol. 26, Issue 4 (Summer 1986), pp. 857 – 896, p. 858.

cannot be sent back even if they do not have a formal application for refugee status.

On the other hand, the principle of non-refoulement is considered as a rule of customary international law. This is because, it has been not only codified by the Convention but also affirmed in numerous declarations in different international fora, in successive resolutions of the UN General Assembly as well as in the laws and practices of states.[2] The fact that it is a rule of customary international law makes the principle of non-refoulement binding on all members of the international community. Moreover, the "violation of such standards renders the non-observant state liable to suit in an international tribunal."[3]

The main debates about the implementation of the principle are closely related to the States' approaches. Some states consider this principle as a humanitarian issue; whereas others argue that it is a legal obligation under the international law and moreover that it is binding for non-party states of the Convention. These different points of view and other international politics led to different implementations of the principle of non-refoulement; whether or not it should be implemented in cases of mass influx and to those who had not entered to the State territory yet is still questioned.[4] However, the legal nature of this principle exceeds the scope of this article. The article seeks a balance between two extreme ideas; to construe this principle as "*right to admission*"[5] for refugees and to leave refugees at the mercy of a repressive government.

In this paper, this principle will be analysed in the context of whether the challenges which are faced by a receiving state can be considered as an excuse. More importantly, it focuses on measurements must be taken by international community to uphold this principle.

2 Roda Mushkat, "Mandatory Repatriation of Asylum Seekers: Is the Legal Norm of Non-Refoulement 'Dead'?", Hong Kong Law Journal, Vol. 25, Part 1 (1995), pp. 42 – 51, p. 45.

3 Scott M. Martin, "Non-Refoulement of Refugees: United States Compliance with International Obligations", *Harvard International Law Journal*, Vol. 23, Issue 2 (Winter 1983), pp. 357 – 380, p. 359.

4 Guy S. Goodwin-Gill and Jane McAdam, "*The Refugee in International Law",* OUP, New York 2011, p. 206.

5 Ibid., p. 215.

B. Mass Influx and International Refugee Law

The term of *"mass influx"* is used to describe a situation when large amount of asylum seekers emigrate from one state to another in a specific period of time. However, it is not clearly determined which conditions are required to name an "emigration" as a mass influx. Neither the 1951 Convention nor the 1967 Protocol includes a formal definition of mass influx. Because of the fact that its existence depends on the resources of the receiving state, UNHCR noted that "*mass influx cannot be defined in absolute numerical terms"*.[6] An Executive Committee Conclusion, after noted that a mass influx has not been defined, stated its possible characteristics;

- considerable numbers of emigrants,

- a rapid rate of arrival,

- the inadequacy of absorption and response capacity of host State,

- the incapability of individual asylum procedures in dealing with the assessment of such large numbers.[7]

On the other hand, European Union Temporary Protection Directive defines mass influx as the arrival of *"a large number of displaced persons, who come from a specific country or geographical area"*.[8] Although it is impossible to provide the certain number needed to define the existence of mass influx, it can be said that the main characteristic of mass influx is the absence of balance between the number of emigrants and the capacity of the receiving State because of the rapid increase of refugees. This *imbalance* is not only the main reason for the problems but also the main challenge which prevents governments from covering these problems immediately. While this unexpected situation causes many potential economic, social, cultural and demographic problems, it may also require that governments must decide and take measurements in a very limited time. Ultimately, because of the fact that mass influx has a *sui generis* character the main principles of international refugee law must be assessed it its own context.

6 Ibid., p. 335.
7 Conclusion on International Coopration and Burden and Responsibility Sharing in Mass Influx Situations, No. 100 (LV) (2004), para (a).
8 Guy S. Goodwin-Gill and Jane McAdam, p. 335.

II. NON-REFOULEMENT IN MASS-INFLUX

The principle of non-refoulement is the most significant factor in the management of a mass influx. Although in many international documents and executive committee conclusions the applicability of non-refoulement in mass influx situations is affirmed.[9] The fact that it is not regulated separately by the 1951 Convention left the main question of whether its implementation in mass influx is a legal obligation or humanitarian issue unanswered. Therefore, the implementation of the principle of non-refoulement in cases mass influx is mostly left at the hands of governments and international politics. However, governments have tended to ignore this principle in cases of mass influx by claiming the existence of some specific conditions; while some of them were merely excuses others were real problems. As well as this, international politics and peer pressure have consistently remained insufficient in persuading governments to appreciate the principle.[10]

In this part of the paper, the problems (or excuses) will be analysed in the implementation of non-refoulement in cases of mass influx. Undoubtedly, the primary solution of the problem of mass influx is that the international community ensures a peaceful environment in their own country by ending conflicts and enabling them to return. However, this solution will not be addressed in this paper which will instead focus on the problems of receiving states.

This analysis will be made under three main titles; economic problems and burden sharing; national security and fight against terrorism; social, cultural and demographic problems.

A. Economic Problems and Burden Sharing

Although, as a matter of international law, refoulement is not justifiable regardless of how dramatic the impacts of a mass influx is on the receiving state's economy,[11] economic burden is still one of the reasons for the failing of the implementation of non-refoulement, particularly for developing countries. Developing countries, such as Tanzania, Pakistan,

9 Ibid., p. 336.

10 The case of two Liberian ships, *Zololitsa* and *Bulk Challenge*, is one of the most dramatic example of this argument; Paul Kuruk, "Asylum and the Non-Refoulement of Refugees: The Case of the Missing Shipload of Liberian Refugees", *Stanford Journal of International Law,* Vol. 35, Issue 2 (Summer 1999), pp. 313-350.

11 Guy S. Goodwin-Gill and Jane McAdam, p. 335.

Zimbabwe and Tunisia, clearly stated their concerns in this context.[12] However, Western states' reaction is, in brief, that economic concerns cannot be an excuse for the refoulement of refugees and "*responsibility-sharing must not be a prerequisite for respecting the principle of non-refoulement".*[13]

In 2004, "Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations" regulated the way of sharing economic burdens and responsibilities. Nevertheless, there are still two main concerns about economic issues. First of all, executive committee conclusions are recommendations and they have no binding character. Therefore, this conclusion cannot confer the responsibility of the sharing of the economic burden to other states and implementation may be different for each case. Secondly, the conclusion focuses on the short term expenses, such as "material and technical assistance", "security of refugee camps". However, the long-term economic impact of a mass influx would be more serious than short-term ones'. For example, in the long term, large amounts of people would negatively affect the expenses of employment, health system, education, security etc.

A binding regulation for the principle of non-refoulement in cases of mass influx is indispensable in protecting the fundamental freedoms and human rights of asylum seekers effectively. The fact that mass influx is defined and regulated by a binding international document would negate the arguments that non-refoulement, in cases of mass influx, is not a legal obligation but rather a humanitarian approach.

Likewise, an effective way of the sharing of a long-term economic burden should also be regulated by a binding international document. Otherwise, international documents consist of recommendations that cannot go beyond good wishes. However, more importantly, instead of sharing the economic-burden, a better solution would be the upholding of the principle of resettlement of asylum seekers in different countries. The international community faced exigency of burden sharing through resettlement of asylum seekers at the first time in 1956, "*with the influx of two hundred thousand Hungarians into Austria and Yugoslavia".* These people were resettled in many countries.[14] This proposal was

12 Ibid., p. 338 and 339.
13 Ibid., p. 339.
14 Atle Grahl-Madsen, "Refugees and Refugee Law in a World in Transition", *Michigan Yearbook of International Legal Studies,* (1982), Vol. 3, pp. 65 – 90, p. 73.

promoted, thereafter, *"by scholars in the late 1970s"* and it "*was to assign refugees worldwide by matching refugee preferences with host countries ranked according to an index of wealth and population density"*.[15] This solution not only provides effective protection for refugees and asylum seekers but is also a useful method in sharing the long-term economic burden. Finally, some countries, such as Denmark and Belgium,[16] strongly support the principle of non-refoulement. However, in reality, it is extremely unlikely that they will ever experience a mass influx. The proposal of resettlement of refugees would also demonstrate whether they change their stances on non-refoulement in mass influx.[17]

The long-term economic burden is one of the foremost challenges for receiving States. Therefore, conferring all responsibility to receiving State is not only unfair but also an ineffective way of protecting refugees' rights. Developing countries would feel in particular the long-term economic impact of a mass influx more strongly. Only emphasizing a principle is not a way to uphold this principle. The International community, particularly western states, must share the economic burden.

B. National Security and Fighting Against Terrorism

"National security" is one of two main potential justifications (the other is "public order") for derogation from the principle of non-refoulement.[18] However, this derogation, particularly after the terrorist attack on 11 September 2001 in New York, United States, has become an increasingly important factor in shaping of refugee policies.[19] Governments have tended to not allow refugees to settle in their territory by putting forward national security as an excuse.[20] However, it is evident that armed conflicts are one of the main reasons for mass influxes; with instances such as civil war, terrorism and government-led ethnic cleansing. Turkey's experience after the Iran – Iraq war is a notable example of this

15 Astri Suhrke, "Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action", *Journal of Refugee Studies*, Vol. 11, Issue 4 (1998), pp. 396 – 415, p. 397.

16 Guy S. Goodwin-Gill and Jane McAdam, p. 226 and 227.

17 The change in USA's stance is an impressive example of this situation; Ibid., p. 225 and 226.

18 Guy S. Goodwin-Gill and Jane McAdam, p. 235.

19 Alice Farmer, "Non-Refoulment and Jus Cogens: Limiting Anti-Terror Measures that Threaten Refugee Protection", *Georgetown Immigration Law Journal*, Vol. 23, Issue 1 (Fall 2008), pp. 1 – 38, p. 13. James Jupp, "Terrorism, Immigration, and Multiculturalism", *International Journal*, Vol. 61, Issue 3 (Summer 2006), pp. 699 – 712, p. 699.

20 Tanzania authorities' argument is an example of this approach; Guy S. Goodwin-Gill and Jane McAdam, p. 230.

argument. About 27.000 Kurds who fled from their country as a result of an Iraqi military operation were settled in Turkey. However, there was a security problem because of the terror organisation PKK. Turkey did not reject refugees, but it is argued that the refuge policy of Turkey was affected by security consideration in this region.[21]

Turkey faced a similar problem again right after the internal disturbance in Syria. Thousand of Syrians have crossed the frontiers of Turkey by seeking asylum. Although Turkey grants refugee status only to those who arrives from Europe, because of the facts that principle of non-refoulement is considered as a rule of customary international law and that Turkey is a signatory state of many international treaties which include this principle,[22] Syrian asylum seekers have been neither returned nor expelled. They have been settled in southern Turkey by Turkish government.[23]

The status of asylum seekers in the case of mass-influx has been regulated by a regulation in Turkey.[24] Article 9 of this regulation requires the disarmament of asylum seekers and Article 11 requires their resettlement in a camp which is as possible as close to the border. These regulations evidently show Turkey's concerns arising from the previous experiences in the cases of mass-influx.

Nevertheless, the fact that in the case of mass influx asylum seekers may not only be victims of an armed conflict but they may also be involved in this conflict should not be ignored. This reality supports governments' concerns related with national security in cases of mass influx.[25] Furthermore, excessive number of refugees aggravates the process of examining personnel situation of each refugee. At the first meeting of Global Consultations on International Protection, the challenge of "*identification of armed or other excludable elements"* was clearly stated

21 Kemal Kirişci, "Legal Status of Asylum Seekers in Turkey: Problems and Prospects", *International Journal of Refugee Law*, Vol. 3, Issue 3 (July 1991), pp. 510 – 528, p. 514 and 517.

22 Nuray Ekşi, *Yabancılar Hukukuna İlişkin Temel Konular,* Beta Publishing, 3. Edition, Istanbul 2011, p. 70.

23 http://www.telegraph.co.uk/news/worldnews/europe/turkey/9196111/Kofi-Annan-visits-Syrian-refugees-in-Turkey-camp.html (accessed on 27 April 2012)

24 "The Regulation on Principles and Methods shall Apply for Individual Asylum-Seekers Who Refuge to Turkey or Who Demand a Residence Permit from Turkey to Refuge to Another Country and for Asylum-Seekers Who Come to Frontiers under the Mass-Influx Conditions and for Potential Demographic Changes" http://www.mevzuat.adalet.gov.tr/html/20075.html (accessed on 10 May 2012)

25 In 2004, Italian government defended mass repatriations to Libya by claiming that *"such removals were necessary to cope with terrorism".* Guy S. Goodwin-Gill and Jane McAdam, p. 230.

in the context of mass influx.[26] Ultimately, a mass influx creates a suitable environment for terrorist leakages and this jeopardizes national security. In Turkey, interviews are made with asylum seekers to minimize this risk.[27]

Undoubtedly, possible terrorist leakages cannot be considered as a justification for derogation from the principle of non-refoulement in cases of mass influx. However, it should be borne in mind that this issue is not only about the national security of receiving State but also about the protection of asylum seekers. Therefore, the security problems should be well considered in its own context. First of all, as it is emphasized in the Executive Committee Conclusion,[28] registration of refugees on an individual basis should be provided with the assistance of international organisations as soon as possible. For that purpose, the establishment of a temporary protection system would be helpful. The term of "temporary refuge" is described by the UNHCR and it is clearly stressed that;

"... [T]he circumstances that lead persons to become refugees according to the wider concept are frequently of a more transitory nature than those giving rise to refugee status as reflected in the 1951 Convention and the 1967 Protocol."[29]

European Union Temporary Protection Directive also requires the establishment of a temporary protection system in cases of mass influx. This temporary protection system, in the Directive, is considered as a tool that enables the system to operate smoothly and not to collapse under a mass influx, rather than a third form of protection.[30] The difference between European and international understanding of the temporary protection is whether or not refugees resettle in a camp.[31] However,

26 Consultations on International Protection, *"Protection of Refugees in Mass Influx Situations: Overall Protection Framework"*, 1st mtg. U.N. Doc. EC/GC/01/4 (19 February 2001), parag. 9. http://www.unhcr.org/3ae68f3c24.html accessed on 29 December 2011.

27 "The Regulation on Principles and Methods shall Apply for Individual Asylum-Seekers Who Refuge to Turkey or Who Demand a Residence Permit from Turkey to Refuge to Another Country and for Asylum-Seekers Who Come to Frontiers under the Mass-Influx Conditions and for Potential Demographic Changes" Article 12.

28 Conclusion on International Coopration and Burden and Responsibility Sharing in Mass Influx Situations, paragraph (d).

29 Note on International Protection, Thirty-third Session of the Executive Committee of the High Commissioner's Programme, para. 19, U.N. Doc. AIAC.96/609IRev.1 (1982).

30 Nuria Arenas, "The Concept of 'Mass Influx of Displaced Persons' in the European Directive Establishing the Temporary Protection System", *European Journal of Migration and Law*, (7: Koninklijke Brill NV. Netherlands 2005), pp 435 – 450, p. 441.

31 Guy S. Goodwin-Gill and Jane McAdam, p. 341.

particularly in cases in which the number of refugee is very high, it can be inevitable that refugees can be held in a camp for a reasonable period of time so as to determine whether they are eligible for refugee status.

Finally, in cases of mass influx, the military assistance of the international community is also indispensable in order to provide security. Particularly in developing countries, their military resources may be insufficient to deal with such a critical and sudden problem. During the 1980s, refugee camps in African states, Thailand and Pakistan are specific examples of military inadequacy in providing security for mass-influx refugees.[32] Therefore, military assistance should be provided as fast and efficient as possible.

Evidently, it is mainly the receiving State's responsibility to respect and uphold the principle of non-refoulement. However, this does not mean that international community can remain indifferent to a mass influx. In many cases of mass influx, even if this principle is considered legally binding, it is evident that the problems cannot be solved without support of the international community.

C. Social, Cultural and Demographic Problems

The impact of a mass influx on the receiving State's social, cultural and demographic structure is the most serious and lasting one. Even, it is claimed that these people are "*one of the main factors weakening national and social homogeneity".*[33] Therefore, this impact of a mass influx should be analysed in this context as well.

It is evident that the impact of such a large amount of people who are from different nations and cultures would be much stronger than ordinary refugees'. Because of the sudden increase in number, their assimilation and coalescence with the receiving State's society would be highly improbable. Moreover, the confidence arising from being such a large community would lead them to act independently, and then in the long term, become a minority in the receiving State's lands. These facts may instigate xenophobic attitudes and nationalist movements in the country. This end is one of the foremost concerns of governments in the context of

[32] Karen Jacobsen, "Factors Influencing the Policy Responses of Host Governments to Mass Refugee Influxes", *International Migration Review* , Vol. 30, No. 3 (Autumn, 1996), pp. 655 – 678, p. 672.

[33] Jef Huysmans, "The European Union and the Securitization of Migration", *Journal of Common Market Studies,* Vol 38, No: 5 (December 2000), pp. 751 – 777, p. 758 and 762.

mass influx. Because of these concerns governments tend to not appreciate the principle of non-refoulement in cases of mass influx from very different cultures. Malaysia's policy that it provides temporary refuge for Filipino Muslims while rejecting ethnic Chinese Vietnamese and non-Muslim Cambodians is a notable example of this approach.[34]

Demographic impacts of a mass influx are also undeniable. It is likely that the population of a part of receiving state would rapidly increase and this would endanger the receiving state's demographic balance. Infrastructure adequacy and other problems which are caused by mass influx would aggravate a reaction from the local community's reaction. Therefore, it is highly improbably that this new situation would be embraced by the local community. Moreover, in the long term, this new demographic reality may cause regional conflicts.

There are two main measurements that must be taken by the receiving state's government; firstly, the resettlement of refugees to different parts of the country, rather than to collect them in one part, would be useful in the context of coalescence within their society. This measurement would also facilitate their assimilation and prevent them from being an independent community in that country. Secondly the government must focus on their education, particularly on the education of the native language.

However, these measurements may be insufficient in cases when the number of refugees is much more than the country can absorb. In these cases, the resettlement of refugees to different states should be considered as an effective and lasting solution. Otherwise, the insufficient absorption capacity of the receiving state may be shown as an excuse in implementation of the principle of non-refoulement. As it emphasized many times in this paper, the receiving state has the primary responsibility in upholding the principle of non-refoulement and there cannot be an excuse to violate this principle. However, the international community has to share the burden and responsibility of receiving states' government effectively, rather than illusively.

[34] Deborah Perluss, Joan F. Hartman, "Temporary Refuge: Emergence of a Customary Norm", *Virginia Journal of International Law,* Vol. 26, Issue 3 (Spring 1986), pp. 551 – 626, p. 574.

CONCLUSION

One of the biggest challenges of international law is that it is not binding without the governments' consent. In this sense, international law sometimes cannot go beyond some principles or good wish declarations. Direct intervention in the internal affairs of states is extremely limited.

In particular, it becomes more complicated when governments are supposed to contribute to a problem for which they are not responsible. Emphasizing the principles of international law or declaration of some good wishes would not provide practical solutions for some unusual problems.

Mass influx is this kind of problem as well. An armed conflict or a civil war in a country may result in a mass influx to another country. Therefore, the problem is transferred to the receiving State's government despite the fact that it is not responsible for the creation of the problem. The major question is of who has the main responsibility in cases mass influx; receiving state's government or the international community? The international community's answer to this question has so far been the receiving state's government. However, it is evident that this answer could not resolve the problems in cases mass influx. Undoubtedly none of the troubles which are caused by a mass influx can ever be a justification for the refoulement of asylum seekers. Nevertheless, the responsibility in upholding the principle of non-refoulement must be shared between the international community and the receiving state.

This argument has two rationales. Firstly, the receiving State is not responsible for this problem. In other words, the receiving State did not violate asylum seekers' rights, and therefore, the whole burden must not be left to its shoulders. Secondly, even if the principle of non-refoulement is well observed by the government, in the case of when the burden of mass influx exceeds the capacity of the receiving State, in practise, asylum seekers cannot be protected and this may lead the other human rights violations. As a result, the absorption capacity of receiving States must be taken into consideration in cases of mass influx. Putting pressure on governments by emphasizing international legal principles would not solve problems in practise.

On the other hand, the international community should take not only short-term expenses but also long-term costs into consideration. In other words, the long-term burden must be shared rather than short-term

expenses of asylum seekers' basic needs such as food, shelter and health care. The most effective way of burden-sharing is the resettlement of asylum seekers in different countries in conformity with the pre-established criteria. Thus, both the rights of asylum seekers will be effectively protected and the receiving State's long-term burden will be shared.

The international community, especially western states, should recognize the sui generis character of "mass influx" and assess it in its own specific context. Therefore, it must have a special place in international refugee law and criteria must be developed for determining a mass influx and sharing the burden. It should be noted that without effective burden-sharing the principle of non-refoulement cannot go beyond a declaration of "good wish".

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"STRIKE" IN TURKISH LABOR LAW

Dr. A. Eda MANAV *

ABSTRACT

Strike is one of the core foundations of labor law. Strike, regulated not only with Constitution but also in Collective Agreement, Strike and Lock-out Act (Act No 2822), is a right that is granted to workers. In this respect, strike can be described as the workers' giving up their work upon a decision taken collectively or by an institution -protecting their rights- in order to suspend work on a large scale or halt the activity of the workplace completely. In order to talk about strike, both physical and psychological elements should be accomplished. Giving up working is the physical element of the strike and workers' agreement among themselves or compliance to an institution's decision is the psychological element of the strike. Strike is regulated as a legal strike and an illegal strike under Collective Agreement, Strike and Lock-out Act. Existence of a collective labor conflict, absence of the strike prohibition and occupational objective are necessary for legal strike. The labor contract is suspended temporarily over the course of legal strike. In another words, during the period of strike, the obligation of the workers to work and the obligation of the employers to make payments are removed. However, since the labor contract does not terminate in the course of the legal strike, the workers' loyalty obligation continues. Illegal strike can be explained as a strike, which comes out without the conditions necessary for a legal strike. The employer may terminate the labor contract without any notification or obligation to pay any compensation in terms of workers who support the decision to call the illegal strike or urge others to support it, or take part in the illegal strike or urge others to take part in it or continue it.

Keywords: Strike, right to strike, legal strike, illegal strike, collective labor dispute.

ÖZET

Grev, iş hukukunun en önemli kurumlarından birisidir. Gerek Anayasa gerek Toplu İş Sözleşmesi Grev ve Lokavt Kanununda düzenlenmiş olan grev, işçilere verilmiş bir haktır. Bu bağlamda grev, işçilerin topluca çalışmamak suretiyle işyerinde faaliyeti durdurmak ve işin niteliğine gore önemli ölçüde aksatmak amacıyla aralarında anlaşarak veya bir kuruluşun kararına dayanarak işi bırakmaları anlamına gelir. Grevden söz edebilmek için maddi ve psikolojik unsurların gerçekleşmesi gerekir. Grevin maddi unsuru işin bırakılması, psikolojik unsuru ise işçilerin aralarında anlaşmaları veya bir kuruluş kararına uymalarıdır. Toplu İş Sözleşmesi Grev ve Lokavt Kanununda grev kanuni grev ve kanun dışı grev olmak üzere iki şekilde düzenlenmiştir. Kanuni grevden söz edebilmek için bir toplu iş

* Judge, Court of İdil

uyuşmazlığının olması, grev yasağının bulunmaması ve grev kararının mesleki bir amaçla alınmış olması gerekmektedir. Kanuni grev süresince iş sözleşmesi askıya alınır. Diğer bir ifade ile işçilerin iş görme borcu, işverenin ücret ödeme borcu bu süre içinde ortadan kalkar. Buna karşın kanuni grev süresince iş sözleşmesi sona ermeyip devam ettiği için, işçilerin sadakat yükümlülükleri devam eder. Kanuni grev için aranan şartlar gerçekleşmeden yapılan grev ise kanun dışı grev olarak kabul edilir. İşveren kanun dışı grevin yapılması kararına katılan, böyle bir grevin yapılmasını teşvik eden, böyle bir greve katılan veya böyle bir greve katılmaya ya da grevin devamına teşvik eden işçilerin iş sözleşmelerini herhangi bir ihbarda bulunmakzısın ve tazminat ödemeye mecbur olmaksızın feshedebilir.

Anahtar kelimeler: Grev, grev hakkı, kanuni grev, kanun dışı grev, toplu iş uyuşmazlığı.

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INTRODUCTION

Strike, which could be defined as workers collectively giving up their work in order to obtain some benefits regarding working conditions, is one of the vital foundations of modern labor law. Turkish law had granted the right to go on strike until the enactment of Labor Law No.3008, in 1936. Nevertheless, strike was then deemed offense and its scope was considerably narrowed by this Labor Law. But, the 1961 Constitution granted a comprehensive right to go on strike. Again the Collective Agreement, Strike and Lock-out Act No. 275, adopted in 1963 and Law No.2822 which is still in force, have amended the right to go on strike.

Our study gives priority to clarifying the concept of strike, the right to go on strike and the elements surrounding strike. After a legal strike and the conditions thereof have been explained, the study ends with a review and the circumstances of an illegal strike.

I. THE SCOPE OF STRIKE

A. The Overall Scope of Strike

Strike, being a fact since ancient times, has been defined as the workers' suspending their work collectively of their own will in order to obtain spiritual and physical benefit, since the 19th century[1]. Moreover a strike is defined as a concerted and complete cessation of work aiming to halt or to hinder significantly the activities of workplace by some or all

[1] Sur Melda, Grev Kavramı, İzmir 1987, p.7; Narmanlıoğlu Ünal, İş Hukuku II, Toplu İş İlişkileri, İzmir 2001, p. 519.

workers[2]. Basically, strike is a kind of challenging labor tool to ensure and protect the rights of workers against the employer[3]. Furthermore, it is an economic oppression tool. Workers who are dissatisfied with the current working conditions go on strike collectively and leave off work, therefore they suppress the employer[4].

B. Right to Strike

Strike is not only a fact, but also is a constitutional right granted to workers as well. The Turkish Constitution of 1982 provides in Art. 54 that workers have the right to strike in the event of a labor dispute arising during negotiations for the conclusion of a collective agreement. The exercise, scope and exceptions of this right shall be governed by the workers. According to Article 54 of the Constitution, workers have the right to go on a strike in case of any dispute which occurs during collective bargaining process. The right to go on a strike is a kind of right that prevents the employer from annulling the labor agreement unilaterally, despite the negligence of the worker of his liability and nonattendance to work during the strike. This right also ensures the maintenance of the labor agreement in favor of the workers during and after the strike[5].

II. DEFINITION AND ELEMENTS OF STRIKE

A. Definition of Strike

Sociologically, strike may be defined as the stand of an occupational group by giving up working, against any decision or situation [6].

As for the legal meaning, it could be described as the workers' giving up work due to a collective decision, by explaining the intention to suspend their labor agreement liabilities for a period of time, in order to have their requests implemented[7]. In other words, strike is the workers' collective action of giving up work for the aim of having their requests accepted

2 Turunç Noyan/SUR Melda, Turkish Labor Law, İzmir 2010, p.133.
3 Narmanlıoğlu Ünal, Grev, Ankara 1990, p.6; Narmanlıoğlu, Toplu İş İlişkileri, p.520.
4 Narmanlıoğlu, Grev, p.6; Narmanlıoğlu, Toplu İş İlişkileri, p.520.
5 Narmanlıoğlu, Grev, p.9-10; Narmanlıoğlu, Toplu İş İlişkileri, p.523.
6 Sur, Grev, p. 7; Sur Melda, İş Hukuku Toplu İş İlişkileri, Ankara 2009, p.377; Tuncay A. Can, Toplu İş Hukuku, 2.bası., İstanbul 2010, p.278; Kabakcı Mahmut, 2822 sayılı Toplu İş Sözleşmesi Grev ve Lokavt Kanununa Göre Toplu Pazarlık Sürecinde Ortaya Çıkan Uyuşmazlıkların Çözüm Aracı Olarak Grev ve Lokavt, İstanbul 2004, p.24.
7 Tunçomağ Kenan/Centel Tankut, İş Hukukunun Esasları, İstanbul 2008, p.458; Kabakcı, p.25.

either by the employer, by the employer association, government or any other institution; or drawing the public's attention to any problem[8].

According to Article 25 of the Collective Agreement, Strike and Lock-out Act, strike is the workers' giving up their work upon a decision taken collectively or by an institution -protecting their rights- in order to suspend work on a large scale or hinder the activity of the workplace completely.

B. Elements of Strike

1. Physical Element: Giving up Working

Giving up work means the failure of workers' to execute their liability of working that arises from a labor agreement. The workers must give up working in order to talk about a strike. The following are the elements which characterize a strike.

a. Workers' Giving up Work

The workers shall give up work in order to mention strike. Giving up work means suspending work and leaving the workplace[9]. We can not talk about strike in case of apprentices, self-employed people or civil servants' -who are not workers-, give up working[10].

b. Workers' Collective Act of Giving up Work

The Law mentions the "collective" action of giving up work. One worker's action to give up work cannot be defined as a strike[11]. Strike is a collective act. As an instrument of defense, it is beneficial for workers or for those belonging to a community[12]. In the case of the collective giving up, the manufacturing and working environment is considerably hindered in the workplace. So, if the working order and the environment are adversely affected by suspension of work by even a relatively small amount of workers, then the term strike could be applied[13]. As one worker's action of giving up work is not satisfactory to call it a strike, it is not necessary that all the workers give up work. The action of giving

8 Koç Yıldırım, Türkiye'de Grev Hakkı, Ankara 1999, p.6.
9 Çelik Nuri, İş Hukuku Dersleri, İstanbul 2010, p.620-621.
10 Narmanlıoğlu, Grev, s.54-55; Sur, Grev, p.33; Sur, Toplu İş, p.378; Tunçomağ/Centel, p.458; Günay Cevdet İlhan, İş Hukuku, Ankara 2003, p.1059; Tuncay, p.285; Kabakcı, p.26.
11 Narmanlıoğlu, Grev, p.63; SUR, Grev, p.96-97; Tuncay, p.286; Günay Cevdet İlhan, Toplu İş Sözleşmesi Grev ve Lokavt Hukuku, Ankara 1999, p.721; Çelik, p. 621; Tunçomağ/Centel, p.459.
12 Narmanlıoğlu, Toplu İş İlişkileri, p.541.
13 Tunçomağ/Centel, p.459.

up work by many workers in the workplace could be described as "strike", on condition of the inclusion of the psychological element[14].

c. The Aim of Halting or Suspending Work in the Workplace

As mentioned before, the workers' collective action of giving up work is not enough to talk about a strike. The workers shall collectively give up work temporarily with the aim of suspending work on a large scale or halt the activity of the workplace completely[15]. In short, strike is in question when the workers give up work on a collective basis, with the intention to strike[16].

2. Psychological Element: Workers' Agreement among Themselves or Compliance to an Institution's Decision

One of the main elements of a strike is the workers' giving up their work collectively, upon a decision taken among themselves or by an institution -protecting their rights. The fact of strike not only involves workers' giving up their work, but also comprises their own agreement or compliance to the decision of an institution.

When workers agree among themselves or obey the decision of an institution to go on a strike, the fact that whether the total number of workers who are on strike is enough for suspending work partially or completely or not, does not have any influence on calling this fact a strike[17]. As a matter of fact, the number of workers on strike may increase during a strike[18]. Therefore, a condition such as "the minimum number of workers on strike" is not a requisite for making agreement or obeying an institution's decision[19].

Workers' compliance to an institution's decision to go on a strike is also accepted as a strike. As a rule, this institution is the authorized trade union[20].

14 Narmanlıoğlu, Toplu İş İlişkileri, p.541.
15 Narmanlıoğlu, Toplu İş İlişkileri, p.560-561; Tunçomağ/Centel, p.460; Günay, İş Hukuku, p.1059; SUR, Toplu İş, p.384; Çifter Algun, "Yasal Grev ve Unsurları", İstanbul Ticaret Üniversitesi Dergisi, http://www.iticu.edu.tr/yayin/dergi/d5/M00070.pdf, p.167.
16 Narmanlıoğlu, Grev, p.82-83.
17 Narmanlıoğlu, Grev, p.83; Tuncay, p.287.
18 Tunçomağ/Centel, p.461.
19 Tunçomağ/Centel, p.461.
20 Çelik, p.620; Tunçomağ/Centel, p.461; Tuncay, p.287; Turunç/Sur, p.133; Kabakcı, p.34; Çifter, Yasal Grev, p. 170; Centel, Tankut, "The Right to Strike and its posssible conflict with other fundamental rights of the people", Turkey Report to XX World Congress of Labour and Social

III. LEGAL AND ILLEGAL STRIKE

A. Legal Strike

1. Definition of Legal Strike

Legal strike has been defined in the Collective Agreement, Strike and Lock-out Act, Article No.25/2. Accordingly, the strike is called a legal strike, when it occurs in case of any disputes during collective bargaining process, with the aim of protecting or improving the economical and social situation and working conditions of workers, in compliance with the above mentioned Law. This means that the strike must have an occupational objective in order to be qualified as 'legal'. Additionally, in order for the strike to acquire a legal character, the procedure determined by the law itself must be fulfilled with strict conformity[21].

Therefore, modalities of industrial action such as solidarity/ sympathy/ secondary strikes, warning strikes, go slows, sit-ins, work-to-rule, rotating strikes, occupation of the enterprise's premises, blockades, picketing and other acts of resistance are not permitted under Turkish law. (Article 54 of the Constitution, Article 25 of the Collective Agreement, Strike and Lock-out Act)[22].

2. Elements of Legal Strike

a. A Collective Labor Dispute

According to Art 25 of the Collective Agreement, Strike and Lock-out Act, strike is legal only if a dispute arises during the process of formation of the collective agreement. The strike decision must have been taken by an authorized trade union which is party to collective negotiations. This is a trade union that represents a majority of the workers involved in the dispute[23].

There shall be a collective labor conflict between the parties, which is the result of a period in which the legal settlement term has expired[24]. In general terms, labor dispute reflects disputes between workers and employers or any institution established by them, regarding a labor

Security Law, Santiago de Chile, September 2012, (http: // www. Congresomundialtrabajo 2012.com/wp-content/uploads/2011/01/Tankut-Centel. pdf), p.4.

21 Centel, p.7.

22 Turunç/Sur, p.136; Centel, p.7.

23 Centel, p.4.

24 Narmanlıoğlu, Grev, p.95; Aktay A. Nizamettin (Arıcı Kadir/Senyen-Kaplan E. Tuncay), İş Hukuku, Ankara 2011, p.505

matter[25]. The character of collective labor dispute which constitutes the basis for the workers' legal right to strike is the conflict of interests[26].

b. Absence of Prohibited Strikes

In order to a strike as legal, it shall not have been prohibited by the relative law. On condition of going on strike despite it having been temporarily or permanently prohibited or deferred in accordance with the Collective Agreement, Strike and Lock-out Act No. 29-33, such strike is not accepted as legal. It is accepted as illegal[27].

c. Strike's Pursuit of an Objective Concerning Labor Law

The decision to go on a strike shall be taken towards an occupational objective, for the strike to be legal. Such occupational objective is to protect and improve the economical and social situations of the workers in their relation with the employer[28].

d. The Strike's Compliance to the Law

Another element of legal strike is, its compliance with the provisions of Act No. 2822. There is a need to have struggled for the peaceful solution of the conflict in the first instance and the attempt shall be ineffective, so that the strike is in conformity with the Law (Article 27 of Act No.2822). Before, the decision to go on strike shall be procedural taken, more clearly it shall be taken by the authorized trade union which is the conflicting party (Article 27/2 of Act No.2822). The authorized trade union has the right to take a decision of a strike after six working days from the time the parties receive a record from the mediator of the failure to reach an agreement[29]. After such six working days, the conflicting party, Trade union could take the decision to go on a legal strike (Article 27 of Law No.2822). In order to strike to start, the parties should have failed to reach an agreement after having tried settle the dispute of legal mediation[30].

25 Narmanlıoğlu, Grev, p.96.
26 Narmanlıoğlu, Grev, p.96-97; Aktay (Arıcı/ Senyen-Kaplan), p. 505; Kabakcı, p.54; Çifter, Yasal Grev, p.167.
27 Oğuzman M.Kemal, Hukuki Yönden Grev ve Lokavt , İstanbul 1964, p.43; KABAKCI, p.59.
28 Oğuzman, p. 33-38; Sur, Toplu İş, p.386; Narmanlıoğlu, Grev, p.167; Narmanlıoğlu, Toplu İş İlişkileri, p.560-561; Tunçomağ/Centel, p.468; Aktay (Arıcı/ Senyen-Kaplan), p. 507; Tuncay, p.288-289.
29 Turunç/Sur, p.133.
30 Turunç/Sur, p.133-134.

This strike decision taken in accordance with the Law, is given to the public notary in order to be sent to the counter party, with one copy to the concerned authority. As a result, the strike decision is announced in the workplace by the receiver (Article 28 of Act No.2822). Announcement of the strike decision is the element of a legal strike[31].

3. Effect of a Legal Strike on the Labor Contract

"The contract of employment of any worker who supports a decision to call a legal strike or urges others to support it, or takes part in such a strike or urges others to take part in it, shall not be terminated for that reason." (Article 42/1 of Act No.2822)[32].

Upon commencement of a legal strike, the obligation for the workers to serve is abolished. The employer cannot terminate the labor contract of the worker due to such obligation to serve.[33] With the introduction of a legal strike the labor contract of the workers is suspended temporarily. In this context, the obligation of the worker which is suspended is the obligation to serve and obey the rules and instructions of the employer. However, since the labor contract does not terminate in the course of the legal strike, the obligation of the worker is to display loyalty[34]-[35]. According to the judgment of the Supreme Court, "The shuttles of the Respondent carrying the workers are deemed to be the offices and the pounding actions and insulations of the claimant and his comrades against the shuttle driver are intended to prevent the workers who go to the work site for serving purposes and who do not take part in the strike from working. Since the labor contract of the claimant who takes part in

31 Çifter, Yasal Grev, p.180; Yarg. 9. HD., 2.11.1964, E.1964/6840, K.1964/7266; Çifter, Yasal Grev, p.180, footnote 33.

32 http://ilo-mirror.library.cornell.edu/public/english /region/ eurpro/ ankara/ legislation/ act 2822. htm.

33 Sümer Haluk Hadi, İş Hukuku Uygulamaları, Genişletilmiş 3. Baskı, Konya 2009, p.542; Ulucan Devrim, İş Mücadelesinin Hizmet Akdine Etkisi, İş Hukuku, C.2, S.2, Nisan-Haziran 1992, p.169; Mollamahmutoğlu Hamdi, Türk Hukukunda Lokavt, Ankara 1993, p.123. Tuncay, p.310.

34 Sümer, p.542; Mollamahmutoğlu, p.125; Ulucan, p.173; Narmanlıoğlu, Toplu İş İlişkileri, p.695; Tuncay, p.310; Tunçomağ/Centel, p.477; Sur, Toplu İş, p.420-421; Çifter Algun, "Türk Hukukunda Hizmet Akdinin Yasal Grev Süresince Askıda Olmasının Sonuçları", AÜHFD., C.VI, S.1-4 (2002) (http:// hukuk. erzincan. edu.tr /dergi /makale /2002_1_13.pdf), p.231.

35 "The rights and obligations under the contract of employment of any worker who takes part in a legal strike or wishes to work in the establishment in accordance with the second paragraph of section 38 but is not called upon to do so by the employer, shall be suspended until the end of the strike." (Article 42/2 of Act No.2822). Article 38/2 of Act No.2822: "The freedom to work in the establishment of the workers who are not participating or have refused to participate in the strike shall not be restricted in anyway." http://ilo-mirror. library. cornell. Edu / public / english/region/eurpro/ankara/legislation/act2822.htm

the strike is suspended, these obligations against the employer persist during such time except for the obligation to serve at the facilities of the employer."[36]

The employer has no obligation to make payment to the workers during strike. Since no payment is to be made to the workers during the time of strike, no deduction for Insurance Premium, Tax etc. shall be made[37]. According to Article 42/5 of Act No.2822, the employer shall not pay any wages or social benefits to workers whose contracts of employment are suspended for the period of a strike. Furthermore this period shall not be taken into account in the calculation of severance pay. Collective labor agreements or contracts of employment may not include any clause contrary to these provisions.

"During a legal strike the employer shall not be permitted to take on any worker in a permanent or temporary capacity or to employ any other person in substitution for a worker whose rights and obligations under his contract of employment are suspended." (Article 43/1 of Act No.2822)[38]. "A worker whose rights and obligations under his contract of employment are suspended in consequence of a legal strike or lock-out shall not be permitted to accept any other employment. If he does, the employer may terminate his contract of employment without notice or compensation." (Article 43/3 of Act No.2822)[39].

Due to the justified reasons within and prior to the legal strike, both parties have the right to terminate the labor contract. However, the notification period shall not be processed during the time of the strike. For the notified terminations both within and prior to the legal strike, the notification period commences subsequent to cessation of the strike[40].

Since the labor contract is suspended during a legal strike, such legal strike has no impact on the duration of the fixed term labor contract. In

36 Yarg. 9. HD., 17.4.2002, E.2002/6043, K.2002/6340, ayrıca bkz. Yarg. 9. HD., 17.4.2002, E.2002/6042, K. 2002/6339; Yarg. 9. HD., 17.4.2002, E.2002/6048, K.2002/6345. (www.legalbank.net.)

37 Aktay (Arıcı/Senyen-Kaplan), p.513; Tuncay, p.311; Turunç/Sur, p.135; Tunçomağ/Centel, p.483; Sur, Toplu İş, p.421; Çifter, Askı, p.231-232; Centel, p.9..

38 http://ilo-mirror. library. cornell.edu/public /english /region /eurpro/Ankara/legislation/ act 2822. htm.

39 http://ilo-mirror.library.cornell.edu/public/english/region/eurpro/ankara/legislation / act 2822. htm .

40 Mollamahmutoğlu, p.131-132; Sümer, p.543.

case the labor contract expires by the time of the legal strike, such labor contract terminates automatically.[41].

B. Illegal Strike

1. Definition of the Illegal Strike

Act No. 2822 has adopted a strike as illegal, which comes out without the conditions necessary for a legal strike. Strikes with political aims, general strikes and cooperation strikes are illegal. Invasion of the workplace, slowing down the work, reducing the output and such other challenges are subject to the sanctions of illegal strike (Article 25/3 of Act No.2822).

According to the judgment of the Supreme Court, "It has become clear that the claimants employed in the office acted in the manner that such actions fall within the scope of Article 25 as evidenced by the documents and information within the dossier and the petition incorporated in the file by the claimants subsequent to holding their joint signatures. Since the conditions for legal strike are not the actual case for this particular action, it is not judicious to make an evaluation within the framework of Article 81 of the Law of Obligations in written form whereas the action of the claimants should have been deemed to be illegal strike. Therefore, the decision should be reversed." [42].

2. Situations of Illegal Strike

Any strike with an aim except for the protection and improvement of the economical and social situations of the workers in their relation with their employer, is regarded as illegal[43]. Any strike shall be organized with an aim against the State's integrity with its territory and the nation, national sovereignty, Republic of Turkey and national security (Article 25/4 of Act No.2822).

The strike is illegal if it comes about without the decision of an authorized trade union or without passing collective negotiation and it is again illegal if the settlement and the strike period is not notified on time according to the procedures[44]. Furthermore, going on a strike despite its

41 Sümer, p. 544; Ulucan, p.172; Narmanlıoğlu, Toplu İş İlişkileri, p.695.
42 Yarg. 9. HD., 6.3.1992, E.1992/2607, K.1992/2667. (www.legalbank.net.)
43 Oğuzman, p.74; Narmanlıoğlu, Toplu İş İlişkileri, p.656; Çelik, p.663; Tunçomağ/Centel, p.498-499.
44 Oğuzman, p.74; Narmanlıoğlu, Toplu İş İlişkileri, p.656; Tunçomağ/Centel, p.499-500.

decision or implementation which has been prohibited or deferred, results in an illegal strike[45].

3. Consequences Of Illegal Strike

"In the event of an illegal strike the employer shall be entitled, without any liability as to notice or compensation, to terminate the contract of employment of any worker who has supported the decision to call the strike or urged others to support it, or has taken part in the strike or has urged others to take part in it or sustain it." (Article 45/1 of Law No.2822)[46]. "In the event of an unlawful strike any damages sustained by the employer as a result of its existence, organisation or conduct shall be compensated by the trade union that decided to call it or, if it takes place other than by decision of a workers' organisation, by the workers who took part in the strike." (Article 45/2 of Law No.2822)[47].

The employer should prove the case as being an illegal strike[48]. According to the doctrine and our opinion, the employer who has the right to terminate the labor contract concluded with the worker as per Article 45 of Collective Agreement, Strike and Lock-out Act should be based on the equal practice in exercising such a right. In this context, the employer cannot dismiss the workers by way of intentional and unfair behaviors[49]. According to the other comments included in the doctrine, it is not fair to dismiss all of the workers taking part in the illegal strike alleging for equalization principle. Therefore, the employer should be left free to select the workers who involve in an illegal strike as per the requirements of the corporation[50].

According to the judgment of the Supreme Court, "As in the litigated case, the claimant employer asks for the compensation of the losses by the respondent trade union which has decided for an illegal strike. On the other hand, according to second paragraph of Article 66 of the Law numbered 2822, the disputes arisen in connection with the application of the terms contained in the referenced law are settled in the competent labor courts . Then in deciding for the rejection of the declaration, the

45 Oğuzman, p.74; Tuncay, p.323.
46 http://ilo-mirror.library.cornell.edu/ public/ english/ region/ eurpro/ ankara/ legislation / act 2822.htm
47 http://ilo-mirror. library. cornell. Edu / public / english / region / eurpro / Ankara /legislatio/ act2822.htm
48 Sur, Grev, p.427; Çelik, p.665.
49 Sur, Grev, p.426, footnote-176.
50 Sur, Grev, p.428.

appeal should have been the actual decision as a consequence of substantial examination"[51].

CONCLUSION

Strike is the workers' collective decision of giving up working for the aim of making their requests accepted by the employer, by the employer association, government or any other institution. Strike has two elements. One element is physical and the other element is psychological. The physical element is "giving up working" and psychological element is workers' agreement among themselves or compliance to an institution's decision.

A strike can be legal or illegal. Legal strike has been defined in Collective Agreement, Strike and Lock-out Act, Article No.25/2. Accordingly, the strike is called a legal strike, when it has occurred in the case of any dispute during collective agreement, with the aim of protecting or improving the economical and social situation and working conditions of workers, in compliance with the above-mentioned Law. Article 25/3 of Law No. 2822 has adopted a strike as illegal, which comes out without the conditions necessary for a legal strike. Strikes with political aims, general strikes and cooperation strikes are illegal.

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[51] Yarg. 4. HD., 17.4.1984, E.1984/3073, K.1984/3862 (www.legalbank.net)

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UNRECHTSAUSSCHLUSS DURCH EINWILLIGUNG IN DER DEUTSCHEN STRAFRECHTSDOGMATIK

„Schließt die wirksame Einwilligung den Tatbestand oder die Rechtswidrigkeit aus?“

Zeynel KARA*

ABSTRACT

Since the case is handled as partially contrary to the mandatory system concerning the infringement of legal interest, and then, the impunity is still ensured through making justification, the question “How is an assent regarding the criminal law to be evaluated?” is considered to be somewhat problematic. This contribution concerns whether the assent excludes the case in the legal framework of "victim" or presents actually a situation regarding a justification on a whole manner only. In this context, it is the focus points of those discussions the will of holder of the legal interest and liberty of its rights. In order to propose a solution at subsequent stage, various ideas which have been represented in the doctrine are included.

Key words: Assent, exclusion of the case, justification, liberty, injustice

ZUSAMMENFASSUNG

Die Frage, wie eine Einwilligung in der Strafrechtsdogmatik zu bewerten ist, scheint überaus problematisch, da zum Teil entgegen der stringenten Systematik in Fällen einer Rechtsgutsverletzung der Tatbestand angenommen wird, um dann aber durch die Rechtfertigung Straflosigkeit trotzdem zu gewähren. Dieser Beitrag befasst sich um den Streitpunkt, ob nun eine Einwilligung in den Rechtskreis des „Opfers“ bereits den Tatbestand ausschließt oder tatsächlich nur eine Rechtfertigung im Gesamtgefüge darstellt. Dabei ist der Wille des Rechtsgutsinhabers als Disposition seines Rechtes im Mittelpunkt de Diskussion. Es werden verschiedene Ansichten die in der Lehre vertreten werden vorgestellt, um danach eine Lösung vorzuschlagen.

Schlüsselwörter: Einwilligung, Tatbestandsauschluss, Rechtfertigung, Disposition, Unrechtstatbestand.

ÖZET

Hukuksal yararın ihlali halindeki zorunlu sistematiğe kısmen aykırı olarak olay esas alındığından, sonra haklı çıkarma gerekçeleri ortaya konularak yine de cezasızlık sağlandığından ceza hukuku dogmatiğinde verilecek bir muvafakatin nasıl değerlendirileceği sorusu, oldukça sorunlu görünmektedir. Bu katkı, verilecek muvafakatin

* Kontakt@zeynelkara.de

"mağdurun" hukuki çerçevesinde olayı hariç tutup tutmadığını ya da bir bütün içerisinde gerçekten sadece bir haklı çıkarmayı oluşturup oluşturmadığı tartışması ile ilgilenmektedir. Bu çerçevede hukuki yarar sahibinin iradesi, hakkının serbestliği ile tartışmaların odağında bulunmaktadır. Daha sonraki adımda bir çözüm önerebilmek için öğretide temsil olunan çeşitli görüşlere yer verilmektedir.

Anahtar Kelimeler: Muvafakat, olayın hariç tutulması, haklı çıkarma, serbestlik, haksızlık durumu.

***

EINLEITUNG

In der Einwilligungslehre ist anerkannt, dass die Einwilligung strafausschließend wirkt. Der Strafausschluss baut auf dem Fundament des Rechtsgrundsatzes des römischen Juristen Ulpian – „dem der es so haben will, geschieht kein Unrecht", auf.[1] Daher ist diese Rechtswirkung nicht streitig. Ein sehr ausgiebiger Streit herrscht jedoch darum, wie die Einwilligung im Verbrechensaufbau einzuordnen ist, denn es ist bisher keine diesbezügliche gesetzliche umfassende Regelung enthalten.[2] Die Einwilligungslehre ist relativ durchschaubar in der Strafrechtsgeschichte zurück zu verfolgen.[3] Die modernen Ansätze in der Lehre wurden bereits sehr früh aufgegriffen, so dass Freiheitsrechte stets unterstrichen wurden und Differenzierungen von Tatobjekten und subjektiven Rechten stattfanden.[4]

Der vorliegende Aufsatz befasst sich mit der Auseinandersetzung der systematischen Einordnung der Rechtsfigur „Einwilligung". Ob die Einwilligung tatbestandsausschließend oder rechtfertigend wirkt, steht im Mittelpunkt dieser Arbeit. Zunächst erfolgt eine differenzierte Darstellung des zustimmenden Willens im Strafrecht. Anschließend werden die unterschiedlichen Ansichten der herkömmlichen- und der sich im Vordringen befindenden Lehre dargestellt und kritisch bewertet. Ferner wird der Rechtsgutsbegriff in der Auswirkung auf die systematische Einordnung behandelt. Um die gesamtstrafrechtssystematische Darstellung zu ermöglichen, wird schließlich mittels Vorstellung der Tatbestandsfunktion die systematische Einordnung der Einwilligung dargestellt.

1 *Roxin,* AT I, § 13 Rn.1.
2 *Ensthaler*, Einwilligung, S.17.
3 *Ortmann*, GA 1877, S.104 (107); *Klee*, GA 1901, S.177; *Kessler*, Einwilligung, S. 52.
4 *Ortmann*, GA 25 (1877), 104 (107); *Ensthaler*, Einwilligung, S.18.

I. Die dogmatische Differenzierung von Einwilligung und Einverständnis innerhalb des strafrechtlichen Zustimmungsbegriffs

1.Zustimmung im Strafrecht

Innerhalb der Strafrechtsdogmatik ist die Zustimmung als Strafausschlussgrund anerkannt.[5] Erklären lässt sich dies damit, dass eine Rechtsguteinbuße hingenommen wird oder erwünscht ist und in der Folge die Tathandlung nicht pönalisiert wird. In diesem Zusammenhang wird jedoch in der Lehre überwiegend zwischen Einverständnis und Einwilligung unterschieden. Das Einverständnis wirkt demnach tatbestandsausschließend die Einwilligung dagegen rechtfertigend. Der herrschenden Lehre zur Folge sind die beiden Rechtsfiguren unterschiedlicher Natur und erfahren daher eine unterschiedliche Einordnung im Verbrechensaufbau. Dies schlägt sich auch in unterschiedlichen Wirksamkeitsvoraussetzungen der Rechtsfiguren nieder. Die Voraussetzungen des Einverständnisses ergeben sich aus der Funktion des einschlägigen Tatbestandes, die der Einwilligung hingegen aus den allgemeinen strafrechtlichen Grundsätzen.[6] Darüber hinaus wirkt sich die Unterscheidung auch im Hinblick auf Willensmängel aus. Einer Einwilligung wird bei Vorliegen von Willensmängeln die Wirksamkeit per sè abgesprochen,[7] wobei das Einverständnis dagegen immun ist. [8]

2.Strafrechtliche Bedeutung des Einverständnisses

Um ein Einverständnis handelt es sich bei einer Zustimmung dann, wenn ein Wille zur Rechtsguteinbuße geäußert wird. Die einem Einverständnis entsprechende Handlung erfüllt regulär nicht den Tatbestand,[9] wenn dieser ein Handeln gegen oder ohne den Willen des Täters voraussetzt.[10] Folgerichtig kann kein Handelnder den Tatbestand des § 242 StGB mit dem Willen des Gewahrsamsinhabers begehen.[11] Denn die Wegnahme setzt ein Handeln gegen oder ohne den Willen des Gewahrsamsinhabers voraus.[12] Stellt die Polizei einem vermuteten Dieb eine Falle, um ihn zu überführen, so liegt lediglich ein versuchter Diebstahl vor, da der Ge-

5 *Ensthaler*, Einwilligung, S.18.
6 *Schmidhäuser*, AT 2.Auflg. 1984, 5/122 f.
7 BGHSt 4, 113 (118); OLG Stuttgart NJW 1962, 62, (63); RGSt 41, 392, (396).
8 *Rönnau*, Jura 2002, S.595, (596).
9 *Tröndle/Fischer*, vor § 32, Rn.3a.
10 *Geerds*, GA 1954, S.262, (264).
11 *Joecks*, vor § 32, Rn. 14.
12 *Stratenwerth/Kuhlen*, § 9, Rn. 8.

wahrsam des Berechtigten – nur scheinbar – gebrochen wurde.[13] Der Tatbestand ist in diesem Fall nicht erfüllt. Einverständnisse können also lediglich bei sog. Willensbruchdelikten vorliegen, welche hinsichtlich der Tatbestandserfüllung als formales Element einen Bruch des Willens verlangen.[14] Ein Einverständnis wirkt sich folglich tatbestandsauschließend aus, so dass eine „*Einordnung*" des zustimmenden Willens auf *Tatbestandsebene* erfolgt. Festzustellen ist somit eine rein tatsächlich faktische Natur des Willens in Form des Einverständnisses.[15] Liegt ein tatbestandsauschließendes Einverständnis vor, so ist eine Rechtsgutsverletzung, damit auch die Tatbestandserfüllung, trotz der Beschädigung des Tatobjekts nicht vorhanden.[16] Der Grund liegt schlicht darin, dass der Wille mit der Tathandlung kongruent ist, somit ein Erfolgsunrecht, durch die Berücksichtigung des Willens im objektiven Tatbestand, nicht eintreten kann.[17] Der Wille des Rechtsgutsinhabers kann dabei nicht dem Rechtsgut angegliedert werden, so dass bei Tathandlung Widerwillens ein Erfolgsunrecht bejaht werden kann. Beim Einverständnis wird der Wille aus dem Strafrechtsschutz entnommen, denn der Wille als solches ist dabei ein Tatbestandsmerkmal und erlangt dadurch objektive Qualität.[18] Fällt ein Tatbestandmerkmal weg, kann kein Erfolgsunrecht, damit auch die Tatbestandsgemäße Handlung, nicht mehr begründet werden. Dies hat zur Folge, dass der Tathandlung dann eine sozialadäquate Bedeutung zukommt, so dass dieser Handlung der deliktische Charakter durch faktische Wirkung genommen wird. Im Sinne der Handlungslehre, kommt einer sozialadäquaten Handlung[19] keine typische Unrechtswirkung und tatbestandserfüllende Bedeutung zu.[20]

Interessant und beachtlich ist, dass zur Wirksamkeit des Einverständnisses es nicht notwendig ist, dass der Wille nach außen tritt. Auch ein vorhandener Willensmangel, etwa durch *Irrtum, Täuschung oder Zwang* ist unerheblich und hat für die Wirksamkeit des Einverständnisses keine Bedeutung.[21] Der Grund liegt darin, dass ein tatsächlich vorliegender Wille objektiv den Tatbestand bereits ausschließt. Der Wirkgrund des

13 BGHSt 4,199.
14 *Otto*, in Geerds- FS, S.603 (604 f.).
15 *Roxin*, AT I, §13 Rn.2.
16 *Rönnau*, Einwilligung, S.12, Fn.4.
17 *Geerds*, GA 1954, S.262, (266).
18 *Rönnau*, Einwilligung, S.12.
19 *Lenckner*, Sch-/Sch, Vor §§32ff., Rn. 31.
20 *Jeschek/Weigend*, AT §34, S.373.
21 *Geerds*, GA 1954, S.263, (265).

Einverständnisses liegt demnach bei der formal ausgestalteten Natur dieser Rechtsfigur.[22] Denn es wird angenommen, dass der Wille, welcher auf der Tatbestandsebene Berücksichtigung findet, die tatbestandlichen Voraussetzungen nicht erfüllen kann. Schließlich finden aus diesem Grund auch keine Sittlichkeitserwägungen statt, da der Tatbestand bereits als solcher ausgeschlossen ist, was bei der Einwilligung anders aussieht.[23] Wohl angemerkt, gibt es auch Stimmen, die die reine Objektivierung des Einverständnisses kritisieren. Eine rein objektive Einordnung des Einverständnisses behandelt demnach die Irrtümer nicht sachgerecht. Es müssten dann jedenfalls die Regeln hinsichtlich Willenserklärungen Anwendung finden.[24]

3.Strafrechtliche Bedeutung der Einwilligung

Von einer Einwilligung wird gesprochen, wenn ein zustimmender Wille in eine Rechtsgutsverletzung vorliegt, im Tatbestand jedoch ein Handeln ohne oder gegen den Willen des Rechtsgutsinhabers nicht vorausgesetzt wird.[25] Anders als das faktisch wirkende Einverständnis handelt es sich bei der Einwilligung um eine Zustimmung, die der Tathandlung ihre strafbare Wirkung nimmt. Die Einwilligung ist nicht wie das Einverständnis tatsächlich faktischer Natur, vielmehr hat die Einwilligung einen rechtlichen Charakter inne, so dass sie bei dem Schutz des Rechtsguts als solches berücksichtigt wird und nicht als reines Tatbestandsmerkmal anzusehen ist. Der Einwilligung kommt dabei eine Bedeutung zu, welche das Schutzgut selbst gestaltet. [26] Die Einwilligung soll der herkömmlichen Lehre nach nicht die objektive Handlung auf eine sozialadäquate Ebene platzieren und somit bereits hier die Wirkung des Unrechtsausschlusses entfalten, sondern eine Unrechtshandlung – *ausnahmsweise* – auf der Rechtfertigungsebene billigen. So ist beispielsweise eine erwünschte Körperverletzung zwar tatbestandsmäßig, jedoch gerechtfertigt. Dogmatisch wird diese Einordnung dadurch begründet, dass in der Einwilligung ein Rechtschutzverzicht vorhanden ist, der mittels eines Erlaubnissatzes durch Abwägung berücksichtigt werden kann.[27] Aus diesem Grund wird die Rechtsfigur der Einwilligung auf der Rechtswidrig-

22 OLG Stuttgart, NJW 1962, 62, (63).
23 *Geerds*, GA 1954, S.263, (268).
24 *Jakobs,* AT, 7/110.
25 *Wessels/Beulke*, AT, Rn. 370.
26 *Mezger*, Strafrecht, S.209.
27 *Bichlmeier*, JZ 1980, S.53 ff. 54.

keitsebene berücksichtigt.[28] Demnach schließt sich der Tatbestand nach der hier vorgestellten herkömmlichen Lehre nicht aus. Die rechtfertigende Wirkung erfährt schließlich auch dadurch eine Begründung, dass der Erfolgsunwert des objektiven Tatbestandes mit der Verfügungsfreiheit des Rechtsgutinhabers abgewogen wird. Es findet also auf der Rechtfertigungsebene eine Interessensabwägung[29] statt. So kann sich beispielsweise jemand zwischen der körperlichen Unversehrtheit und der Freiheit sich schlagen zu lassen selber entscheiden.[30] Verletzt jemand den Einwilligenden seinem Willen entsprechend, ist er zunöchst einmal grundsätzlich nicht mehr strafbar.

Jedoch gewinnt seit den siebziger Jahren ein neuerer Ansatz mit folgendem Einwand an Bedeutung[31]: Dieser vertritt, dass es zwischen den Rechtsfiguren Einverständnis und Einwilligung keinen systematischen Unterschied gibt. Vielmehr habe jede wirksame Zustimmung einen Tatbestandsausschluss zur Folge. Der Herrschenden Lehre nach wird im Falle einer unerbetenen Zusendung von Schriften mit sexuellem Inhalt der Beleidigungstatbestand des § 185 StGB als erfüllt angesehen.[32] Die Neue Lehre hingegen würde keine Tatbestandserfüllung annehmen, weil der zum Rechtsschutz gehörende Achtungsanspruch des § 185 StGB nicht erhoben wird.[33] Eine Rechtsgutverletzung sei deshalb zu verneinen, da infolge der willensgemäßen Disposition durch den Rechtsgutinhaber der Zweck der Selbstbestimmung erreicht werde.[34] Um diese Position zu untermauern, wird ein Vergleich zum Zivilrecht gezogen. § 903 BGB gewährt dem Rechtsgutinhaber das Recht, mit dem Rechtsgut nach Belieben zu verfahren. Wenn der Eigentümer nun kraft seines Willens einer Beschädigung oder Zerstörung der Sache zustimmt, ist darin eine Ausübung der Verfügungsfreiheit zu sehen.[35] Konsequenterweise könne es keinen Unterschied machen, ob er die Zerstörung selbst vornimmt oder sich hierfür eines Dritten bedient. Im Ergebnis müsse eine Rechtsgutverletzung entgegen der Herrschenden Lehre zu verneinen sein, was der Erfüllung des Tatbestandes entgegensteht. Eine Zweiteilung des zustim-

28 *Roxin*, AT I, §13 Rn.3.
29 *Jeschek/Weigend*, AT §34, S.373.
30 *Jakobs*, AT, 14/4.
31 *Freund*, AT, §1, Rn.6; *Kientzy*, Straftatbestand, S.16; *Roxin,* ZStW 84 (1972), S.993 (1001 f.); *ders*., ZStW 85 (1973), S.76 (100 f.); *Sax,* JZ 1976, S.9.
32 BGHSt 11, 67 (72).
33 *Roxin,* AT I, §13 Rn.24.
34 *Jakobs,* AT, 7/111.
35 *Roxin,* AT I, §13 Rn.12.

menden Willens in Einverständnis und Einwilligung ist nach der Neueren Lehre folglich abzulehnen.[36]

Eine weitere Lehre – der der negativen Tatbestandsmerkmale – leitet die tatbestandsausschließende Wirkung der Einwilligung auf anderem Wege her. Danach schließen die Rechtfertigungsgründe bereits den Gesamtunrechtstatbestand aus.[37] Wenn eine vorliegende Einwilligung trotz Rechtsgutverletzung die Tathandlung als wünschenswert darstellt, ist die Tat nach der Lehre der negativen Tatbestandsmerkmale gerechtfertigt. Die Rechtfertigung findet innerhalb des Gesamtunrechtstatbestandes Berücksichtigung, wodurch eine Erfüllung ausgeschlossen wird.[38]

II.Einordnung der Einwilligung in der Strafrechtsdogmatik

Der Strafbarkeitsausschluss des zustimmenden Willens ist anerkannt und unstreitig. In den Fällen, wo der Tatbestand ein Handeln – gegen oder ohne den Willen des Täters – nicht verlangt, ist die Einordnung des zustimmenden Willens in Form der Einwilligung streitig.[39] Die Rechtfertigungslehre ordnet die Einwilligung der Rechtswidrigkeitsebene zu, wohingegen die Tatbestandslehre die Einwilligung stets als Tatbestandsausschließungsgrund sieht.[40] Die erste Meinung sieht den Lösungsansatz auf der Rechtfertigungsebene mit der Begründung des Rechtsschutzverzichts mittels einer Interessensabwägung angesiedelt. Die zweite Meinung möchte durch die Einwilligung den objektiven Tatbestand ausschließen, indem sie den Erfolgs- und Handlungsunwert verneint.[41] Dabei werden in der Neuen Lehre Rechtsgut und Tatobjekt auseinandergehalten, so dass bei einem infolge der Einwilligung zerstörten Sacheigentum der Tatbestand des § 303 StGB nicht als erfüllt anzusehen ist.[42]

An dieser Stelle ist vorweg festzustellen, dass das Verständnis des Rechtsgutbegriffs sich in der Entwicklung der Einwilligungslehre als das zentrale Problem erwiesen hat.[43] So herrscht in der Lehre ein versachlichtes Rechtsgutverständnis, in der das Tatobjekt als das durch den Tatbestand geschützte Gut verstanden wird. Dabei beschränkt sich die tatbestandserfüllende Wirkung lediglich auf den Bestandsschutz des Schutz-

36 *Roxin,* AT I, §13 Rn.11.
37 *Jeschek/Weigend,* AT, S.375.
38 *Roxin*, AT I, § 10, Rn.15.
39 *Kühne* JZ 1979, 241.
40 *Roxin,* AT I, §13 Rn.11.
41 *Roxin,* AT I, §2 Rn.34.
42 *Maurach/Zipf* AT I, §17, 33f.
43 *Rönnau*, Einwilligung, S.20.

gegenstandes. Die Neue Lehre will einen liberaleren Rechtsgutbegriff annehmen und wirft der Gegenmeinung Verwechslung von Tatobjekt und Rechtsgut vor. Vielmehr sei der Wille, wie oben angeführt, als Verfügungsfreiheit in den Rechtsgutbegriff aufgenommen.[44]

1.Rechtfertigungslehre

Die Einwilligung als Rechtfertigungsgrund ist gewohnheitsrechtlich anerkannt. Zur Begründung der h.L. wird vertreten, dass das Prinzip des mangelnden Interesses ausschlaggebend sei.[45] Am Beispiel des Sacheigentums verhält es sich wie folgt: Das Rechtsgut Eigentum verliert den Genuss des Strafrechtschutzes aufgrund mangelnden Schutzinteresses des Berechtigten.[46] Im Sinne des Grundsatzes – volenti non fit iniuria[47] resultiert ein Verständnis, das wegen des mangelnden Schutzinteresses die Tathandlung zwar tatbestandsmäßig, jedoch ausnahmsweise[48] gerechtfertigt einstuft.[49]

1.1.Rechtsgeschäftstheorie

Die ehemals verbreitete *Rechtsgeschäftstheorie* vertrat i.S.e. privatrechtlichen Instruments, dass eine Einwilligung als Willenserklärung des Gutsinhabers die Rechtswidrigkeit der Tat ausschloss.[50] Dabei galt die Einwilligung als Unterfall einer zivilrechtlichen Willenserklärung, worin die Ausübung eines Rechtes gesehen wurde. Heute wird der Rechtsgeschäftstheorie keine Beachtung mehr beigemessen. Die Unanwendbarkeit resultiert daraus, dass Rechtsgüter, wie Unversehrtheit des Körpers, Leib oder Ehre, nicht in der Art und Weise disponiert werden können, wie materielle Güter.[51] Dispositionsbefugnisse werden heute allerdings hinsichtlich der genannten Rechtsgüter aus dem allgemeinen Persönlichkeitsrecht hergeleitet.[52]

1.2.Rechtsschutztheorie

Die *Rechtsschutztheorie* umfasst verallgemeinert das mangelnde Interesse an dem Rechtsgutschutz. Bei einem Verzicht auf strafrechtlichen

44 *Roxin,* AT I, §13 Rn.11f.
45 *Kühl*, AT, S.251 Rn. 23.
46 *Lenckner*, GA 1985,295, (302).
47 *Jeschek/Weigend*, AT, S.376.
48 *Rönnau*, Jura 2002, S.595.
49 *Kühl*, AT, S.250 Rn. 20.
50 *Fischer*, Einwilligung, S.271 (272 f.).
51 RGSt 41, 392, 395 ff.
52 *Rönnau*, Einwilligung, S.176 f.

Schutz erhält der Erlaubnissatz dergestalt den Vorzug, [53] dass nach Abwägung zwischen dem Erfolgsunwert – Zerstörung des Sacheigentums – und der Willensfreiheit ein klares Gewicht auf letzteres gelegt wird.[54] Dazu soll es kommen, indem der vorhandene Rechtsschutz aufgehoben wird.[55] Dem ist jedoch entgegenzuhalten, dass der durch das Strafrecht aufgestellte der Allgemeinheit dienende Rechtsschutz nicht durch den Einzelnen disponiert werden kann. Diesen Standpunkt untermauert auch die Einwilligungssperre. Denn schließlich kann man in eine vorsätzliche Tötung nicht einwilligen, was sich aus § 216 StGB ergibt.[56]

Eine Disposition aus dem Persönlichkeitsrecht aus Art. 2 I GG herzuleiten, erscheint deshalb als Kunstgriff. Vielmehr lässt diese Ansicht die Frage nach der konkreten Gestaltung eines Rechtsschutzverzichts unbeantwortet.

1.3.Normschutzverzichtstheorie

Durch eine modifizierte Ansicht der Rechtschutztheorie, namentlich der sog. *Normschutzverzichtstheorie* wird eine Konkretisierung der Rechtsschutzpreisgabe vorgenommen.[57] In der Einwilligungslehre beziehe sich der Rechtsschutzverzicht seitens des Gutsinhabers nicht auf die Rechtsfolgen der Tat, sondern dieser verzichte vielmehr auf den konkreten Schutz durch die Norm als solche.[58] Zieht man das Beispiel des Sacheigentums heran, so liegt der genannten These zur Folge in der zerstörten Sache eine Rechtsgutverletzung vor, auf den Normschutz des § 303 StGB von Seiten des Eigentümers wird jedoch verzichtet und im Ergebnis der Tathandlung der anhaftende Unrechtsgehalt entzogen, so dass dadurch eine rechtfertigende Wirkung vorliegen kann.

Zu bemängeln ist an der Normschutzverzichtstheorie, dass sie versucht, das aus dem Notwehrrecht bekannte „ Erforderlichkeitsmerkmal" [59] auf die Einwilligung zu übertragen.[60] Führt man diesen Gedanken weiter, müsste der mit dem Willen des Gutsinhabers vorgenommene Eingriff geeignet sein und zugleich die mildeste unter den geeigneten Alternativen darstellen, die mit dem Gutseinsatz verfolgten Zwecke des Verfügenden

53 *Geppert* ZStW 83 (1971), S.947 (952 f.).
54 *Rönnau*, Einwilligung, S.15.
55 *Noll*, ZStW 77 (1965), S.1 (15).
56 *Hirsch*, LK, vor §32 Rn. 105.
57 *Hirsch*, LK, vor §32 Rn. 105.
58 *Hirsch*, LK, vor §32 Rn. 105.
59 *Hirsch*, LK, vor §32, Rn. 105.
60 *Rönnau*, Einwilligung, S.147.

zu realisieren.[61] Die Normschutzverzichtstheorie setzt sich mit dieser Vorgehensweise aber über den in der gefestigten Einwilligungsdogmatik herrschenden Grundsatz hinweg, dass die Opferzustimmung nicht unter eine „Vernunftshoheit" zu zwingen, sondern als Instrument der Selbstbestimmung[62] des Gutsinhabers zu deuten sei.[63] Denn selbst wenn der Gutseinsatz im Rahmen einer Erforderlichkeitsprüfung zur Zweckerreichung ungeeignet oder nicht das mildeste der geeigneten Mittel wäre, würde die Rechtsordnung – sofern die §§ 216, 228 StGB nicht entgegenstehen – die Einwilligung des Verfügenden hinnehmen.

1.4.Güterabwägungslehre

Auf den ersten Blick bildet die *Güterabwägungstheorie* eine plausiblere Lösung für die Rechtfertigungslehre. Anders als die Rechtschutztheorie betrachtet sie nicht den Verzicht des Rechtsgutsträgers als Wirkgrund der Einwilligung, sondern konstruiert ein Gebilde, in dem der Wert des Rechtsschutzinteresses mit dem Wert des Selbstbestimmungsrechts[64] abgewogen wird[65], ausgehend auch hierbei von einem Verständnis der Wertekollision der tatbestandlich geschützten Güter mit den Erlaubnissätzen aus der Rechtswidrigkeit.

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Durch die Werteabwägung erfolgt dieser Lehre nach keine unnatürliche Behandlung der Einwilligung. Die Einwilligung stelle keinen Fremdkörper[66] im System der Rechtsfertigungsgründe dar, sondern vielmehr entspräche sie mit der erforderlichen Interessensabwägung dem für alle Rechtfertigungsgründe maßgeblichen Strukturprinzip. Ein solcher von der Güterabwägungstheorie vorgetragene Gesichtspunkt vermag jedoch nicht zu überzeugen.

Diese Ansicht ist bereits schon deshalb problematisch, weil der Gesetzgeber mit der Aufstellung der Einwilligungsschranke des § 216 StGB es - soweit es diese Norm betrifft - auf eine Abwägung überhaupt nicht ankommen lässt. Vielmehr wurde schon im Vorfeld der Normierung der genannten Vorschrift eine Abwägung zum Nachteil der Dispositionsbefugnis vorgenommen so das eine vom Gesetzgeber fest vorgeschrieben Grenze einzuhalten ist. Im Ergebnis verbietet es sich dann für den

61 *Rönnau*, Einwilligung, S.147.
62 *Honig*, Einwilligung, S.118.
63 *Rönnau*, Einwilligung, S.147.
64 *Arzt*, Willensmängel, S.45.
65 *Geppert* ZStW 83 (1971), S.947 (953).
66 *Noll*, ZStW 77 (1965), S.1 (15).

Rechtsanwender im Rahmen der bestehenden Verfügungsfreiheit die Interessen bewertend gegenüberzustellen.

1.5.Interessenkollision des forum internum

Der innerlichen Interessenskollision nach soll der Rechtsgutinhaber die Hinnahme der Rechtsgutverletzung aus dem Grund billigen, weil dadurch die Wahrung des höheren Rechtsguts gewährleistet sei.[67] Der Rechtsgutsinhaber hat sich also schon für eine Disposition entschieden. Somit stellt sich die Einwilligung als eine Rechtsfigur dar, wodurch nach der inneren Willensrichtung des Einwilligenden das höhere Rechtsgut gewahrt bleibt.[68] Zum das disponierte Recht z.B. eine Sache oder die körperliche Unversehrtheit und zum anderen die Willensbetätigung.

Die Verschiedenheit zu den übrigen Rechtfertigungsgründen resultiere allein daraus, dass der Einwilligung eine „interne Interessensabwägung", während z.B. dem rechtfertigenden Notstand eine „externe Interessenskollision" zugrunde liege.

Dieser Ansicht wird jedoch entgegengehalten, dass zwischen der Rechtsfigur der Einwilligung und der des Notstandes keine Berührungspunkte vorliegen.[69] Die im Kontext der Entscheidungsfindung des Einwilligenden personenintern auftretende Interessenkollision ist für das Recht zunächst ohne Bedeutung. Willigt aber der Gutsinhaber nach dem Willensbildungsprozess in den Eingriff ein, kann diese Zustimmung je nach Rechtsgutverständnis auf Tatbestands- oder Rechtfertigungsebene Beachtung finden. Der Umstand, dass der Entscheidung des Disponierenden eine interne Abwägung von Interessen vorausgegangen ist, gäbe jedenfalls kein Kriterium ab.

1.6.Stellungnahme

Innerhalb der Rechtfertigungslehre ergeben sich Probleme durch die Zweiteilung des zustimmenden Willens. Dass der Wille auf der Tatbestandsebene berücksichtigt werden kann, steht außer Frage.

Zugespitzt ist zu sagen, dass sich die Argumente dort treffen, wo es um den Begriff des Rechtsgutes geht. Will man den Willen der Dispositionsfreiheit der Rechtsgüter innerhalb des Rechtsguts verstehen, so ist die

67 *Mitsch*, Baumann/Weber/Mitsch, AT, § 16 Rn.52.
68 *Rönnau*, Einwilligung, S.148 f.
69 *Mitsch*, Baumann/Weber/Mitsch, AT, § 16 Rn.53; § 17 Rn. 96 f.

Berücksichtigung des Willens auf Tatbestandsebene unproblematisch. Dafür spricht sich die Tatbestandslehre aus.

Systematische Aspekte, wie die Rechtswidrigkeit der Tat innerhalb des § 228 StGB, können nicht für eine Zweiteilung der Einwilligung plädieren, weil § 11 I Nr. 5 StGB bei einem erfüllten Tatbestand von einer rechtswidrigen Tat spricht. Es ist also nicht ausschließlich bei einer sittenwidrigen Einwilligung von einer Rechtswidrigkeit auszugehen. So könnte man den Wortlaut auch dahingehend verstehen[70], dass sich die Rechtswidrigkeit bei Vorliegen von sittenwidrigen Taten ergibt.

Es überzeugt auch nicht, dass mittels der Güterabwägung dem Rechtsgut ein Gemeinschaftsinteresse[71] auferlegt wird, somit die Willensfreiheit weniger berücksichtigt werden kann. Denn handelt der Täter der Einwilligung entsprechend, kann er auch als verlängerter Arm des Einwilligenden verstanden werden. Oder die Tathandlung ist als Gegenstand der Einwilligung anzusehen. [72] Einer solchen Handlung eine Tatbestandserfüllung zuzusprechen und ein Handlungsunrecht zu bejahen[73] erscheint nicht zweckmäßig. Schließlich erscheint die Handlung gegen sich selbst nach strafrechtlichen Gesichtspunkten unbedeutend. Vergleichsweise beinhaltet die Täterintention nämlich lediglich der Einwilligung entsprechende Rechtsgutverletzung. Überschreitet der Täter seine Grenzen, so ist die Einwilligung bereits nicht mehr vorhanden, so dass sich eine Einordnungsproblematik nicht ergibt.

Die verbrechenssystematische Einordnung der Einwilligung in der Rechtswidrigkeit wirkt wegen der Eigenschaft der Einwilligung als Rechtsdisposition unnatürlich. Auf der Rechtswidrigkeitsebene ist vielmehr eine Interessen-bzw. Rechtsgüterkollision, zu berücksichtigen,[74] wohingegen es sich bei der Natur der Einwilligung um eine Freiheitsausübung handelt.

2.Tatbestandslehre

Die als „Neuer Ansatz" oder teilweise noch als „im Vordringen befindliche Meinung" betitelte Ansicht lehnt kategorisch die systematische Zweiteilung des zustimmenden Willens ab und vertritt, dass die Einwilligung

70 *Roxin*, AT I, § 13 Rn. 29.
71 *Weigend*, ZStW 98 (1986), S.44 (47).
72 *Schmidhäuser*, AT 2. Auflg. 1975, 8/138.
73 *Hirsch*, ZStW 74 (1962), S.78 (104, Fn.101).
74 *Roxin*, JUS 1988, S.425 (426).

stets als Tatbestandsauschluss zu verstehen sei.[75] Ausgangspunkt dieser Ansicht ist, dass unter dem Rechtsgutverständnis das Tatobjekt und der „Wille" über diesen zu verfügen als unzertrennliche Komponenten angenommen werden.[76]

Beachtlich erscheint zudem, dass sich Parallelen des neuen Ansatzes bereits früh innerhalb der Strafrechtslehre finden lassen.[77]

So war anerkannt, dass der Rechtsgutinhaber in den bestehenden rechtlichen Grenzen frei sein soll im Umgang mit dem tatbestandlich umschriebenen Tatobjekt.[78]

Konsequenterweise fehlt es dann bei einem vorhandenen zustimmenden Willen in Form der Einwilligung bereits an einer möglichen Angriffsfläche, wie es auch bei einem Einverständnis der Fall ist.[79]

2.1.Tatbestandsauschluss durch faktische Einwilligung

Der Wille des Rechtsgutinhabers erscheint als ein Mittel, objektiv sozial missbilligte Handlungen als adäquat oder gar als erwünscht einzustufen, wenn dem Rechtsgut die Selbstdisposition übergeordnet wird.[80] Daraus ist zu entnehmen, dass der Täter mangels Willens keinen Erfolgsunwert herbeiführt und im Interesse des Einwilligenden handelt. Genau aus dieser Beschaffenheit der eingewilligten Handlung ist eine Tatbestandserfüllung unbillig, weil die innerhalb der Strafnorm deliktstypische Tätigkeit nicht verwirklicht wird. So erfüllt dann beispielsweise ein zum Brennholz bestimmtes Möbelstück den Tatbestand nicht. Eine Verletzung des Tatobjektes ist deshalb dieser Ansicht nach *nicht* als Rechtsgutverletzung zu sehen. Der Rechtsgutlehre wird daher entgegenzuhalten sein, die Verletzung des Tatobjektes als Rechtsgutverletzung hinzunehmen, um diese bei der Rechtswidrigkeit wieder als sozialadäquat zu normieren. Ein Unrechtsauschluss ist daher nicht notwendig.[81]

Unter dem Lichte, dass einem erfüllten Tatbestand bereits ein Unrecht anhaftet,[82] ist eine solche Behandlung des verletzten Tatobjektes als kritisch zu behandeln. Denn es ist eindeutig, dass man dem Willen des

75 *Roxin*, AT I, § 13 Rn. 11.
76 *Roxin*, JUS 1988, S.425 (426); *ders.* Kriminalpolitik, S.25.
77 *Keßler*, Einwilligung S.50 ff.; *Klee* GA 48 (1901), S.337 (339).
78 *Ortmann*, GA 1877, S.104 (107).
79 *Rönnau*, Einwilligung, S.17.
80 *Rönnau*, Einwilligung, S.124 f.
81 *Jakobs*, AT, 7/112.
82 *Mezger*, Strafrecht, S.209.

Rechtsgutinhabers entsprechenden Behandlungen keine unrechtsindizierte[83] Wirkung beimessen kann. Wenn der konkrete Wille allerdings dermaßen der Vernunft zu widersprechen scheint, könnte es zu bejahen sein, den Tatbestand als erfüllt anzusehen und ihn dann mittels Unrechtsausschluss bei der Rechtswidrigkeit auszuschließen. Dies ist jedoch abzulehnen, weil es nicht einleuchtend erscheint, den Willen bei Härtefällen differenziert zu behandeln. Das dem Rechtsgut beigeordnete Selbstbestimmungsrecht ist hierbei im Sinne des liberalen Rechtsgutbegriffs zu verstehen, wobei eine Vernunfthoheit des Staates zu verwerfen ist.[84] Anders ergäbe sich eine Bevormundung durch den Staat. Als die plausiblere Lösung erscheint es, untrennbare Komponenten, wie Tatobjekt und Verfügungsfreiheit des Rechtsgutinhabers, nicht zu trennen.

2.2.Einwilligung im differenzierten Unrechtstatbestand

Im Vordergrund steht hier der materielle Teil des Unrechtstatbestandes. Die Begründung des Unrechtes wird bereits dort erfüllt, wo die Handlung objektiv tatbestandsmäßig[85] erfolgt und somit einen materiellen Unrechtsgehalt enthält. Hierbei wird der Unrechtstatbestand weit verstanden, so dass das Vorliegen einer Rechtsgutverletzung auch dann zu bejahen ist, wenn es durch sozialadäquates Handeln geschieht. Allerdings ist das weite Verständnis des Tatbestandes nicht als Einfallstor zu betrachten, sämtliche einschlägigen Handlungen als verletzend anzunehmen und somit der Rechtfertigungsebene einzuordnen. Die Tathandlung ist bei sog. formaler Betrachtung des Tatbestandes als erfüllend anzusehen.[86] Jedoch lässt sich in einer dem Rechtsgutsinhaber zukommenden Tathandlung ein „Wert" erkennen, so dass aus diesem Grund der materielle Gehalt des Tatbestandes nicht gegeben ist.

Ohne diese Differenzierung dränge sich einer formalen Einordnung ein materieller Unrechtsgehalt auf. Unbillig würde die Einordnung eines solchen erfüllten Tatbestandes auch deshalb sein, weil bei der Güterabwägung dieser materielle Unrechtsgehalt in die Abwägung mit einfließen würde.[87] Die Differenzierung beläuft sich hierbei auf eine scheinbare Verletzung des Rechtsguts und eine Erfüllung des objektiven Tatbestandes. Ausgegangen wird davon, dass keine wirkliche Rechtsgutsverletzung

83 *Roxin*, AT I, § 13 Rn. 19.
84 *Roxin*, AT I, § 13 Rn. 19.
85 *Schmidhäuser*, AT 2. Auflg. 1975, 8/123.
86 *Schmidhäuser*, AT 2. Auflg. 1975, 8/113.
87 *Schmidhäuser*, AT 2. Auflg. 1975, 8/114.

vorliegt und daher keinem Unrechtsgehalt entsprochen werden kann, weil lediglich das Tatobjekt beeinträchtigt ist.[88] Liegt es z.B. auf der Hand, dass durch das Handeln eine Sache zerstört wird, diese allerdings für die Zerstörung bestimmt wird, erscheint es unsachgemäß eine Tatbestandserfüllung anzunehmen. Der formalen Tatbestandsmäßigkeit entfällt folglich die materielle Subsumtionsmöglichkeit.[89] Hinnehmbar ist es deshalb, in solchen Konstellationen eine Rechtsgutverletzung nicht als erfüllt anzusehen. Diesem Verständnis liegt ebenfalls ein freiheitlicher Rechtsgutbegriff zugrunde, in dem der Autonomie der Person Bedeutung beigemessen wird.[90] Im Ergebnis liegt trotz der formal tatbestandsmäßigen Handlung keine Rechtsgutverletzung vor, weil keine in strafwürdiger Art und Weise unternommene Tangierung des Rechtsguts vorliegt. Dem formal erfüllten Tatbestand eine unrechtsindizierende Wirkung zukommen zulassen und eine evtl. Rechtswidrigkeitslösung vorzuschlagen, wäre sinnwidrig, weil eine Nichtverwirklichung des typischen Unrechts besteht.

Dogmatisch findet diese Stellungnahme eine Einordnung auf der Tatbestandsebene, weil ein von ihr beschriebener *Tatbestandsauschluss wegen Haftungsbegrenzung durch den Schutzzweck der Norm* unter die neu gebildete Kategorie des *Tatbestandsauschlusses wegen Fehlens einer Rechtsgutverletzung gefasst wird*.[91]

2.3.Einwilligung in der Tatbestandslösung und die Lehre der negativen Tatbestandsmerkmale

Der Straftatbestand stellt im Falle eines Erfüllens als solche, bereits den Kern eines Unrechts dar.[92] Der Lehre der negativen Tatbestandsmerkmale zufolge, schließen Rechtfertigungsgründe nicht erst die Rechtswidrigkeit, sondern bereits den Tatbestand aus.[93] Ausgegangen wird hierbei von einem zweistufigen Deliktsaufbau. Im Gesamtunrechtstatbestand werden die Merkmale zusammengefasst. Es wird die Tat festgestellt und das Nichtvorliegen von Rechtfertigungsgründen bestimmt.[94] Daraus folgt, dass Tatbestand im engeren Sinne nicht wertfrei ist.[95] Sind die negativen Tatbestandsmerkmale des Unrechtstatbestandes erfüllt, liegt somit eine

88 *Schmidhäuser*, AT 2.Auflg. 1984, 5/30.
89 *Kruse*, Rechtsgutsverletzung, S.9.
90 *Schmidhäuser*, AT 2.Auflg. 1984, 5/118ff.
91 *Sax*, JZ 1976, S.9.
92 *Schünemann*, GA 1985, S.341 (347).
93 *Roxin*, AT I, § 10, Rn.15; *Gropp*, AT, § 6, Rn. 4 ff.
94 *Jakobs*, AT, 6/57.
95 *Rönnau*, Einwilligung, S.140.

Rechtfertigung vor, der den Tatbestand entfallen lässt.[96] Die Tathandlung wird bei erfülltem Tatbestand bereits als rechtswidrig eingestuft. Schließlich lässt sich die Tathandlung als ein strafrechtlich auffälliges Handeln betrachten. Ausgehend von diesem Gesichtspunkt ist bestimmbar, dass auch hier ein der tatbestandsmäßigen Handlung anhaftender Unrechtsgehalt vorliegt. So ist die fehlende Einwilligung des Rechtsgutinhabers vielmehr als eine Bedingung zu verstehen, um eine Rechtsgutverletzung anzunehmen. Nach dem Sinn der negativen Tatbestandsmerkmale kommt dem „Willen" eine zentrale Bedeutung zu. Erst das Fehlen des Willens lässt eine Tatbestandsverwirklichung zu. Als Ergebnis ist festzuhalten, dass die Einwilligung i.S.d. Lehre der negativen Tatbestandsmerkmale eine tatbestandausschließende Wirkung annimmt.

2.4.Tatbestandslehre contra Gegenargumente

Entgegen der Tatbestandslehre wird in der Rechtfertigungslehre die dogmatische Einordnung der Einwilligung mittels Abwägungsgesichtspunkten getroffen, wodurch im Interesse des Rechtsgutinhabers ein Ausnahmeverständnis herrscht. Wie oben dargelegt, handelt es sich bei der Einwilligung um eine Freiheitsbetätigung des Dispositionsbefugten.[97] Einen Rechtsschutzverzicht kann es nicht geben, da der Rechtsgutinhaber, gerade vom strafrechtlichen Schutz ausgehend, die Freiheitsbetätigung ausüben kann. Solch ein Verzicht auf Rechtsschutz kann nicht im Interesse des Rechtsgutinhabers sein. Bei Preisgabe des geschützten Guts an Dritte die Verbotsnorm zurücktreten zu lassen, dann mittels der Abwägung innerhalb der Rechtfertigung[98] die erwünschte Rechtsfolge zu erzielen, ist ein unbegründetes Zurechtbiegen.[99] Genauer betrachtet, ist die Einwilligung innerhalb der sonstigen Rechtfertigungsgründe ein Fremdkörper. Für die Rechtfertigung ist es charakteristisch, dass ein erforderlicher Eingriff als erlaubte Ausnahme zur Wahrung des höherwertigen Interesses erfolgt ist.[100] Wenn der Täter als verlängerter Arm handelt,[101] ist aber fraglich, wo die Erforderlichkeit und wo ein höherwertiges Interesse angenommen werden soll. Ebenso ist es unpassend, die für die Rechtfertigungslehre sprechende Interessenskollision dadurch herauszuarbeiten, dass ein verobjektiviertes Interesse einem subjektiven Interes-

96 *Jakobs*, AT, 6/56.
97 *Noll*, Rechtfertigungsgründe, S.74 f.
98 *Lenckner*, Sch/Sch, vor §32 ff. Rn. 33; BGHSt 17, 360.
99 *Rönnau*, Einwilligung, S.144 f.
100 *Hirsch*, ZStW 74 (1962), S.78 (104).
101 *Hirsch*, ZStW 74 (1962), S.78 (104, Fn.101).

se des Einwilligenden gegenüber steht. Dies ist als eine künstliche Aufstellung zu bewerten.[102] Der Unterschied der natürlichen Beschaffenheit der Einwilligung springt in den genannten Beispielen ins Auge.

Bei den Rechtfertigungsgründen ergibt sich eine zwangsweise Abwägung von disponiblen Rechtssphären, da sozial unübliche Handlungen Gegenstand sind. Fraglich erscheint in diesem Moment lediglich, ob ein Erlaubnissatz auch bei Einwilligung greift. Eine zwangsweise Abwägung ergibt sich nämlich bei Einwilligung nicht.[103] Hierbei gestaltet sich zudem auch problematisch das Erforderlichkeitsmerkmal innerhalb der Rechtfertigung. Denn die Einwilligung dient der Selbstbestimmung. So ist die Einwilligung innerhalb des gesetzlich festgelegten Rahmens der §§216, 228 StGB wirksam. Es läuft letztlich darauf hinaus, dass die Rechtsnatur der Einwilligung nicht eine Interessenkollision inne hat, sondern dass ihr ein autonomer Verwirklichungswille inbegriffen ist.[104] Somit erscheint es sinnwidrig[105], das innerhalb der Rechtfertigung enthaltene Prinzip des überwiegenden Interesses[106] auf Einwilligung zu übertragen und diese Rechtsfigur letztendlich als Rechtfertigungsgrund anzusehen. Demnach ist weder das Erhaltungsinteresse noch das Eingriffsinteresse mit der Eigenart der Einwilligung in der Rechtfertigung zu vereinbaren. Außerdem ist dem Prinzip des überwiegenden Interesses nach ein im Tatbestand geschützter Wert im Einzelfall einem höher bewerteten gegenüber zu stellen.[107] In einer Sachbeschädigung wird dann zu untersuchen sein, ob der Erhalt des Gegenstandes oder der gegenüberstehende Wert als notwendiges Gut verstanden wird. Nach Berücksichtigung unterschiedlicher Argumente ist an dieser Stelle festzuhalten, dass es sich bei der Einwilligung um die Freiheit[108] handelt und dies in der systematischen Einordnung so zu berücksichtigen ist.

Die Einwilligung ist hierbei als ein Tatbestandsausschlussgrund einzuordnen.

102 *Rönnau*, Einwilligung, S.147.
103 *Kientzy*, Straftatbestand, S.79 f.
104 *Kientzy*, Straftatbestand, S.80 f.
105 *Rönnau*, Einwilligung, S.149.
106 *Mitsch*, Baumann/Weber/Mitsch, AT, §16 Rn.52.
107 *Mezger*, Strafrecht, S.206.
108 *Ortmann*, GA 1877, S.104 (107).

3.Modifikation der Einheits- und Zweiteilungslehre

Außerhalb der Tatbestandslehre findet sich in modifizierter Form in der von Jakobs vertretenen Auffassung, dass die Einwilligung sowohl tatbestandsausschließend als auch rechtfertigend wirken kann.[109]

Ob nach einer Disposition eine Rechtsgutverletzung vorliegt oder nicht, ist mittels des Willens zu ermitteln. Eine Rechtsgutverletzung liegt hier noch nicht vor, wenn die zur Entfaltung der Persönlichkeit zur Verfügung stehenden tauschbaren[110] Güter auch ohne ein Äquivalent hingegeben werden. Eine negative Bewertung der Tathandlung schließt sich durch den Willen aus, so dass die Definition des Tatergebnisses als tatbestandlicher Erfolg[111] lediglich vom Willen des Berechtigten abhängt.[112] Die Einwilligung schließt den Tatbestand in den Fällen aus, in welchen das Tatobjekt als Entfaltungsmöglichkeit dient und nicht als Boden der Entfaltung selbst. Die einwilligungskongruente Tathandlung wird wie in der Tatbestandslehre als sozialverträglich bewertet[113], so dass keine Rechtfertigung des Konfliktverhaltens notwendig erscheint. Eine rechtfertigende Einwilligung liegt zumindest dann vor, wenn der Tatbestand eine sog. „naturalistische Bestimmung hat", es also auf das konkrete Tatobjekt als Schutzgut ankommt.[114] Ferner ist die rechtfertigende Einwilligung dort anzunehmen, wo das preisgegebene Rechtsgut in dem hier benannten Sinn kein Tauschmittel ist und nicht als Entfaltungsmittel genutzt werden durfte.[115] Ist ein besonders wertvolles Rechtsgut tangiert, wie ein schwerer operativer Eingriff in Form einer Nierenexplantation, so ist diese Rechtsgutpreisgabe innerhalb des betroffenen Kontextes zu bewerten. Die Einwilligung als Rechtfertigungsgrund anzunehmen, fällt dieser Lehre nach den Fällen zu, in denen eine Disposition über eigene Rechtsgüter nicht der Person selber überlassen werden kann, da ein gewisses Interesse der Allgemeinheit impliziert wird. Daher ist der Tatbestand in solchen Fällen zwar als erfüllt, jedoch als gerechtfertigt anzusehen.[116] Wichtig erscheint hier, dass die Bewertung der Tathandlung im Kontext erfolgt. Die Rechtsgutverletzung ist als Missachtung der Handlungsmaximen zu beurteilen, welche den allgemeinen Bestand der Schutzgüter beabsichti-

109 *Jakobs*, AT, 7/111.
110 *Lesch*, NJW 1989, S.2309 (2312).
111 *Jakobs*, AT, 7/112.
112 *Lesch*, NJW 1989, S.2309 (2312).
113 *Lesch*, NJW 1989, S.2309 (2312).
114 *Jakobs*, AT, 7/112.
115 *Jakobs*, AT, 7/112.
116 *Jakobs*, AT, 14/5.

gen.[117] Eine rechtfertigende Wirkung in eine negative Tatbestandsberührung verlangt de lege lata ein höherwertigeres Äquivalent als die Einwilligung. Sinnvoll erscheint hierbei, dass zur Einwilligung eine Güterabwägung hinzutritt.[118] Sofern keine überragenden Dispositionen zur Frage stehen, ist dieser Lehre nach der Einwilligung grundsätzlich tatbestandsauschließende Wirkung beizumessen, wobei festzustellen ist, dass sich eine Differenzierung zwischen tatbestandsausschließender sowie rechtfertigender Einwilligung als treffend erweist, da die Ansätze der Einheitslehre und der Zweiteilungslehre miteinander verbunden werden.[119]

Auffällig und kritikwürdig erscheint der Lehre von *Jakobs* nach, dass die Fälle, in denen eine rechtfertigende Einwilligung angenommen wird, die Sphäre erreicht, wo die Dispositionsbefugnis bereits ihre Grenzen findet. In eine Nierenexplantation kann bereits wegen § 228 StGB nicht eingewilligt werden. Es stehen also lediglich die Fälle der Heileingriffe zur Diskussion. Bei Heileingriffen den Tatbestand als erfüllt anzusehen, ist allerdings deshalb sinnwidrig,[120] weil es sich letztlich nicht um eine Gutsdisposition handelt, sondern um einen nützlichen Heileingriff, in dessen Folge das Rechtsgut der körperlichen Unversehrtheit und des Wohlbefindens verbessert werden soll. Der Ärztliche Heileingriff soll an dieser Stelle allerdings nicht weiter interessieren.

III.Der Rechtsgutbegriff und die Bedeutung für die systematische Einordnung der Einwilligung

Der umstrittene Rechtsgutbegriff nimmt, wenn es um die Frage der systematischen Einordnung der Einwilligung geht, eine entscheidende Rolle ein; denn ohne den Rückgriff auf den Rechtsgutgedanken, kann keine Prüfung einer Tangierung unternommen werden.[121]

Theoretischen Erwägungen zufolge ist jeweils nach dem dualistischen und dem monistischen Verständnis der Rechtsgutbegriff unterschiedlichen Implikationen zu unterziehen, wie der gesellschaftlichen Bindung des Objekts und der individuellen Freiheitsmöglichkeit.[122] Zweck der Strafnormen ist, Rechtsgüter zu schützen. Die Einwilligung dahingegen beinhaltet die Rechtsfigur, dieses Rechtsgut preiszugeben. Was genau

117 *Jakobs*, AT, 14/4.
118 *Arzt*, Willensmängel, S.39 f.
119 *Göbel*, Die Einwilligung im Strafrecht, S.70.
120 *Roxin* AT I, § 13 Rn. 26.
121 *Schmidhäuser*, AT 2. Auflg. 1975, 8/28.
122 *Rönnau*, Einwilligung, S.30 ff.

preisgegeben wird und wie dadurch die systematische Einordnung der Einwilligung betroffen wird, hängt somit von der Art des Rechtsguts ab. Denn geschieht eine Verobjektivierung des Rechtsguts, so dass quasi ein naturalistisches Schutzgut vorliegt, wird im Falle einer Tangierung des Rechtsguts der Tatbestand zu bejahen sein. Widersprechend beläuft es sich bei einem versubjektivierten Verständnis, wo die Tatbestandsmäßigkeit entfällt. Ist der Wille des Sacheigentümers in der Sache als inbegriffen verstanden, so wird eine Zerstörung der Sache nicht den Tatbestand erfüllen.

Die Diskussion zum Rechtsgutbegriff bietet eine Weichenstellung, die Aufschluss darüber geben soll,[123] ob die strafrechtlich geschützten Güter lediglich einen puren Bestandsschutz genießen oder das Strafrecht im Sinne eines liberalen Verständnisses ebenfalls den im Rechtsgut verstandenen Willen schützen will. Letzteres spricht für eine systematische Einordnung der Einwilligung als Tatbestandsausschließungsgrund. Ob das Rechtsgut seiner Funktion oder seinem Bestand nach geschützt wird, ist wie man – sieht – von fundamentaler Bedeutung für die Einordnung der Einwilligung.

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Im Streit um den Begriff des Rechtsguts gibt es eine unübersehbare Fülle von Definitionen,[124] was angesichts der unterschiedlichen Auffassungen bzgl. der Funktion des Rechtsguts nicht verwunderlich erscheint.[125]

1.Rechtsgutbegriff i.S.d. Rechtfertigungslehre

Die Einwilligung als Rechtfertigungsgrund einzustufen, rührt daher, dass das Rechtsgut als verletzt und somit der Tatbestand als erfüllt angesehen wird.[126]

Die Anhänger der zweiteilenden Lehre sind sich im Ergebnis einig, dass der Wille des Rechtsgutträgers hierbei außen vor zu lassen ist. An dem Bestand eines Gegenstandes sei nämlich auch die Allgemeinheit beispielsweise wegen eines vorhandenen historischen Wertes interessiert.

Der theoretische Ansatz findet an dieser Stelle somit auch durch den Staat ein Anrecht auf die Bestimmung des Rechtsguts seitens der gesellschaftlichen Ordnung.[127]

123 *Rönnau*, Einwilligung, S.31.
124 *Koriath*, GA 1999, S.561 (565).
125 *Suhr*, JA 1990, S.303 (306).
126 *Stratenwerth*, ZStW 68 (1956), S.41 (42 f.).

Somit vollzieht sich eine Einschränkung der Dispositionsfreiheit, weil gesamtgesellschaftliche Interessen[128] nicht tangiert werden dürfen.[129]

Ausdruck erhält dieser Aspekt im etatistischen Rechtsgutsverständnis, wonach das Interesse des Einzelnen im Rahmen von Diensten zu verstehen ist, welche den Interessen der Gesamtheit quantitè nègligeable erscheinen.[130] Gewichtig erscheint hier das vom Individuum hinzunehmende Sozialinteresse. Wenn allerdings das Strafrecht diesen dient, dann müssen auch deren spezifische Ausformungen – die Rechtsgüter – als Sozialinteressen gelten.[131] Persönliche Entfaltungsmöglichkeiten werden hier durch Sozialbindung verkürzt.

Den Verfechtern des dualistischen Rechtsgutverständnisses sagt es nicht zu, zur Wahrung von objektiven Werten den Willen heranzuziehen, sondern sie plädieren vielmehr dafür, das positivrechtliche Verständnis in § 34 StGB herauszuarbeiten.[132] Im Rahmen des Selbstbestimmungsrechts ist es dieser Ansicht nach nicht plausibel, die in § 34 StGB genannten Rechtsgüter mittels aus dem Verfassungsrecht direkt hergeleiteter Freiheitsrechte preiszugeben.[133] Im Sinne des strafrechtlichen Schutzes gilt es vielmehr, den Bestand der hier genannten Rechtsgüter zu garantieren. Auch infolge der Einwilligung sei eine Amputation eines Beines nicht mehr unter der körperlichen Unversehrtheit zu subsumieren.[134] Dem Straftatbestand wird schließlich ein edukativer Effekt impliziert, der in § 223 StGB die Unversehrtheit des Körpers allein als ein schützenswertes Gut ansieht, wonach die verfassungsrechtlich garantierten Rechtsgüter als geschützt verstanden werden sollen.[135] Eine Einwilligung des Rechtsgutinhabers kollidiert mit dem Wert des Gemeinschaftsinteresses und des geschützten Tatobjekts.[136] Diese Kollision entsteht durch das Verschmelzen[137] des Rechtsguts mit dem Tatobjekt, weshalb eine Abwägung auf der Rechtfertigungsebene plausibel erscheint.[138]

127 *Amelung*, Einwilligung, S.21 f.
128 *Amelung*, Einwilligung, S.22 f.
129 *Hegler*, ZStW 36 (1915), S.19 (22 f.)
130 *Honig*, Einwilligung, S.115.
131 *Weigend*, ZStW 98 (1986), S.44,(54).
132 *Hirsch*, LK, vor § 32 Rn. 98.
133 *Hirsch*, LK, vor § 32 Rn. 98.
134 *Mitsch*, Baumann/Weber/Mitsch, AT, §17 Rn.96.
135 *Geppert*, ZStW 83 (1971), S.947 (968).
136 *Rönnau*, Jura 2002, S.595 (596).
137 *Rönnau*, Einwilligung, S.36.
138 *Geppert*, ZStW 83 (1971), S.947 (967).

Somit ist im Ergebnis festzuhalten, dass der der Einheitslehre entsprechende Rechtsgutbegriff eine formale und objektive Erscheinung darstellt, in ihm der Wille nicht als schützenswert integriert, dieser vielmehr als ein Gegenwert verstanden wird, der i.S. einer Kollision mittels der Abwägungstheorie durch einen Vergleich der sozialen Gewichtigkeit der Verfügungsmöglichkeiten und des allgemeinen Interesses einen Ausgleich findet.[139] Dieser Begründung des Rechtsgutbegriffes nach ist die systematische Einordnung der Einwilligung auf der Rechtswidrigkeitsebene vorzunehmen.

2.Rechtsgutbegriff i.S.d. Tatbestandslehre

Entgegen der Rechtsgutlehre bildet die individuelle Selbstbestimmung den Mittelpunkt im Rahmen des Rechtsgutbegriffsverständnisses der Tatbestandslehre.[140] Der Zweck des Rechts ist der Mensch; ihm zu dienen, ist Aufgabe des Rechts.[141] In der Betonung des Zwecks werden hierbei Stellung und Schutz des Individuums dargestellt, wodurch sich der Wille im Bezug auf die systematische Einordnung auswirkt. Das Verständnis unter Rechtsgüterschutz ist folglich nicht differenzierend vom Gut und dem Gutsinhaber zu bewerten, sondern die Bezogenheit beider ist zu unterstreichen.[142] Ein Rechtsgut erwirbt vielmehr die Sphäre der Unantastbarkeit durch Dritte, wenn es mittels einer Zugehörigkeit zum Persönlichkeitsbereich des Berechtigten eintritt.[143] Die Dispositionsfreiheit des Berechtigten hat daher einen gewichtigen Anteil innerhalb des Rechtsgutbegriffes. Darunter ist zu verstehen, dass der Sacheigentümer nicht nur die Unversehrtheit seiner Sache als geschützt versteht, sondern auch den freien und uneingeschränkten Umgang damit. Jedoch wird der objektive Gegenstand des Rechtsguts nicht völlig dem Willen nachgestellt. Es findet dabei eine besondere Zuordnung statt. Deshalb sind der Verfügungsgegenstand und die Verfügungsbefugnis als aufeinander bezogen zu behandeln und im Tatbestand als ein solches Rechtsgutverständnis zu bewerten.[144] Wird diese Beziehung dergestalt gestört, dass eine dem Willen entsprechende Disposition des Rechtsgutes nicht erfolgen kann, ist der Tatbestand als erfüllt anzusehen. Somit liegt in einer Beeinträchtigung dieser Beziehung eine Rechtsgutverletzung. Hier wird

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139 *Jakobs*, AT, 14/3.
140 *Stratenwerth*, ZStW 68 (1956), S.41 (42 f.).
141 *Marx*, Rechtsgut, S.40.
142 *Marx*, Rechtsgut, S.64.
143 *Stratenwerth*, ZStW 68 (1956), S.41 (44).
144 *Rudolphi*, ZStW 86 (1974), S.68 (87).

die Beziehung zwischen dem Gutsinhaber und der Gesellschaft als ineinanderfließend oder quasi als Partizipation betrachtet. Individualrechtsgütern kommt dadurch eine sog. doppelte Wertbeziehung zu, in welcher sie sowohl für die Gesellschaft als auch für den Einzelnen von erheblicher Bedeutung sind und eine Einbindung der jeweiligen Interessen in den Rechtsgutbegriff geschieht.[145] Diese doppelte Wertbeziehung ist ausführend so zu verstehen, dass wohl ein Interesse der Allgemeinheit vorhanden ist, welches im Einzelfall auch gegenüber dem Individualinteresse Vorrang finden kann. So kann ein Erhalt des Rechtsgutgegenstandes im Interesse der Allgemeinheit sein, wenn die Einwilligung die Tatbestandsverwirklichung i.S.d. Einheitslösung nicht ausschließt. Eine Einwilligung in eine Sachbeschädigung kann dann den Tatbestand nicht ausschließen. Solche Fälle können nämlich dort geschehen, wo der Gesetzgeber konkret eine positive Bewertung festgelegt hat,[146] so dass mittels eines generellen Normschutzes der vom Willen des Rechtsgutinhabers getrennte objektive Tatbestandsinhalt zum eigenständigen Rechtsgut qualifiziert wird. Dies könnte etwa bei Gebäuden vorliegen, die unter Denkmalschutz stehen. Dieses Verständnis ermöglicht schließlich, Interessen nicht als unantastbar zu definieren. Demzufolge sind der Partizipation von schutzwerten Gütern keine statischen, sondern dynamische Zustände und Funktionen zuzubilligen.[147] Ferner ist festzustellen, dass die personenbezogene Gestaltung des Rechtsgutes innerhalb der Einheitslehre nicht zu sehr ausgeweitet werden darf, so dass eine verhaltensbezogene Autonomie festgelegt wird, sondern eine objektbezogene Autonomie Geltung findet, wodurch das besondere Verhältnis des Rechtsgutinhabers und des Rechtsgutgegenstandes unterstrichen wird.[148] So ist die Willensfreiheit im Umgang mit dem Gegenstand innerhalb des dem Berechtigten gesetzten Dispositionsrahmens frei, wobei ein Verzicht i.S. einer Einwilligung derartig Akzeptanz zu finden hat, dass die Selbstbestimmung - mit ihrem entsprechenden Anteil im Rechtsgut - den Tatbestand ausschließen kann.

3.Die Einordnung der Einwilligung mittels des Basismodells

Die Auswirkung des Rechtsgutverständnisses wirkt sich innerhalb der Einwilligungslehre unmittelbar im Bezug der systematischen Einordnung

145 *Amelung*, ZStW 84 (1972), S.1015 (1024).
146 *Rönnau*, Einwilligung, S.51.
147 *Tiedemann*, Tatbestandsfunktion, S.116.
148 *Rönnau*, Einwilligung, S.51.

innerhalb der Verbrechenslehre aus. Faktisch kommt es letztlich nur noch darauf an, ob das mittels Einwilligung disponierte Rechtsgut den Tatbestand erfüllt oder nicht. Genauer betrachtet hängt es vom Bestandsschutz des Gegenstandes ab. Die seitens Rönnau als Kollisions- und Integrationsmodell vorgestellten Rechtsgutverständnisse werden ihrerseits kritisiert und durch ein eigenes „Basismodell" ersetzt. Innerhalb dieses Verständnisses werden Individualrechtsgüter geschützt, weil sie dem konkreten Gutsinhaber als Basis für seine personale Entfaltung dienen.[149] Dem Merkmal nach stellt das Basismodell einen Mittelweg dar und versucht sowohl den Rechtsgutgegenstand als auch die Willensfreiheit zu schützen.[150] Der Wert des Gegenstandes[151] innerhalb des Rechtsgutes liegt hierbei in der faktischen Möglichkeit eine Disposition zu treffen und so das Handlungspotential der selbstbestimmten Entfaltung dienlich zu machen.[152] Solche konstruierten Handlungsmöglichkeiten mit entsprechendem Rechtscharakter sind bereits in den vorgestellten Rechtsgutverständnissen enthalten.[153] Man könnte das Basismodell als eine Modifikation des Rechtsgutbegriffes der Zweiteilungslehre verstehen. Die Interessen des Gutsinhabers kollidieren derart, dass das Sacheigentum dem Gutsinhaber zum Zwecke der Handlungsmöglichkeit zur Verfügung steht. So kollidieren nicht Interessen auf der Ebene der Rechtswidrigkeit. Vielmehr stehen sich auf der Tatbestandsebene das materielle Freiheits- und das formale Erhaltungsinteresse des Gegenstands zum Zwecke der Handlungsmöglichkeit gegenüber.[154] Das Basismodell verhindert, dass weder eine Naturalisierung des Rechtsgutes, welches lediglich den Bestandsschutz verfechte, noch eine Sozialisierung stattfindet. Folglich werden Interessen der Gesellschaft gegenüber der persönlichen Freiheit nicht bevorzugt.[155] Der Gegenstand wird hier als Mittel zum Zweck i.S.d. individuellen Freiheit verstanden. Geschützt wird hierbei faktisch unmittelbar die Basis und nicht die Dispositionsfreiheit. Der Wille wird folglich nicht zum konstitutiven Bestandteil, sondern ein ergänzender Faktor zum funktionsfähigen Rechtsgutverständnis innerhalb der Einwilligungslehre.[156] Eine Rechtsgutverletzung ist hier dann gegeben, wenn eine Beeinträchti-

149 *Roxin*, AT I, § 13 Rn. 17.
150 *Rönnau*, Einwilligung, S.85.
151 *Rönnau*, Jura 2002, S.595 (598).
152 *Rönnau*, Einwilligung, S.85.
153 Rönnau, Einwilligung, S.86 f.
154 *Rönnau*, Einwilligung, S.92.
155 *Rönnau*, Einwilligung, S.94.
156 *Rönnau*, Jura 2002, S.595 (598).

gung des Rechtsgutgegenstandes vorliegt, zusätzlich allerdings auch die Entfaltungsmöglichkeit tangiert ist.[157] Infolge einer Disposition des Rechtsgutes ist hier kein tatbestandliches Unrecht anzunehmen, weil der Wille nicht beeinträchtigt wird. Die Einwilligung ist hiernach – mit Recht – also als Tatbestandsausschlussgrund und nicht als Rechtfertigungsgrund einzustufen.[158]

IV.Tatbestandsfunktion und die systematische Einordnung der Einwilligung

Aufgabe des Tatbestandes ist es, den Rechtsfriedenschutz[159] beizubehalten und die Grundlage des Verbrechens festzulegen.[160] Wird der Bestands- und Funktionsschutz hochwertiger Rechtsgüter nicht eingehalten, hat es eine Pönalisierung zur Folge, sofern keine Rechtfertigungsgründe eingreifen.[161] Dem Rechtsgutbegriff kommt folglich eine erhebliche Bedeutung zu. Ist das Rechtsgut verletzt, gilt der Tatbestand der dreistufigen Verbrechenslehre als „nacherfüllt". Ohne einen Rückgriff auf das Rechtsgut und die Eigenschaften kann ein Unwertsachverhalt als negatives Gegenstück des gebotenen Handelns nicht vorliegen.[162] Das „Nichtzerstören fremder Sachen" kann nicht handfest sein, wenn nicht feststeht, was unter fremden Sachen zu verstehen ist.

In den Straftatbeständen sind missbilligte Verhalten festgelegt, welche i.e.S. die Auslesefunktion[163] des Tatbestandes darstellen.[164] Hat der Täter eine kriminelle Absicht, so hält er sich nicht an die gebotenen Verhaltensnormen. Danach ist der Tatbestand erst dann erfüllt, wenn ein Verhaltensunrecht vorhanden ist.[165] Dieser systematische Kurzschluss ergibt sich deshalb, weil der Unrechtstatbestand alle Merkmale der Strafbestimmung, die Unrecht begründen, erhöhen oder vermindern, beinhaltet.[166] Im Rahmen der Strafrechtssystematik kommt es an dieser Stelle darauf an, ein tatbestandsmäßiges Verhalten anzunehmen oder abzulehnen. Liegt ein tatbestandsmäßiges Verhalten vor, so haftet dem Verhalten

157 *Rönnau*, Einwilligung, S.95.
158 *Rönnau*, Jura 2002, S.595 (598).
159 *Maurach/Zipf*, AT I, §19 Rn. 4.
160 *Maurach/Zipf*, AT I, §19 Rn. 38.
161 *Maurach/Zipf*, AT I, §19 Rn. 23, 29.
162 *Schmidhäuser*, AT 2. Auflg. 1975, 8/28.
163 *Wessels/Beulke*, AT, Rn.120.
164 *Freund*, AT, §1 Rn.32.
165 *Freund*, AT, §4 Rn 3.
166 *Wessels/Beulke*, AT, Rn.120.

bereits ein Unrecht an,[167] was jedoch noch kein endgültiges Urteil darstellt. Ersteres ist vielmehr ein Indiz für eine strafbare Handlung, die möglicherweise i.S. des Erlaubnissatzes gerechtfertigt sein kann.[168] Hier ist der Zweiteilungslehre nach der Sinn der Tatbestandserfüllung trotz Einwilligung darin zu erkennen, dass dadurch ein Indiz vorliegt. Praktisch erweist sich hier, dass außerhalb der Dispositionsbefugnis liegende Einwilligungen bereits erfasst werden. Willigt jemand in die Sachbeschädigung fremden Eigentums ein, ist der Tatbestand erfüllt und es greift kein Erlaubnissatz. Die Irrtumsregeln würden dann einschlägig sein. Die Einheitslehre hingegen missbilligt die unrechtsindizierende Wirkung der Tatbestandserfüllung. Die Tathandlung wird als eine quasi mittelbare Handlung durch einen Dritten angesehen, wonach sich ein Unrechtsindiz i.S.e. Tatbestandserfüllung als unzweckmäßig ergeben würde. Dem vorgestellten Basismodell nach ist das materielle Unrecht im Tatbestand als Beeinträchtigung personaler Handlungschancen zu verstehen.[169] Die Normwidrigkeit – das Unrecht – liegt diesem Rechtsgutmodell nach darin, dass die aus den Gütern des Rechtsgutinhabers erwachsenden Handlungsmöglichkeiten teilweise oder ganz einer Einschränkung der Entfaltungsmöglichkeiten unterliegen, so dass der Sacheigentümer sich durch seine Sachen nicht entfalten kann.[170] Mittels einer Einwilligung geschieht jedoch gerade eine Entfaltung, welche aus den Gütern sich ermöglicht, so dass sich ein Unrechtsindiz nicht ergibt.[171] Notwendig ist es, in der Einwilligungslehre den Zweck der Einwilligung nicht außen vor zu lassen, so dass der Natur entsprechende Lösungsansätze konstruiert werden können. Das einer Einwilligung entsprechende Täterverhalten ist keineswegs dahingehend sozial auffällig, dass eine Adäquanz ausgeschlossen wird und ein strafrechtliches Interesse vorhanden ist. Es fehlt in solchen Fällen sowohl an einem Handlungs- als auch an einem Erfolgsunwert.[172] Zumindest ist der im Interesse des Rechtsgutinhabers handelnde Täter nicht darauf fixiert, rechtlich missbilligten Unwert herbeizuführen,[173] sondern eine normale Handlung durchzuführen.[174] Folglich ist die seitens des Rechtgutträgers mittels Einschaltung einer anderen Person ausgeübte

[167] *Welzel*, ZStW 58 (1939), S.491 (513 Fn.30).
[168] *Wessels/Beulke*, AT, Rn.122.
[169] *Rönnau*, Einwilligung, S.124.
[170] *Rönnau*, Einwilligung, S.124.
[171] *Rönnau*, Einwilligung, S.124 f.
[172] *Rönnau*, Einwilligung, S.125.
[173] *Kindhäuser*, AT, §12 Rn. 4.
[174] *Schmidhäuser*, AT 2. Auflg. 1975, 8/9.

Dispositionsfreiheit nicht als materielles Unrecht zu werten, so dass in der Konsequenz ein Tatbestandsausschluss anzunehmen ist.[175] Gegenteilig müsste man daran festhalten, dass der im Tatbestand als geschütztes Rechtsgut verstandene Gegenstand als solcher Schutz genießen würde, unabhängig von der Stellung des Individuums[176] und dessen Einflussmöglichkeiten.[177] Als sehr ausschlaggebend wirkt sich schließlich aus, dass strafrechtlich möglicherweise interessante Tathandlungen bereits durch den Rahmen der Einwilligungsdispositionsberechtigungen festgelegt werden, so dass im Rahmen der Strafrechtssystematik und der Diskussion der Einwilligungslehre darauf ein Schwerpunkt gelegt werden kann, eine Lösung zu finden, die den der Rechtsfigur innewohnenden konkreten Eigenschaften entspricht. Demnach ist die Einwilligung als Willensfreiheit zu behandeln. Eine Einordnung als Rechtfertigungsgrund läuft dem zuwider, dass zunächst die Voraussetzung einer Erforderlichkeit sich nicht unbedenklich zurechtbiegen lässt. Eine Parallele zu den sonstigen Rechtfertigungsgründen ist der Willensausübung ebenfalls nicht zu entnehmen. Letztlich kann man der Einwilligung als Dispositionsmöglichkeit eigener Güter keine Kollision mit Interessen oder Gütern implizieren, wodurch erst eine der Rechtswidrigkeit aushelfende Abwägung stattfinden kann.

IV.Zusammenfassung

Nach der kritischen Vorgestellung der Lehren hinsichtlich der systematischen Einordnung der Einwilligung, ist im Ergebnis folgendes festzuhalten: Der Standpunkt der Zweiteilungslehre ist in vieler Hinsicht kritikwürdig. Eine Lösung als Rechtfertigungsgrund stellt sich der herkömmlichen Lehre nach deshalb problematisch dar, weil die Einwilligung zunächst nicht ihrer Natur und Beschaffenheit entsprechend behandelt wird. Eine der Rechtswidrigkeit typische Abwägung auch bei der Einwilligung heranzuziehen, erscheint mehr als fragwürdig, weil sich zunächst keine Wertekollision ergibt. Es handelt sich bei der in die Zerstörung des Rechtsgutsgegenstandes Einwilligenden und de Rechtsgutsträger um dieselbe Person. Eine Wertekollision erscheint deshalb unsachgemäß, weil es sich bei den Werten nicht um eine Kollision, sondern um eine Gestaltung dieser handelt, wozu sich der Gutsinhaber entschieden hat. Zu bemängeln an dem Standpunkt der herkömmlichen Lehre ist, dass die

175 *Gropengießer*, JR 1998, S.89 (92).
176 *Weigend*, ZStW 98 (1986), S.44,(54).
177 *Rönnau*, Einwilligung, S.126.

Einwilligung eine nicht ihrer wirklichen Eigenschaft entsprechende Einordnung findet. Denn es ist dieser Auffassung entgegenzuhalten, dass i.S. des Einverständnisses, der Wille als strafrechtlich geschütztes Freiheitsgut auf der Tatbestandsebene berücksichtigt werden kann. Es werden Konstellationen herangezogen, zu welchen es nicht bedarf.

Die vermittelnde Ansicht von *Jakobs* ist aus dem Grund abzulehnen, weil die rechtfertigende Einwilligung lediglich den Fällen zukommt, in denen eine Dispositionsbefugnis bereits ihre Grenzen erfährt. In den Fällen der ärztlichen Eingriffe handelt es sich nicht wirklich um eine Disposition. Daher erweist es sich nicht wirklich als notwendig, eine neben der tatbestandsausschließenden Einwilligung nur besonderen Härtefällen zugeschnittene separate Einwilligung zu konstruieren.

Aus dem Rechtsgutsverständnis sich ergebenden Problemen wird mittels des Basismodells seitens *Rönnau* eine tragbare und der Natur der Einwilligung entsprechende Lösung entwickelt. Sowohl die Selbstbestimmung als auch der tatbestandlich geschützte sachliche Gehalt werden dahingehend differenziert, dass jeder Komponente ein notwendiger und genügender Anteil an Schutz und Disposition zugebilligt werden. Eine Einordnung der Einwilligung auf Tatbestandebene trotz des Bestandsschutzes, welches der Rechtfertigungslösung ähnlich kommt, wird aus dem gesunden und lebensnahen Verständnis des Rechtsgutsbegriffes hergeleitet.

Zu vergegenwärtigen ist letztlich, dass es sich bei der Einwilligung um eine Willensfreiheit handelt. Diese gewohnheitsrechtlich anerkannte Rechtsfigur wirkt sich strafausschließend aus, was unstreitig ist. Zweckmäßig ist es, diese Rechtsfigur ganz im Sinne ihrer Eigenschaft nach zu behandeln und im Ergebnis dem Basismodell beizupflichten, das die Freiheit über Rechtsgüter zu disponieren, zurecht dem Rechtsgutsbegriff zuweist. Ergebnis: Die Einwilligung ist innerhalb des Strafrechtssystems als ein Tatbestandsausschlussgrund einzuordnen.

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