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JUDICIAL SYSTEM IN MONTENEGRO (HISTORICAL DEVELOPMENT, BASIC PRINCIPLES, AND ORGANISATION)

KARADAĞ ADLİ SİSTEMİ

(Tarihsel Gelişimi, Temel İlkeler ve Organizasyon)

Prof. Dr. Mladen Vukčević[1] Miloš - Bošković LLM[2]

ABSTRACT

The content of the paper is divided in two parts. The first part tackles historical development of judiciary in Montenegro whereas the second part discusses the constitutional principles underlying the Montenegrin judiciary as well as its organisation and jurisdictions. The aim of the paper is to demonstrate in a synthesized way pivotal milestones of development of Montenegrin judiciary and traditional legal culture which is inter alia an inspiration for contemporary architecture of the court organisation in Montenegro. Understanding the basic features of Montenegrin judiciary requires presentation of historical context of its development. Recently, judiciary has gone through substantial reforms as a result of harmonisation with the EU standards. Amendments of the Constitution and of the relevant legislation aimed at redefining the network of court organisation as well as at improvement of specific institutions such as the Judicial Council. Further strengthening of independence and autonomy of judicial branch of power is the key subtexts of the on-going reforms.

Keywords: Montenegro, judiciary, courts, historical development, organisation, principle of independence, Constitution, judicial reforms, appointment, promotion, professional evaluation, EU membership, Judicial Council,

ÖZET

Bu tebliğin içeriği iki bölüme ayrılır. Birinci bölüm, Karadağ'da yargının tarihsel gelişimini ele alırken, ikinci bölüm Karadağ yargısının yanı sıra organizasyonunun ve yetki sınırının temelindeki anayasal ilkeleri tartışır. Çalışmanın amacı, diğer hususların yanısıra Karadağ yargısı ve Karadağ'daki mahkeme organizasyonundaki çağdaş mimarinin ilham kaynağı da olan geleneksel hukuk kültüründeki gelişmenin önemli kilometer taşlarını sentezlenmiş bir şekilde ortaya koymaktır. Karadağ yargısının temel özelliklerini anlamak, gelişimindeki tarihsel kaynağın tanıtımını gerektirmektedir .Son zamanlarda, yargı, AB standartlarına uyum sonucunda önemli reformlar geçirmiştir. Anayasa ve ilgili mevzuattaki değişiklikler, Mahkeme kuruluş ağını yeniden tanımlamanın yanı sıra Yargı Konseyi gibi belirli kurumların iyileştirilmesini amaçlamıştır. Bağımsızlığın daha da güçlendirilmesi ve gücün yargı alanındaki özerkliği, devam eden reformların anahtar alt metinleridir.

Anahtar Kelimeler: Karadağ, yargı, mahkemeler, tarihsel gelişim, organizasyon, bağımsızlık ilkesi, Anayasaya, yargı reformları, atama, terfi, mesleki değerlendirme, AB üyeliği, Yargı Konseyi

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INTRODUCTION

The legal system in Montenegro is associated with the continental European legal tradition and has roots in Roman law. The contemporary justice system has evolved over a thousand years of history of state consolidation, going through different epochs. The territory of present Montenegrin state was characterized by legal particularism as over the centuries it didn't included areas which includes today. Early written legal documents as well as rudimentary forms of judicial authority were strongly influenced by the norms of Roman law embodied through the legal culture of Byzantine Empire and Venetian Republic. Following the arrival of the Ottomans in the Balkans, the unwritten or customary law takes the primacy and the justice is organized under the patronage of the Montenegrin rulers.

After achieving *de iure* independence at the Congress of Berlin of 1878, the need for comprehensive legal regulation of social life in Montenegro arose. At the time, the *General Property Code for the Principality of Montenegro* was developed and is, according to many, the best legal writing on the Balkans. The Code codified customary law and functionally embodied contemporary principles of civil law, at the same time incorporating national legal tradition. Such a code provided an incentive for progressive development of judicial institutions modelled after modern European legal systems. However, stability of the institutions as well as of the legal system in general relied to the great extent on rulers' discretion.

Following the WWI, Montenegro loses its independence and engages into various forms of state associations of south Slavic nations (with different forms of economic systems) up till 2006, when Montenegro regained its independence. Today, Montenegrin judiciary undergoes comprehensive reforms inspired by aspiration for full-fledged membership in the European Union (EU) through meeting relevant standards. Given this, both the Constitution and the legislation related to organisation and hierarchy of court as well as substantial and procedural legislation were significantly amended.

1. HISTORICAL DEVELOPMENT OF THE JUDICIARY IN MONTENEGRO (One of the most important references for the research of the history of Montenegrin judiciary is a monograph of Cedomir Bogicevic, *History of Montenegrin Judiciary*, Podgorica, 2009. This paper goes along the results of Bogicevic`s study).

Evolvement of justice at the territory of Montenegro was carried out within different societal set ups which have had either stateless or features of the state. Several statehood forms existed on the territory of Montenegro starting from the Illyrian state. Slavic tribes that inhabited concerned

territories were receiving influences from the Byzantine Empire as well as from the coastal Roman cities for a long time. Christianization of Slavs took place mainly during the IX century, and firmly continued during the X century. The Christian church boosted this process by spreading itself among the Slavic tribes around parishes of *Doclea*. In general, one can say that Montenegro has built its foundations on the legacy of Greco-Roman culture.

At the time, there is an interweaving of religious, moral and legal norms. This can be particularly seen in the *Chronicle of Priest Dukljanin*, the most important historical and legal source for the research of the period concerned. In time of the first state – *Doclea*[1], the written legal heritage of Byzantine was incorporated into the customary law of the newcomer nations. This customary law was preserved in accordance with the continuously changing historical circumstances till the appearance of first written legal acts in XIX century.

Following the battle of *Tudjemil* (1042), a place close to the coastal town Bar, and reception of royal insignias from the Pope (1077), the *Doclea* gained independence from Byzantine. Judicial and administrative power was conferred to *Ban*[2] and *Zupan*, but their attribution were functionally separated thus making *Ban*`s courts and *Zupan*`s courts two types of courts. The justice was delivered in accordance with the customary law which was codified in the code called *Methodes* (*Rationale*). In addition to regulation of the relations between the rulers and the people as well as of defence, this code included provisions on respective areas of law such as property, family, administration, inheritance, commerce, penal law and finance. Such a legal order was kept even at the time of the rulership of the Serbian dynasty of Nemanjic (1186-1360). At the time, Stephen Dusan`s Code (1349) was extensively used at the territory of Montenegro as well.

Zeta is the new name of the medieval state existed in the territory of current Montenegro since mid-14th century (1355-1496). After fall of *Zeta* under Ottoman rule (1449), the independent state organization in the territory of Montenegro disappeared. Since then, this region was under domination of foreign powers. Most of the territory was under administration of Ottoman Empire whereas the smaller part of the country was under administration of western powers – Venetian Republic, Austria, and France[3]. Medieval territories of current state of Montenegro were characterized by fragmentation of legal sources which were mainly of ecclesiastical nature.

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1 The territory was named after the former Roman province – Doclea.

2 In his province he acted as satraps in Persian Empire or praetors in Roman Empire.

3 Marijana Pajvančić, Mladen Vukčević, Ustavno pravo, Podgorica 2012, str. 69.

Medieval coastal cities, centres of merchantry and handicraftery, had their own autonomy. At the time, Kotor spawned several important legal sources among which the Kotor Statute of the XIV century (*Statuta et leges civitatis Cathari*) stand out. The Statute regulated internal autonomy and established municipal administration and judiciary. The local government was headed by *Knez*, who shared the power with three judges and city councils (*Consilim minus, Consilim maius, Consilium Rogatorum*). Altogether with city judges, *Knez* adjudicated both criminal and civil cases. When adjudicating cases *Knez* was on equal foot with the judges so verdicts were rendered by majority of votes. Similar to Kotor, medieval coastal town Budva had a Statute which very much alike regulated local self-government.

Charters of *Zeta`s* rulers enacted by Balsic and Crnojevic`s dynasties (proclaimed in 1368 and 1485) are extremely precious legal sources from that period of history regardless of their lack of statutory features. They mainly touched upon agrarian and commercial relations as well as upon monastery estate.

The *Code of Ivan Crnojevic* of 1482, which mainly dealt with clerical issues, established one of the most primordial institutional forms of court organization in Montenegro – *the Imperial and Patriarchate`s Court*.

The present name of Montenegro[4] emerged during the rule of Stefan Crnojevic (1455-1464). At the time of Crnojevic`s dynasty there were people`s courts that adjudicated blood feuds and state border demarcation disputes. At the time of rule of Montenegrin prince-bishops (*vladike*), the people`s court was composed of 24 members and it passed judgements over monastery and civil cases. During the period of Danilo Petrovic`s rule (1696-1730), people`s court passed judgements respectively over criminal cases, debt collections, appraisal of real estates, inheritance, land distribution, thefts, revision of an old judgements, or doing reconciliation over blood feuds. People`s court ceased to operate in 1831 when Petar II Petrovic – Njegos established *the Governing Senate* (Praviteljstvujušči Senat Crnogorski i Brdski) as a state institution supplied with judicial functions and administrative prerogatives, also known as the *Supreme Court*.

During the first dynasts from line Petrovic, the courts were named after their founders so there were *General Montenegrin Court* (Opštecrnogorski sud) also known as the *Court of Vladika Danilo* (1713), then the *Court of Vladika Vasilije* (1751), and the *Court of Scepan Mali* (Stephen the Little) (1771). These courts dealt mainly with blood feuds, pacification of blood

[4] The name Montenegro (Italian: monte - mountain, hill; nero – black) emerged in Venetian sources at the beginning of XIV century. Ottoman sources use the name Karadag.

revenge, serious crime but they were also dealing with assets seizure. A kind of courts of arbitration (in Boka Kotorska such an entity was called *the Court of Good People* (Sud dobrih ljudi)) and the reconciliation councils (e.g. *serfs courts* (kmetovski sudovi)) to settle petty disputes also existed at the medieval territory of Montenegro. The judgements in these cases were grounded on customary law. Under Venetian, and later on, under influence of Austro-Hungarian legal tradition, there was a highly developed organization of courts in the new age coastal cities (particularly in Boka Kotorska). These courts had different names (*Curia* or *Pretoria*).

The tribal – clans' justice existed in Montenegro up until the sett up of the central state government. The judicial function for the most serious crimes was exercised by the *tribal assembly* (treason, desertion, exile and other serious crimes punishable by death penalty). As for the other crimes, the judicial function was exercised by the *head of the tribe* (plemenski knez). Petty cases were adjudicated by a type of reconciliation individuals known as *poljaci* or *globari* who were assistants of *Knez* or *Kapetan*. At first, these courts passed the decisions upon customary law and in the spirit of people`s understanding of justice and fairness, and later on upon written law.

During the period of existence of Montenegro as an independent state there was an unlimited right of citizens to lodge an application to the Sovereign (*Gospodar*) in case they were not happy with judgements. In addition to his regular duties, *the Sovereign* conducted trials through his secretary[5]. Inter-tribal courts (*stanci*) also existed and they dealt with criminal and property cases. In the areas of Montenegro inhabited with Muslim population, Sharia courts applied Sharia law. Decisions of Sharia courts were fully respected by Montenegrin authorities[6].

The process of development of modern Montenegrin state and its territorial expansion started in 1796 following the battles of national liberation and enactment of the document called *Stega*. *Stega*, as the first written law of this period, proclaimed territorial and political unity of Montenegro and its neighbouring regions (*Brda*). It also embodied basic principles related to the duty of the tribes and individuals to be engaged in the joint fight for establishment and sustainment of the national state. The central court (*Praviteljstvo Suda Crnogorskog i Brdskog*) was introduced for the first time through the *Common Montenegrin Legal Code* (*Zakonik Obšči Crnogorski i Brdski*) known as the Code of Petar the First. In

[5] Soon after, this right was limited to be exercised only on specific days (on Saturdays) by Decree of the Ministry of Justice of 14 December 1896. As a rule the right can be exercised only for cases which did not go through all court instances.

[6] See in detail in: Čedomir Bogićević, Istorija crnogorskog sudstva, Podgorica, 2009.

addition to judicial function, this court also had administrative jurisdiction.[7] At the time, great attention was paid to the organisation of courts as well as to the judicial proceedings grounded on the principle of impartiality. The relevant literature points out that the enactment of the new code laid the foundation for the early modern state, raised the legal awareness, and heralded the basics of the law creation that had arisen from political and legal philosophy of the Montenegrin ruler Petar I Petrovic Njegos.[8]

Judicial branch of power was further strengthened by virtue of introduction of *Praviteljstvo Senata Crnogorskog i Brdskog* (*Senate*, the highest institution of authority and a court of last resort) in 1832. Furthermore, the lower courts were established such as court of *Kapetans* (first instance court) as well as the central state court – *Senate* (second instance court). *Common Legal Code* (Opšti zemaljski zakonik), known as the *Code of Knjaz Danilo I* of 1855, laid down in detail the judicial proceedings, crimes and criminal penalties. The Code affirmed the basic legal principles such as legality, independence of judicial function, the principle of equality before the court etc. The Great Reform of the State (1879) introduced instead of the *Senate* specific bodies – The State Council, The Ministry, and the Grand Court as the highest judicial instance in the country thus making separate judicial from executive power. The Grand Court was an appeal court against judgements of the county (*oblasni*) and of the regional (*okružni*) courts. It also acted as the court of first instance passing judgements for the most serious crimes: transgressions and felonies. Judgements of the Grand Court could have been challenged before the *Sovereign* who could then recommend reconsideration of the case. *The Law on Court Organisation* of 1902 envisaged that the Grand Court decides over appeals in criminal and civil cases exclusively against judgements of the regional courts. It`s judgements were final. In addition, it resolved conflicts of jurisdiction between lower courts.

During the said period, the monumental legal reading *General Code on Property for the Principality of Montenegro* (*Opšti imovinski zakonik za Knjaževinu Crnu Goru*) emerged in 1888 (translated to five languages). The author of the Code is widely- known jurist Valtazar Bogisic.[9] The Code represents codification of property law during which development Bogisic intended to reconcile endeavours to have a modern civil code of the young state modelled as per Napoleon`s *Code Civil* with the strive to have a

[7] See in detail in : Svetislav Marinović, Ratko Vukotić, Marko Dakić, Crnogorsko sudstvo kroz istoriju, Cetinje, 1998, str. 217 - 221.

[8] Mladen Vukčević, Komentar Ustava Crne Gore, izdavač Univerzitet „Mediteran", 2015, str. 18.

[9] Juristic mission of Valtazar Bogisic was subject of many scholar writings. The most important writing in this regard is monograph of Surja Pupovci, „Valtazar Bogišić – život i djelo", Podgorica, 2004.

code that instantiate Montenegrin customs, notably convenient to common people. Thus, many provisions of the code were shaped in formulaic language. The Code was in force until 1970s when the former Yugoslavia replaced its previous private law with the *Law of obligations*.

The judiciary reforms of 1902 *inter alia* set in detail organization and jurisdiction of then courts so the judicial power was respectively exercised by village leaders (*seoski kmetovi*) as reconciliation judges, courts of *Kapetans*, five county courts, and the Grand Court. Proceedings before courts were regulated by the Law on judicial proceedings in civil cases and by the Law on judicial proceedings in criminal cases of 1910.

According to the *Constitution of Kingdom of Montenegro* of 1905 there were *Kapetan* courts, county courts, and the Grand Court. The Law on court organization of 1910 envisaged that the Grand Court was the court of last resort and that it operated within to sections – civil and criminal. By virtue of decrees, the Ministry of Justice regulated procedural and organisation aspects of the judiciary (the same did the Grand Court). All the judges were appointed by the *Sovereign*. Furthermore, the principles of independence, public trial, and right to defence were laid down as well as the criteria for appointment of judges.

The profession of legal assistance found its place in Montenegrin judiciary system of that time through enactment of the *Law on public legal representation* (1909). Military justice was exercised by military courts such as *Division courts* (first instance court) and the *Grand Marshal Court* (second instance court). The organisation and the jurisdiction of military courts were set by the *Law on organisation of military courts of the Kingdom of Montenegro* (1910).

Multi-century existence of Montenegro as an independent state was discontinued after the WWI when it entered the Kingdom of Serbs, Croats, and Slovenians (hereinafter: KSCS). As an administrative territorial unit within the KSCS named *Banovina of Zeta*, Montenegro existed until 1941. The result was discontinuity in all domains of state life including judiciary.

According to the KSCS Constitution (1921) legislative power was exercised both by the King and the parliament. Courts could be established only by law. For the whole territory of KSCS there was only one Court of Cassation. It judges were appointed by the King. According to the *Law on organisation of regular courts* (1928), judicial power was exercised by district, county, and commercial courts as well as by the court of appeal and the court of cassation. The *Imposed Constitution* (1931) kept the similar court organisation while adjusting it to the new territorial division of the country. Family and inheritance cases of Muslim population were handled both by secular and Sharia judges.

Following the WWII and the socialist revolution, Montenegro becomes one out of six federal units within the federal Yugoslavia. Immediately after the war, revolutionary authorities established people`s courts: the Supreme Court, county courts, and district courts. According to *the Constitution of People`s Republic of Montenegro* (1946), judges of the Supreme Court were appointed and dismissed by the People`s Parliament whereas the judges of county and district courts were appointed by the district and municipal people`s committees.

Chairpersons of the parliament determined the bodies, the time, the manner, and the procedure of appointment of judges and lay judges in all the courts in Montenegro. Complete organisation of judicial power was achieved by endorsement of the federal *Law on Courts* (1954) which elaborated constitutional principles on judiciary such as independence and impartiality; two-level adjudication, public conduct of a trial and so forth. In accordance with the new concept of socialist self management,[10] the constitutions of former Yugoslavia and of Montenegro (1976) envisaged that judicial function is exercised by regular courts as well as by self-management courts – employment tribunals, designated courts, arbitrations, whereas the safeguarding of constitutionality was entrusted to the Constitutional Court of Montenegro. The feature of self-management courts was that they settled disputes over employment as well as the labour disputes within the socialist companies. These courts ceased to exist in 1991.

Following the dissolution of socialist Yugoslavia and constitution of the specific two-member federation of Federal Republic of Yugoslavia at the beginning of 1990s (which was later reconstituted as State Union of Serbia and Montenegro) the judicial organisation was keeping up with the process of transition of Montenegrin society. The legal system of Montenegro as well as the judiciary had to adapt to the different economy systems during the transition from socialism to capitalism and subsequently to the harmonisation with the EU *acquis communautaire*. Social and economic development in Montenegro was to a great extent determined by devastating ramifications of the civil war that took place at the territories of the former Yugoslavia. In contrast to all former federal units of Yugoslavia, the war did not take place only in Montenegro.

The *Constitution of Montenegro* of 1992 laid down the basic principles of the judicial office such as independence, sitting in a collegiate composition, and permanent tenure of judicial office. The laws on courts (dating from 1991 and 1995) established the following courts: 15 basic courts, two high courts, two

[10] This concept of Yugoslav economy and society should have been opposition to that of etatist socialism as developed in Soviet Union.

commercial courts, and the Supreme Court. *The 1991 Law on courts* inaugurated the parliamentary body - the Judicial Council - responsible to put forward proposals of the candidates for judges to the Parliament as well as to conduct dismissal procedures. Parliament's involvement in personnel management in the judiciary raised serious concerns for the independence of the judicial system. There is a clear risk of political interference in appointments and dismissals.[11] *The 2002 Law on courts* introduced two new types of courts: the Court of Appeal and the Administrative Court. They become fully operational in 2004.

From 2002 to 2006 Montenegro existed within the new political entity called *State Union of Serbia and Montenegro*. One can say that this political arrangement, agreed under patronage of the European Union (EU), was a transition to full independence of Montenegrin nation.

Given the proclaimed independence of Montenegro in 2006, all necessary preconditions were met to carry out deep reforms in all areas of social life thus and so in the judiciary. Next step was implementation of the new Constitution adopted in 2007. This constitution brought on board some important reforms of the judiciary. Involvement of the legislative power in appointments and dismissals of judges was considerably reduced due to entrustment of personnel management in the judiciary to the newly established independent body - *the Judicial Council*. The role and duties of the Judicial Council are fully defined by *the Law on Judicial Council* of 2008 as well as by subsequent amendments of this law (occurred in 2011, 2012, 2013, and 2015). A set of judiciary related laws were endorsed while the current legislation was considerably amended. Significant changes were introduced into the procedural and substantive legislation. *The Judicial Training Centre* was established whereas the living standard of judges was improved through *the Law on Remunerations of Judicial Offices' Holders.* The laws on organisational set up of courts were also amended to the great extent with an aim of increasing the efficiency of the judiciary. Acquirement of the status of the candidate country for the EU membership (2010) gave a new impetus to the reform process.

II. CONSTITUTIONAL PRINCIPLES ON JUDICIARY

In order to understand importance and role of judiciary in the legal order of Montenegro it is necessary to present the constitutional principles which determine its status. These principles can be found in the Constitution and the Law on courts.

In the most general sense, the Constitution`s Preamble attributes significance to the judiciary and contains expression of citizens' commitment

[11] The 2006 EU Progress Report for Montenegro.

to live in a state in which *inter alia* there is rule of law embodied among other social values.[12]

In addition to the Preamble, the principles on judiciary are contained in several normative sections of the Constitution (part I – Basic Provisions, part II – Human rights and freedoms, and part III – Organization of powers) that are characterized by mutual interaction and interdependence. Apart from these three parts of the Constitution, provisions on judiciary can be implicitly found in most of its 158 articles.

The very concept of the notion *court* enshrined by the Constitution – as an „autonomous and independent" body (Article 118 par. 1 of the Constitution) - implies fundamental principle of a modern judiciary – *the principle of independence and autonomy.* The principle is based on the separation of powers (Art. 11, paragr. 1-2 of the Constitution) according to which the judiciary constitutes one of three branches of government, in addition to legislative and executive. The content of this principle in general entails that the exercise of judicial power is independent not only from involvement of legislative and executive government but also from any other influence, commands or control of any institution (including other courts), any centre of power or individual. In the context of Montenegrin legal order, this principle assumes several guarantees: life tenure (irremovability) for judges,[13] modality of appointments and dismissals of judges, securing adequate resources for work of judges and so forth.

The principle of independence is affected by number of legal and non-legal (cultural, historical, religious, etc.) factors which make independence of judiciary a "problem of common sense in every culture". With regard to legal factors, special importance can be attributed to the organization of courts. Some scholars argue that there are some essential elements of the court organization which can contribute to the consolidation of the independence principle.[14]

The principle of constitutionality and legality is a fundamental principle for all state institutions and a guarantee that the respect of this principle

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12 The Preamble of the Constitution (paragraph 2) is pointed out "the commitment of the citizens of Montenegro to live in a state in which the basic values are freedom, peace, tolerance, respect for human rights and liberties, multiculturalism, democracy and the rule of law". The English version of the Constitution available at http://www.skupstina.me/images/documents/constitution-of-montenegro.pdf .

13 During the time of one-party system, gurantees of judicial independence had an oposite direction. For example, it was argued that the principle of electivity of judges (not the irremovability of judicial office) is a guarantee of judicial independence.

14 Vesna Rakić - Vodinelić, Pravosudno organizaciono pravo, Beograd, 1994. , str. 19.

would ensure protection of fundamental social values such as freedom, order, peace, and legal order. When it comes to courts, this principle is embodied in the constitutional provision that "the court shall rule on the basis of the Constitution, laws and confirmed and published international agreements"(Art. 118 paragr. 2 of the Constitution). This means that courts should be free of any arbitrary performance, rulings based on political and similar documents, frivolous delivering of justice or reconsideration of court decisions in a way which is not underpinned by constitutional and law provisions. Consequently, this implies boundedness of a court both by substantial and procedural legislation. However, the conduct of a trial according to law does not entail that this should be done in a verbatim or mechanical way but court is rather perceived as a creative institution in the process of law application.

The principle of public trial (Art. 120 of the Constitution) is manifested in two aspects: 1) hearing before court is open to public; and 2) judgments have to be pronounced publicly. The Constitution envisages that public may be excluded (from all or a part) of the trial for the reasons necessary in a democratic society, only to the extent necessary: in the interest of morality; public order; in order to protect military, business or official secret and for other relevant reasons. This principle comes to a life along these lines: the right of media to report on the work of court as well as on the conduct of a specific trial; publication of a yearbooks of judgements and similar publications; organizing seminars, conferences and symposiums related to the work of courts; analysis of case law and so forth.

The principle of judicial (functional) immunity (Art. 122 of the Constitution) stands in a close relationship with other principles given that this principle is a prerequisite for their fulfilment. The judge (and lay judge) would not be held responsible for the expressed opinion or vote at the time of adoption of the decision of the court, unless this represents a criminal offense (immunity *ratione materiae*, immunity of unaccountability). Integral part of this principle is a restriction on prosecuting a judge suspected of a criminal offence committed in the performance of judicial office without the approval of the Judicial Council.

The principle of group decision making (Art. 119 of the Constitution) means that a trial shall be conducted by the panel of judges except when the law provides that an individual judge shall rule (e.g. in petty cases, in non-contentious cases etc.). Panel of judges allows to make all-around, comprehensive, and impartial review of the factual and legal circumstances of a case and to have a well-grounded decision made in accordance with the law. Panels of judges represent „a unique decision making groups that are better equipped with knowledge than a single individual. Through mutual

control, corrections, holding back, panels are providing guarantees that their decisions would be reasonable, objective, balanced and fair."[15]

The principle of incompatibility of judicial office with accessory activities (Art. 123 of the Constitution) involves prohibition for judges to discharge duties of a Member of the Parliament or other public duties or professionally perform some other activity. The prohibition aims at independent, autonomous, and impartial approach of a judge and objective exercise of judicial office.

In addition to the Constitution, *the fundamental principles of judicial office are contained in the Law on courts*. In order to improve and protect human rights and freedoms, the law affirmed other principles that correspond to the international standards on efficiency of courts. These are:

The principle of independence and autonomy entails that judicial office is exercised free of influence whosoever, namely that no person cannot influence the work of a court;

The principle of adherence to the judicial office;

The principle of free access to courts and equality of parties aim at ensuring equality before the law as well as to secure everyone's right to lodge a claim with court in order protect his/her rights;

The principle of impartiality can be described as an unbiased personal relation of a judge with a case which also includes a right of a party to request judicial disqualification;

The right to a "natural judge", or in another words, in determination of his/her rights everyone is entitled to have a randomly designated judge. This is also an international standard according to which random allocation of cases have to be fully objective, that is to say, free of influence of parties to the case;

In addition to constitutional and legal principles related to the judicial office, one can also refer to the *ethical principles and codes of conduct for judges*. These rules contained in the Code of Judicial Ethics must be followed in order to maintain, affirm and upgrade authority and reputation of judges and judiciary.[16]

All the above-mentioned principles have been defined as strategic goals of judiciary reforms in Montenegro. After all, these principles constitute basis for the mission and the vision of the Montenegrin

[15] Triva, S., Belajac,V., Dika, M., Građansko parnično procesno pravo, Zagreb, 1986, str.176.

[16] The very first Code of Ethics for Judges was adopted by the Conference of all judges at its session of 26 July 2008. The current Code of Ethics was adopted in 2015.

judiciary. *Mission* – to protect human rights and to efficiently conduct fair trials and; the *Vision* – to have an open judiciary for everyone, trusted by public thus securing justice for each and every citizen.[17] Important precondition for implementation of the said principles is an adequate organization of courts and of the judiciary in general.

III. ORGANISATION OF MONTENEGRIN COURT SYSTEM

The establishment, organization and jurisdiction of courts, the organization ofworkofcourts,and judicial administration are regulated by the *Law on courts*.[18] The law enshrined the respective principles of legality, right to access to justice, equality, publicity, impartial trial within a reasonable time, and the principle of natural judge.

In Montenegro there are courts of general jurisdiction and the specialized courts. The courts of general jurisdiction are: misdemeanour courts, basic courts, high courts, the Court of Appeal, and the Supreme Court. The specialized courts are: the Commercial Court and the Administrative Court.

III. 1. Misdemeanour courts

There are three misdemeanour courts for the whole territory of Montenegro (in Bijelo Polje, Budva, and Podgorica) and are deciding over misdemeanour offences. The High Misdemeanour Court decides over appeals to the decisions of the mentioned misdemeanour courts.

III. 2. Basic courts

There are 15 basic courts in Montenegro. Basic courts have jurisdiction over:

1) Criminal cases, notably to: **a)** adjudicate in the first instance on criminal offences punishable by law by a fine or imprisonment of up to 10 years as principal punishment, regardless of the character, profession and position of the person against whom the proceedings are conducted and regardless of whether the criminal offence was committed in peace, state of emergency, in a state of imminent war danger or in a state of war, unless the jurisdiction of another court is prescribed for specific types of these criminal offences; **b)** adjudicate in the first instance on those criminal offences which are by separate law prescribed to fall within the jurisdiction of basic courts; **c)** conduct proceedings and decide on requests for expunging of a sentence,

[17] Judicial Reform Strategy for the period 2014 -2018.
[18] Official Gazzette of Montenegro No. 11/15.

requests for termination of security measures or legal consequences of a sentence and adjudicate in those matters when they have imposed such a sentence or measures;

2) Civil cases, to adjudicate in the first instance: **a)** on disputes relating to property, matrimony, family, personal-legal and other relationships, except in those disputes where the law prescribes the jurisdiction of another court; **b)** On disputes relating to correction or reply to information provided by the media and petitions relating to violation of personal rights committed through the media;

3) Labour law cases, to adjudicate in the first instance on disputes relating to:

a) employment,

b) conclusion and application of collective bargaining agreements, as well as all disputes between employers and trade unions;

c) application of the rules on strike;

4) Other legal matters:

a) to resolve non-contentious cases in the first instance;

b) to resolve cases of enforcement and security;

c) to decide on recognition of foreign judgments, as well as on the enforcement of foreign judgments when so prescribed by law, except for those falling within the jurisdiction of the Commercial Court;

5) Free legal aid; and

6) International legal assistance in criminal matters under a *letter rogatory* for service of documents.

III. 3. High courts

There are two high courts with the seats in Bijelo Polje and Podgorica. The high courts have a jurisdiction to decide *in first instance* over:

- Criminal cases for a crimes punishable by law by imprisonment in excess of 10 years as principal punishment, regardless of the character, profession and position of the person against whom the proceedings are conducted and regardless of whether the criminal offence was committed in peace, state of emergency, in a state of imminent war danger or in a state of war, and for the following crimes: manslaughter, rape, endangering the safety of air traffic, unauthorized production, keeping and putting into circulation of narcotic drugs, calling for violent change of the constitutional order, disclosure of secret

data, instigation of ethnic, racial and religious hatred, discord and intolerance, violation of territorial sovereignty, associating for anti-constitutional activity, preparing acts against the constitutional order and security of Montenegro, against humanity and other goods protected by international law. Higher courts also decide in the first instance over those crimes which are by separate law prescribed to fall under their jurisdiction.

The high courts have a jurisdiction to decide *in the second instance* over appeals against decisions of basic courts both in criminal and civil cases.

In addition, the high courts are dealing with: conduct of a proceedings for establishment of circumstances regarding the request for extradition of accused and convicted persons and the procedure of recognition and enforcement of foreign judgments in criminal matters; resolve conflict of jurisdiction between basic courts from their territory; decide upon requests for expunging of a sentence based on judicial decision and upon requests for termination of security measures or legal consequences of a sentence relating to the prohibition to acquire certain rights, when they have pronounced such a sentence or measure; international legal assistance in criminal matters under a letter rogatory for a hearing person, implementation of special evidentiary actions, as well as other forms of international criminal legal assistance;

Irrespective of the rules on territorial jurisdiction, Special Division of Podgorica High Court decides over criminal cases for the following crimes:

1) organized crime, regardless of the sentence prescribed;

2) high-level corruption if a public official committed the following crimes: abuse of office, fraud in the conduct of official duty, illegal influence, incitement to illegal influence, passive bribery, active bribery. If the material gain exceeding the amount of forty thousand euro was obtained through the commission of the following criminal offences: abuse of position in business operations, and abuse of office in economy;

3) money laundering;

4) terrorism; and

5) war crimes.

III. 4. The Commercial Court

There is a single commercial court for the whole territory of Montenegro. It decides in the first instance over disputes between companies, entrepreneurs and other legal entities performing economic activity (commercial entities), which arise from their commercial-legal relationships and in the disputes arising between commercial entities and other legal persons in

the performance of the activity of commercial entities, as well as in the case where one party in those disputes is a natural person, if he / she is in relation of substantive joint litigant to one of the parties. *Ratione materiae* it decides over disputes relating to: registration of commercial entities as well as disputes arising from relationships governed by company law; bankruptcy and liquidation of commercial entities, regardless of the capacity of the other party and irrespective of the time when the dispute was initiated, unless otherwise provided by law; copyrights and related rights, industrial property rights and trademark protection, and other rights arising from intellectual property regardless of the capacity of the parties; rights of artists, rights concerning the multiplication, duplication and releasing for circulation of audio-visual works, as well as disputes relating to computer programmes and their use and transfer; disturbance of possession; distortion of competition, abuse of monopolistic or dominant position in the market and entering into monopolistic agreements; ships and navigation at sea and inland waters, as well as disputes governed by navigation law, except for disputes relating to the transport of passengers; aircrafts and disputes governed by air law, except for disputes relating to the transport of passengers; and other legal matters which the law places within the jurisdiction of the Commercial Court.

In the first instance the Commercial Court also: 1) conducts the proceedings of bankruptcy and liquidation; 2) decides on and conduct enforcement when the enforceable instrument has been issued by the Commercial Court or arbitration when so defined by a separate law, decide on enforcement between the parties, and decides on and conduct enforcement and security on board ships and aircrafts, regardless of the capacity of parties; 3) decides in non-contentious proceedings concerning ships and aircrafts; 4) decides on the recognition of foreign judicial decisions rendered by commercial courts, as well as of foreign arbitral awards. It also provides mutual legal assistance in matters under its jurisdiction.

III. 5. The Court of Appeal

The Court of Appeal decides over appeals to the high court`s decisions in first instance as well as on appeals to the decisions of the Commercial Court and resolves conflicts of jurisdictions between: basic courts from the territories of the high courts, basic courts and the high courts, and between the high courts.

III. 6. The Administrative Court

The Administrative Court has its seat in Podgorica and decides over administrative cases.

III. 7. The Supreme Court

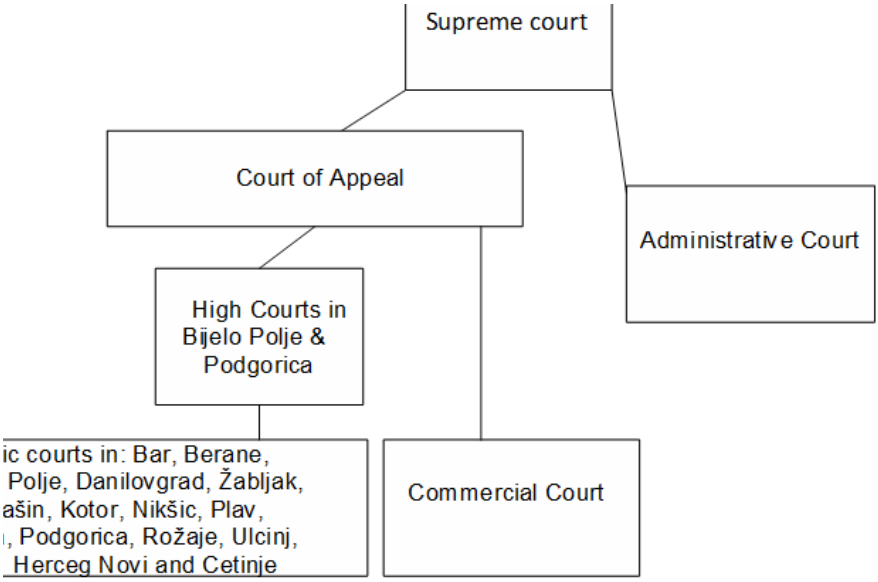
The Supreme Court is the court of last resort in Montenegro. Its seat is in Podgorica and has jurisdiction to decide: 1) in the third instance when so provided by law; 2) over extraordinary legal remedies against decisions of the courts in Montenegro; 3) over legal remedies against decisions of its panel, when so prescribed by law; 4) over the transfer of territorial jurisdiction when it is obvious that it will be easier for the other court that has *ratione materiae* jurisdiction to conduct the proceedings, or for other important reasons; 5) over establishing which court shall have territorial jurisdiction when the jurisdiction of the courts in Montenegro is not excluded, and when, in accordance with the rules on territorial jurisdiction, it is not possible to reliably determine which court has territorial jurisdiction in a particular legal matter; 6) over conflict of jurisdiction between different types of courts in the territory of Montenegro, except when the jurisdiction of another court has been prescribed to resolve the conflict of jurisdiction. The Supreme Court also decides over the matters relating to the transfer of territorial jurisdiction, determining the court having territorial jurisdiction and conflict of jurisdiction in a panel of three judges, without conducting a hearing.

At a General Session, the Supreme Court: 1) takes general legal standpoints; 2) considers issues in relation to the work of courts, implementation of laws and other regulations and exercise of judicial power, informing the Parliament of Montenegro thereof when it deems necessary; 3) adopts Rules of Procedure of the General Session of the Supreme Court; and 4) proposes candidates for the President of the Supreme Court, issue the proposal for establishing the termination of office, disciplinary liability and dismissal of the President of the Supreme Court and issue opinions on candidates for judges of the Supreme Court.

The general legal standpoints are being taken on disputable legal matters arising from case law, in view of ensuring uniformity in the application of law by the courts. The general legal standpoint may be taken *ex officio* or at the request of a court.

All-embracing session of the Supreme Court involves General Session of the Supreme Court and the presidents of the Court of Appeal, the Administrative Court, the Commercial Court, and the high courts.

Organization chart of Montenegrin court system



IV. CRITERIA AND PROCEDURE FOR THE APPOINTMENT, PROMOTION, EVALUATION, AND DISCIPLINARY LIABILITY OF JUDGES

Judicial function can be exercised either in the professional capacity (judges) or as a layman (lay judges). As a result, the criteria a judge has to meet vary.

One can become the candidate for a judge if he/she meets both the general criteria and the special criteria in accordance with the law.

The general criteria relate to appointments of judges in all the courts and require that a judge is: a citizen of Montenegro;[19] in good health condition; attributed with legal capacity; in possession of degree in law; and that he/she passed a bar exam.

The special criteria for appointment are reflected in adequate work experience in legal profession. The candidates for judges of the misdemeanour courts have to have **four years** of working experience. The candidates for judges of the basic courts have to have **four years** of experience in legal profession or alternatively if he/she, after passing the bar exam, worked for at least two years as an adviser in court or public prosecution office, as an attorney, notary

[19] According to the Basic Principles on the Independence of the Judiciary of 13 December 1985 a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

or Professor of Law. One is qualified to become a judge of the Commercial Court if he/she worked for at least **eight years** as a judge, public prosecutor, attorney, notary, Professor of Law, or on other legal matters. A person may be appointed as a judge of the Administrative Court if he/she worked for at least **eight years** as a judge, public prosecutor, attorney, notary, Professor of Law, or on other legal matters. The requirement of the High Misdemeanour Court is that the candidate worked as a judge or a misdemeanour judge, or as a public prosecutor, for at least **four years**. Adequate working experience in judiciary (as a judge or a prosecutor) is required for the candidates for judges of the High Court (**eight years**), the Court of Appeal (**ten years**), and the Supreme Court (**fifteen years**). Alternatively, a person may be appointed as a judge of the Supreme Court if he/she has at least **20 years** of work experience as a judge, public prosecutor, attorney, notary, Professor of Law or on other legal matters. The candidates for the presidents of the courts are required to possess a bit longer adequate working experience.

Furthermore, candidate for a judge has to meet the requirements of professional impartiality, high moral qualities, and proven professional ability. At the same time, the candidates are praised for efficiency, accountability, and the quality of judicial office exercise, in case he/she exercised judicial office. These criteria are set with a view of the international standard that "persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law" which implies that "any method of judicial selection shall safeguard against judicial appointments for improper motives". [20]

A longstanding process of reforming the modality of appointment of judges was completed in February 2015 by enactment of the *Law on Judicial Council and Judges*. [21] The law introduced a single countrywide recruitment system of judges and an objective and merit-based promotion system and reinforced accountability and integrity safeguards in the judicial system. New provisions reinforced the role of the Judicial Council thereby being perceived as the key actor of the judicial system expected to exercise its competences with full transparency, accountability and effectiveness. In a single piece of legislation can be found all the provisions related to the rights and duties of judges as well as of the Judicial Council as an independent body that has a fundamental function to appoints and dismisses judges and ensures independence and autonomy of judges and courts.

[20] Basic Principles on the Independence of the Judiciary of 13 December 1985, Article 10.
[21] Official Gazzette of Montenegro No. 11/05.

Judges and presidents of the courts are being **appointed and dismissed** by the Judicial Council. The appointment of judges starts with advertisement of vacant positions. Candidates for judges that are applying for the first time undergo written testing organized by the Judicial Council. On the basis of success in the written test or the bar exam and interview evaluation, the ranking list of candidates for judges is being formed. Best ranked candidates are filling the vacant judicial positions and are submitted to undergo 18-months (9 months in misdemeanour courts) initial training in Podgorica Basic Court, the Administrative Court, or the Commercial Court until the final decision on appointment is made.[22] The Judicial Council appoints for a judge of the basic court the candidate who passed the initial training and is evaluated with the grade "satisfactory". The right to choose the basic court where he/she will serve judicial tenure, the candidate acquire in accordance with his/her ranking. The employment of a candidate who acquired unsatisfactory grade or he/she refuses to be assigned to the specific court is being terminated. Criteria for appointment of the Supreme Court`s judges are professional knowledge and ability to exercise judicial office. The fulfilment of these criteria is assessed around different sub-criteria. This innovative legislative intervention aimed at objectification of the appointment procedure. Transparent evaluation of candidates and interviews with candidates at the sessions of the Judicial Council open to public brought a high level of transparency.

The Constitution provides that the Judicial Council appoints **the president of the Supreme Court** by two-third majority based on the proposal of the General Session of the Supreme Court. Following the interviews with candidates for the Supreme Court`s president, the General Session of the Supreme Court communicates its proposal to the Judicial Council.

In addition to the voluntary **deployment and transfer of judges**, new law envisages permanent horizontal transfer of judges. If a judge wants to be permanently transferred to the court of equal or lower level he/she applies to the internal vacancy announcement. Considering both on the results a judge had in last three years and the list of such candidates, the Judicial Council makes the final decision on transfer.

The second segment of the reforms included professional evaluation, respectively **the right of a judge to advance** to the court of higher instance in case his/her performance is evaluated with the mark "excellent" and if he/she meets criteria requested for appointment in that court. Criteria for professional evaluation are to the great extent objectified (evaluation of performance and evaluation of an interview with a candidate) while related issues are regulated in detail by the Judicial Council`s Rules of Procedures.

[22] A candidate for a judge is entitled to remuneration of 70% of remuneration of a judge in the basic court.

The system of professional evaluation envisages the intervention in the evaluation procedure by a plurality of evaluators and a plurality of reports. First of all the concerned judge expresses his/her own evaluation trough the self-evaluation report. Then, a judicial evaluation panel composed by the president of the court the evaluated judge belongs to, and four judges from higher instance courts, selected by the Judicial Council for the evaluation of judges draft the evaluation report and propose an evaluation grade. The draft report is then submitted to the evaluation committees in the Judicial Council which then performs the final evaluation.

Sources of evaluation for judges are: 1) 5 judgments extracted by lot; 2) 5 judgments offered by the evaluated judge; 3) 5 judgments that were reversed upon appeal, extracted by lot; 4) A statistical report on the work of the judge, containing information on the work of the judge, data from the records on judges as well as other all the relevant information about the judges' professional life; 5) records obtained through inspection of work of the court; and 6) reports by the Judicial Training Centre on training courses completed by the judge.

A judge who is evaluated either as a "satisfactory performer" or as a "non-satisfactory performer" must undergo a mandatory programme of continuous training. A judge who is evaluated as an "excellent performer" becomes eligible to be promoted to a higher court.

The system of professional evaluation system will become operational as of 1 January 2016. The system is expected to be tested as a pilot project in Podgorica Basic Court in order to establish its effectiveness.

Development of indicators for measuring work productivity of judges and the *case weighting study* will contribute to proper and objective setting of criteria for evaluation of judicial performance. One should be proud of this achievement because it makes the judicial system in Montenegro one step closer to the standards of the EU members.

The law has introduced the innovated **system of disciplinary liability** that fully meets requirements of legality principle. The law contain three lists of detailed infringements, divided, according their seriousness in: *minor disciplinary offences (*5 infringements), *severe disciplinary offences* (12 infringements) and *the most serious disciplinary offences* (5 infringements). The new provisions further respect the legality and proportionality principles for sanctions: they envisage four disciplinary sanctions: reprimand, fine, prohibition of promotion and dismissal, and they further associate each sanction to a group of disciplinary offences according to the seriousness of the violation. Dismissal shall be imposed for committing the most severe criminal offences. The laws consider dismissal of judges as a sanction for a disciplinary

infringement and clearly define the cases of dismissal, thus protecting the judges' independence and judges' and their irremovability.

As regards the disciplinary proceeding, the law provide for: a wide range of authorities, (including the Commission for Monitoring Compliance with the Code of Judicial Ethics) that are entitled and have the duty to file a motion for a disciplinary infringement*;* the regulation of the content of the disciplinary motion; the composition of the disciplinary panel and it`s competencies; the hearings; the decision-making process; and the temporary removal from office of the accused judge/prosecutor, in case of a criminal charge against him/her. Given the principle of fair conduct of disciplinary proceedings, the law established a disciplinary plaintiff. Consequently, there is no option that single entity "prosecute and adjudicate" in disciplinary proceedings. The law further established the principle of the mandatory prosecution, according to which the disciplinary plaintiff is not entitled to archive a case on his/her own discretionary decision but she/he has to seek the authorisation by the disciplinary panel of the Judicial Council. This panel is empowered to impose an obligation on the disciplinary plaintiff to conduct an investigation and bring an indictment in cases in which the plaintiff asks the panel to dismiss the disciplinary motion. The decision can be appealed with the Supreme Court.

The law also brought the novelty that a judge will be liable for intentional damage caused by unlawful, unprofessional or unscrupulous work in the exercise of judicial office. Naturally, the ultimate goal is neither expansion of disciplinary proceedings nor the "hunt for judicial errors".[23]

In addition, the Judicial Council established the Commission for monitoring the application on the Code of ethics. Every citizen can file a complaint alleging the violation of the code of ethics. In case the Commission establishes that no violation of the Code occurred, the procedure stops there, otherwise the case is forwarded to the Judicial Council for a disciplinary proceeding.

V. THE JUDICIAL COUNCIL

In Montenegro there are separate councils in place for appointment of judges and prosecutors (the Judicial Council and the Prosecutorial Council). Specialized body that deals with personnel management in the judiciary was introduced by *1991 Law on courts*. Since then, the composition and competencies of the council has constantly been changing. The Judicial Council (hereinafter: *the Council*) become a constitutional category by adoption of the

[23] According to the CEPEJ`s Report on "European judicial systems – Edition 2014 (2012 data): efficiency and quality of justice Montenegro is ranked 31 position in relation to number of disciplinary proceedings initiated against judges. The report is available at http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport_2014_en.pdf.

current Constitution in 2007.[24]

The Constitution governs position, composition, and the competencies of the Council. The Council related issues are regulated in detail by *the Law on Judicial Council and Judges* (appointment of its members, termination of the mandate of its members, appointment of judges and lay judges, termination of judicial office, disciplinary liability, and dismissal of judges as well as other relevant issues).

The Council is an independent and autonomous body which ensures independence and impartiality of judges and courts. This is reflected in the fact that the Council is not just entitled to propose candidates for judges as per former legislation but it is fully responsible for appointment of judges. This way, the procedure of judicial appointments is dislocated from the Parliament and entrusted to the Council. The seat of the Council is in Podgorica.

V. 1. Composition

According to 2013 amendments of the Constitution, the Council is composed of president and nine members: the president of the Supreme Court, four judges (appointed by the Conference of all judges), four eminent jurists (appointed in public call procedure by the Parliament in accordance with the proposal of the relevant parliamentary committee), and the Minister of Justice. President of the Council is appointed from non-judicial members by two-third majority of votes of the Council`s members. The Minister of Justice cannot be appointed as the Council`s president. President of the Council has a casting vote in case of parity of votes. The four year mandate of the Council is promulgated by the President of the State.

Members of the Council from among judges[25] are appointed by the Conference of all judges by secret ballot. A member of the Council from among eminent jurists may be a person who has at least fifteen years of work experience in legal profession and enjoys personal and professional reputation and was not convicted of criminal offences that render judges unworthy for the exercise of judicial office.

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[24] Establishment of such a body was one of seven conditions recommended by the Constituent Parliament by the Venice Commission.

[25] These are three members from among the judges of the Supreme Court, the Court of Appeal, the Administrative Court, the High Misdemeanour, the Commercial Court and the High Courts, having at least ten years of work experience as judges as well as one member from among the judges of the basic courts and the misdemeanour courts, having at least five years of work experience as judges.

V. 2. Competences

According to the Constitution, the Council: 1) appoints and releases from duty the president of the Supreme Court; 2) appoints and releases from duty the president of the Judicial Council; 3) submits the Report on the performance of the judicial council and the overall judicial situation to the Parliament; 4) appoints and releases from duty the judge, the president of the court and the lay judge; 5) deliberates on the report on the court activities, applications and complaints regarding the work of the court and take a standpoint with regard to them; 6) establishes the termination of the judicial duty; 7) establishes the number of judges and lay judges; 8) proposes to the Government the amount of funds required for the work of courts; 9) performs other duties as stipulated by the law. The Council makes decisions by majority vote of all its members except in the cases provided by the Constitution. The Minister of Justice does not vote in disciplinary proceedings.

In addition to the competences entrusted by the Constitution, the Council: 1) decides on disciplinary liability of judges and court presidents; 2) provides for the use, functionality and uniformity of the judicial information system, in the part referring to the courts; 3) takes care of the training of judges and court presidents; 4) keeps records of data on judges and court presidents; 5) considers complaints against the work of judges and court presidents; 6) inspects complaints of judges and take positions regarding threats to their independence and autonomy; 7) proposes framework criteria on the necessary number of judges and court administration; 8) issues opinions on the incompatibility of performing certain duties with the exercise of judicial office; 9) establish the Commission for Professional Evaluation of Judges; 10) appoints the disciplinary plaintiff; 11) adopts it`s Rules of Procedure; 12) determines the methodology for preparation of reports on work of courts and the annual work distribution in court; 13) issues official identity cards of judges and court presidents and keep records of official identity cards; and 14) issues opinions on draft regulations in the field of judiciary.

One of the important activities of the Council is development of the annual reports which contains respective information about the work of the Council, the description and analysis of the state of play in the judiciary, detailed information for each court relating to the number of cases received and resolved on annual basis, the problems and deficiencies in their work, as well as measures to be taken to remedy identified deficiencies. The courts have a duty to communicate relevant information requested by the Council within the deadline set by the Council.

V. 3. Secretariat of the Judicial Council

Logistical support to the work of the Council is provided by its Secretariat in terms of all financial, administrative, IT, analytical and other tasks of the Council and activities of mutual interest to the courts. Secretariat is organized within the four departments: Department for legislation, status issues, and education of judges, Department for IT technologies and multimedia, Department for General Affair, and the Department for Internal Audit.

V. 4. Commissions

In order to implement properly the new legislation, the emphasis was put to the establishment of special commissions composed by the Council`s members for: the recruitment and the mobility of judges and the management of human resources; performing the individual professional evaluation; the establishment and the implementation of appropriate workload framework criteria; appointing heads of courts and promoting judges according to fair procedures; allocating the budget according to the needs, and for other relevant purposes. Hence, the Council set up the following commissions: Commission for Ethical Code for Judges, Commission for Appointment, Commission for Professional Evaluation, and the Commission for Testing. The Council`s Rules of Procedure provides that it can set more commissions in case of a need.

CONCLUSION

Montenegro truly belongs to the groups of countries with rich legal and judicial traditions and can serve as an interesting subject of studies in terms of comparative law. Since the most rudimentary forms of statehoods up to modern times, Montenegrin judiciary was changing in consonance with the needs of society and circumstances of different periods of history. The judiciary system in Montenegro is anchored to the well-known national legal culture but also embraced the features of great civilizations that reached areas of Montenegro.

During the time, Montenegrin judiciary evolved in relatively modern system as it is today. Given that Montenegro is a small and unitary country, courts are organized in single, integral way with simplified organization based on three layers of adjudication. Important advantage of such a system is its efficiency. A career judiciary exists in Montenegro where one can be entrusted with judicial office in early stage of judicial career. Independence of judiciary is one of the most important principles of the constitutional order in Montenegro. The recent reform interventions safeguard judges from undue influences of any kind, principally of the influences of legislative and executive

power. This ultimate goal can be achieved through fairly modernized system of appointments, promotion, professional evaluation, and disciplinary liability of judges which is harmonized with the highest standards followed by the EU members. Finally, there is probably no perfect judicial system and experience shows that judges are the heart of the controversy. Therefore, it is of paramount importance to ensure their independence.

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LES CAUSES DE DELINQUANCE EN SPORT ET LA RESPONSABİLİTE PENALE DU FAIT DES ACTIVITES SPORTIVES[*]

Sporda Suçu Doğuran Sebepler Ve Spor Faaliyetlerinden Doğan Ceza Sorumluluğu[**]

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ABSTRACT

Le sport est une activité le plus ancien et aussi le plus populaire du monde. De nos jours, les causes de délinquance dans le sport et la responsabilité pénale du fait des activités sportives est l'un des sujets le plus populaire. C'est parce que le sport est une activité ludique, un pouvoir économique. En tant qu'une activité multi-disciplinaire, notre article sera sur cet évenement populaire qui cause aussi la violence et la responsabilité pénale.

Les mots clés: Sport, La violence dans le sport, le match fixé, le doping, la corruption

ÖZET

Sporda şiddetin sebepleri ve spor faaliyetlerinden doğan ceza sorumluluğu günümüzün en fazla tartışılan konularının başında gelmektedir. Sporun önemi başta büyük bir ekonomik güç olmasından kaynaklanmaktadır. Mültidisipliner bir alan olması dolayısıyla da pek çok alanı yakından ilgilendiren spor ile ilgili, sporda şiddeti doğuran sebepleri ve bu sebepler dolayısıyla ortaya çıkan şiddet kaynaklı fiillerden doğan ceza sorumluluğu üzerinde kısaca duracağımız makalemiz ayrıntılı değil ancak konu başlıkları şeklinde ele alınmıştır.

Anahtar Kelimeler: Spor, sporda şiddet, şike, doping, yolsuzluk

I. Introduction

De nos jours la place et l'importance du sport ne sont plus contestées. Le sport *est une activité de participation, d'appartenance, de revendication et d'intégration à la société*[1]. Le sportif en adhèrant à cette activité gagne une possibilité de se prononcer à sa façon, une identité, une culture et aussi parfois un salaire. Il n'ya pas seulement le sportif dans cette activité, il ya des hommes de sport comme l'antreneur, le directeur technique, l'organisateur, l'arbitre, le médecin, les organisations comme les clubs, les fédérations, et sans oublier les spectateurs qui sont un des points le plus important dans l'activité sportive. La place du sport est aussi importante en droit turc. La constitution Turque 1982 prévoit dans son article 59 le sport par son titre

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[**] Türkiye Adalet Akademisi Yayın Kurulunun 14.12.2016 tarih ve 2016/6 Sayılı Kararına İstinaden Hakemsiz Olarak Yayınlanmıştır.

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[1] MOREILLON Laurent, *Introduction- Vers un nouveau droit pénal du sport,* in Aspects pénaux du droit du sport, Collection CIES, Staempfli Editions SA Berne.2002, p.7 (p.7-14).

"promotion du sport" en disant *"L'Etat prend les mesures propres à améliorer la santé physique et mentale des citoyens turcs de tout âge et encourage l'extension de la pratique du sport par les masses.*

L'Etat protège les sportifs méritants

En ce qui concerne les décisions des fédérations sportives relatives à la gestion et la discipline des activités sportives, on peut recourir à l'arbitrage obligatoire. Les décisions prises par le tribunal arbitral sont définitives at aucune autorité judiciaire ne peut être saisie. (intitulé modifié at alinéa 3 ajouté par la loi no: 6214 du 17 mars 2011)*».*

Avec tous ces élements le sport est une activité ludique, intellectuelle et compétitive et aussi un spectacle qui tient une place importante dans l'espace économique de chaque pays. Cette place importante du sport entraine aussi des inconvenients, des enjeux et des risques qui peuvent conduire à la tragédie. Il faut donc constater ici, l'antagonisme du fait de l'évenement sportif *qui fait cohabiter pureté et impureté, norme et déviance*[2].

Parlant de l'antagonisme, la partie tragique du sport nous emmene aux crimes ou plutôt des délits. Nous pouvons constater les crimes[3] prévues d'une part, dans le Code Pénal comme l'homicide par négligence (Code pénal Turc art.85), les lésions corporelles ou les voies de fait intentionnels ou par négligence (on utilise le même terme en droit pénal turc, (CPT.art.86-89), l'injure (CPT. art. 125), la discrimination (CPT. art. 122) et d'autre part les faits déviants de nature purement sportive comme doping[4] qui n'est pas connu comme un délit dans le code mais un fait illégal contre fair play connu par les réglements sportifs des Fédérations; les faits de violence connus par la Loi 6222 de "Lutte contre la violence et le désordre dans le sport"; la corruption qui est la tricherie en vers le skor du match ou de compétion sportive.

La violence dans le sport comprend bien sur l'homicide, les voies de fait mais comme dans les réglementations du Conseil de l'Europe, on parle ici d'une violence dite sportive comme hooliganisme, porter atteinte a l'intégrité corporelle des hommes de sport et aussi les actes contre les biens de l'environnement du sport comme le fait jeter les pierres ou les bouteilles au stade etc. Dans les faits cités il y'en a d'entre eux qui sont à la fois prévus par

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2 BOUCHET Patrick/CASTEL Philippe/LACASSAGNE Marie-Françoise, *"Comment analyser les relations déviantes potentiellement violentes ou discriminatoires dans le spectacle sportif au stade?",* in Sport Science Review, vol. XX, No. 1-2, April 2011, pp. 139 (pp. 137-165). DOI: 10.2478/v10237-011-0051-6.

3 ÖZBEK Veli Özer/KANBUR Nihat/DOĞAN Koray/ BACAKSIZ Pınar/TEPE İlker; *Türk Ceza Hukuku Özel Hükümler,* Seçkin, Eylül 2014."

4 ERKİNER Kısmet, *Hukuk Boyutunda Doping*, Nobel Yayın Dağıtım, Ankara Şubat 2006, p. 231.

la Loi 6222 et les réglements des Fédérations sportives et il y'en a qui sont prévus simplement par les réglements qui sont considérés moins importants et moins dangeureux. Au-delà de l'affirmation des faits, il nous faut examiner les types de délinquance causés par les hommes du sport comme le sportif, le spectateur, l'organisateur etc. Chacun a le droit de pratiquer de l'activité sportive qui lui convient mais bien sur avec le respect aux régles des principes.

Par cette perspective, pour pouvoir comprendre les raisons de la tragédie dans le sport, il faut montrer les facteurs de la délinquance dans le sport. Par la compréhension des facteurs on peut échapper des délits. Mais une fois qu'un acte dit délit ou crime soit commis, il faut préciser la responsabilité pénale du fait des activités sportives en droit[5], surtout en droit pénal Turc.

II. Les Causes de Délinquances dans le sport

Les causes de délinquance dans les sports sont très variées et parfois change d'après la nature du sport. La variance dépend principalement de la société, de son histoire et c'est la raison pour la quelle la détermination des causes de délinquance dans le sport est un des problématiques des sociologues et des criminologues. Comme disait NUYTENS en décrivant la violence sportive, *"la violence se traduit de manière différentes en fonction de la dynamique des groupes, de leur histoire rythmée par des contentieux, du rôle et de la position occupée par le ou les supporters violents"*[6]. Les causes de délinquances non seulement la violence mais pour les autres faits illégals aussi, il faut au moins démontrer les points de repères. Notre objectif pour ce travail, est de montrer les causes reconnues et générales pour toute sorte des sports. En effet, il semble qu'il ya un multiple des comportements déviants, violents ou discriminatoires dans le milieu sportifs[7].

- Comme dans toutes sortes de criminalité, en criminalité sportive on constate que la premiere raison de délinquance est la société. La nature, la culture et la perception sociale est l'une des facteurs de la criminalité sportive. Par exemple la plupart des cas de violence fait provoquer par les goupes de meme classe sociale. Donc la société est le point de départ des causes de délinquance dans le sport.

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5 SCHILD Wolgang, *Antrenörün, Hakemin ve Seyircinin Ceza Sorumluluğu*, çeviren: HAKERİ Hakan, in: "Spor ve Ceza Hukuku"-Karşılaştırmalı Güncel Ceza Hukuku Serisi 1, Seçkin, Ankara 2004, pp. 41-59.

6 NUYTENS Williams, *"La violence dans les stades de football. Eléments d'étiologie à partir du cas des autonomes du Racing Club de Lens"*, in: Revue internationale de Criminologie et de Police technique et scientifique, Volume LV, No:3, 2002, Juillet-Septembre, p. 295 (pp.277-300).

7 BOUCHET/CASTEL/LACASSAGNE,Comment analyser les relations déviantes potentiellement violentes ou discriminatoires dans le spectacle sportif au stade, p. 144. ;

- L'aspect économique du phénomène est la deuxième raison de la criminalité dans le sport. Pour tous les cas de délinquaces dites sportive comme la violence, le doping, la tricherie, la corruption, on constate que le facteur économique est le plus important. Du sportif au spectateur, les participants à l'activité sportive, les parieurs, le peuple du monde sportif veut profiter de cet acte qui est à la fois spectacle, à la fois business.
- La victoire est l'une des facteurs de délinquance en sport. La réussite dans le milieu sportif entraine un pouvoir et un nouveau mode de vie et aussi la chance du choix entre les meilleurs clubs. C'est la raison pour la quelle un sportif n'hésite pas d'utiliser la substance ou les méthodes en question dite doping[8].

Nous pouvons multiplier les facteurs ou les raisons de délinquance dans le milieu sportif mais tous vont être les dérivées de ce qu'on a cité. L'homme dépendant de sa classe sociale, veut gagner quelque soit l'argent, la victoire, en faite un statut économique élevé. Ce la s'explique par le coté ludique du sport[9]. Tout cela est lié bien à la psychologie de la personne. Les parieurs veulent gagner un peu plus, l'organisateur veut profiter de son organisation, le sportif veut la réussite et tout cela entraine d'abord la faute au fair play puis les crimes.

Dans ce cas là, il faut se demander comment lutter avec ce phénomène? Chaque pays qui participe aux organisations sportives nationales ou internationales a ses propres codifications comme la Turquie. C'est la raison pour la quelle dans la deuxième partie de cette présente contribution, nous voulons aborder le problème de la responsabilité pénale du fait des activités sportives en cas de commission des crimes par les agents sportifs d'après le droit pénal turc.

III. La responsabilité pénale du fait des activités sportives

La responsabilité pénale du fait des activités sportives est un sujet nouveau dans le droit pénal turc. La nouveauté n'est pas de connaitre les actes sportif comme les faits justificatifs, ce qui est nouveau, c'est de définir les crimes dites sportives comme la corruption, les matchs fixés, les paris sportifs truqués, les actes de violence contre les biens sportifs etc.. Le doping aussi est une sorte de corruption[10] mais il n'est pas considéré comme un acte criminel mais un

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8 MIMIAGUE Marie-Jose, *"Le Problème du Doping en Droit Pénal Comparé",* Thèse pour le doctorat en Droit présentée et soutenue le 16 Juin 1973, Université de Bordeaux I, sh. 8-9.

9 DEFRANCE Jacques, *Sociologie du sport,* La DECOUVERTE, Paris 1995, p. 11 ets..

10 La Corruption dans le sport: Une réalité, voir le site internet; https://www.coe.int/t/dg4/epas/Source/Ressources/EPAS_INFO_Bures_fr.pdf; 11/12/2015.

acte illégal prévu par les Réglements disciplinaires des Fédérations. Pourtant l'usage des substances ou des méthodes considéré à la fois drogue, à la fois doping, dans ce cas là le fait est considéré un acte criminel prévu dans le code pénale. Ces actes de nature sportive, c'est à dire les actes qui peuvent se faire seulement à l'occasion d'une compétition sportive ont été abordé et déterminé par une loi en 2011 par la loi 6222. Jusqu' à cette loi édite, il n'existait pas de règles pénales spécifiques en Turquie qui concernent les délits commis par les hommes sportifs, les spectateurs. Dans ce travail, on ne va pas aborder en détail le problème du fait justificatif mais on veut essayer de montrer les actes sportifs déterminés comme crime; la raison de les déterminer comme crime et la responsabilité pénale du fait de ces activités dites sportives[11] mais en réalité non-sportives, contraire au fair play. Comme LAPOUBLE cite dans son livre "*"les valeurs sportives"marquent le pas face aux valeurs fondatrices des régimes démocratiques"*[12].

A. Activité sportive: Jusitification du régime de résponsabilité pénale

Comme nous l'avions remarqué qu'il n'existait pas de règles pénales spécifiques en droit turc qui concernent les délits commis par des sportifs, ce qui signifie que les sportifs doivent être soumis aux dispositions pénales ordinaires. Cela cause aussi l'intervention minimale du juge pénale aux affaires sportifs[13]. Il faut donc souligner que seules les infractions commises par négligence ou celles de peu de gravité pourront tomber sous le coup de l'immunité. Il faudra alors se demander les risques et les dangers inhérents à un sport déterminé sont tels qu'ils dépassent les bienfaits qu'on peut raisonnablement en attendre. Pour resoudre ce probléme, il faut examiner les cas par le principe du consentement de la victime, le principe de l'activité autorisée, l'acceptation des risques et la permission du droit.

Le fameux principe du consentement de la victime (volenti non fit injuria) dépend du consentement du sportif qui participera à la compétition mais il faut bien dire qu'aujourd'hui, cette thèorie est rejeté par la plupart de la doctrine[14].

Quant au principe de l'activité autorisée, ceci est plus délicat par rapport au consentement dela victime puis que l'activité est autorisée par des législations. La base de références est juridique. Comme nous l'avions précité d'abord la Constitution, les lois des organisations sportives et ses textes, ses réglements etc.

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11 SCHILD, *Antrenörün, Hakemin ve Seyircinin Ceza Sorumluluğu*, pp. 41-43

12 LAPOUBLE Jean-Christophe, *"Droit du Sport"* , L.G.D.J., p. 188.

13 LAPOUBLE; *"Droit du Sport",* p. 183.

14 HOTİN, Sefkat; "La responsabilité pénale des sportifs", in in Aspects pénaux du droit du sport, Collection CIES, Staempfli Editions SA Berne.2002, p.121, (p.117-134).

En effet, le risque accepté non plus n'exclut pas la possibilité de sanctionner la maladresse ou l'imprévoyance et, à fortiori, la volonté de nuire, c'est pourquoi a été condamné un joueur de football coupable de brutalités prohibées par les règles du jeu. En revanche, le fait pour un footballeur de fracturer, au cours d'une partie, la jambe d'un adversaire ne constitue pas le délit de blessures involontaires dès lors que, dans la phase de jeu au cours de laquelle s'est produit l'accident, il a, sans qu'il puisse lui être reproché une imprudence ou une négligence, pratiqué un acte autorisé par les règles du sport.

Dans les sports qui ne comportent pas précisément de violence mais qui présentent un certain nombre de dangers, comme les sports de montagne, l'imprudence ou l'imprévoyance peuvent également être retenues par les tribunaux. Le ski de fond ou l'escalade comportent, des risques objectifs (tempêtes, chute de pierres) ou subjectifs (chutes). Mais si le skieur ou l'alpiniste, se fiant aux conseils d'un guide, subit un dommage par la faute, l'imprudence ou l'imprévoyance de celui-ci, les tribunaux en se livrant à une appréciation in concreto de la situation peuvent retenir la responsabilité pénale.

En revanche, lorsque le sport n'est ni violent ni dangereux par nature, les décisions de justice peuvent être sévères. La seule réalisation d'un dommage suffit alors à caractériser l'imprévoyance, cause du préjudice. La finalité de la jurisprudence est, ici, d'assurer au mieux la réparation du préjudice de la victime.

En effet, il n'est pas exagéré d'affirmer qu'il n'y a pas à proprement parler de droit de la responsabilité sportive. C'est bien au droit commun de la responsabilité que demeure soumise l'activité sportive. Elle n'échappe donc pas à la loi commune. La pratique d'une activité sportive, par essence à risque, est l'occasion de différents préjudices causés par le sportif. Que la victime concernée soit un autre sportif, un spectateur, l'organisateur ou encore l'arbitre notamment, elle invoque régulièrement devant les tribunaux différents arguments juridiques pour obtenir une réparation du préjudice subi. Les responsabilités, qu'elles soient civile ou pénale, le sportif, en lien avec l'activité qu'il exerce, constituent une première source de contentieux. La relation entre le droit de la responsabilité et l'exercice d'une activité physique et sportive ne peut se limiter à l'unique analyse des éléments qui concernent le sportif à l'origine du préjudice qui affecte une tierce personne. Au-delà de cet analyse, d'autres intervenants sont susceptibles d'être directement concernés par une éventuelle mise en oeuvre de leur responsabilité. Tel peut être le cas des organisateurs, des spectateurs ou des arbitres[15] et plus généralement toutes personnes qui interviennent dans le cadre de l'organisation d'une

[15] SCHILD, *Antrenörün, Hakemin ve Seyircinin Ceza Sorumluluğu*, pp. 41-59.

activité sportive au cours de la quelle un préjudice est causé et doit être réparé. Quelque soit la personne physique ou morale, toute personne est responsable de son acte[16]. Pourtant en droit turc, la personne morale n'est pas responsable pénalement d'après l'article 20 du CPT.

B. Les Crimes Sportives prévues par La Loi 6222

La loi 6222 de "Lutte contre la violence et le désordre dans le sport" est la base des crimes spécifiques du sport qui date le 14 Avril 2011[17]. Cette loi en réalité n'est pas la première loi prévoyant les actes délictuels. Avant cette loi il existait une autre loi de même nom datant 2005 prévoyait des contraventions dont les sanctions étaient administratifs. Mais cette loi n'a pas eu de pouvoir empêcher les faits et le législateur a décidé de faire une autre loi que l'on peut appeler une loi pénale spécifiques aux actes violents ou aux actes qui peuvent provoquer la violence au domain sportif.

On peut citer les crimes prévues dans cette présente loi comme; La manipulation du match (match fixing) ou la trucage, l'injure par la voie de discrimination, vente illégale des billets de compétition, porter des gangs, nuiser les biens etc..

La manipulation illégale de compétition sportive était interdite par les réglementations sportives, mais par la loi 6222, elle est acceptée et décrite comme une crime et une sorte de corruption. La peine prévue pour cette crime était de 5 ans jusqu'au 12 ans de prison et une somme de peine pécuniaire. Mais cette peine a été considéré tres lourd et après quelques mois de l'entrée en vigueur de la loi, le législateur a changé la peine et ce qui est aujourd'hui de 1 à 3 ans d'emprison et une somme de peine pécuniaire.

IV. Conclusion

En conclusion, la responsabilité pénale se distingue de la reponsabilité civile alors que le responsabilité civile a une vocation réparatrice du dommage causé, au travers de l'allocation de dommages-intérêts, la responsabilité pénale a une fonction exclusivement punitive. Celui qui commet une infraction prend le risque outre l'engagement de sa responsabilité civile, de se voir attribuer une ou plusieurs peines: amende, emprisonnement, confiscation etc. La responsabilité pénale est intimement liée à la commission d'une infraction. La détermination du responsable dépend des règles générales relatives à la responsabilité pénale, de l'identification de celui qui commet les faits répréhensibles et de l'identification des infractions intéressant la pratique du sport comme la violence, le doping et la corruption à part les infractions contre la vie et contre l'integrité du corps humain.

16 LAPOUBLE; *Droit du Sport,* pp. 183-185.

17 DONAY Süheyl, *"Sporda Şiddet ve Düzensizliğin Önlenmesi ve Şike ve Teşvik Primi*", 2.ve Güncellenmiş Bası, İstanbul 2012, p.84.

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GENERAL EVALUATION OF FOOD REGULATION IN TURKISH CRIMINAL JUSTICE SYSTEM[1]

(Türk Ceza Adaleti Sisteminde Gıda Düzenlemelerine Dair Genel Değerlendirme)

Asst. Prof. Dr. Hasan SINAR - Asst. Prof. Dr. R. Murat ÖNOK

ABSTRACT

Current improvements on medical science, demonstrates that the relation between nutrition and health is much stronger than former assumptions. Therefore, the violation acts on the process of the production, conservation and launching to the market of the food -as the main nutrition source- may create direct harmful results on human health. Thus, the establishment of an effective penalisation mechanism against the violating acts on food safety turned into a fundamental necessity for the protection of the public health. In Turkish criminal law, the acts violating the food safety are designed under the headline of "crimes against public health" in the Art. 185-186 of Turkish Penal Code, Law No. 5237. Moreover, Biosecurity Law, No. 5977 which enacted in 2010 contains criminal provisions that are specifically designed to prevent the risks arised from the products of genetically modified organisms (GMO). In this article, the fundamentals of the criminal law tools on the struggle against violations of food safety will be examined. Within this scope, in particularly the current legislation will be questioned to reveal the certain missing points. In sum, it is aimed to contribute to shape a more effective mechanism against the violations of food safety.

Key Words: Food, food safety, public health, turkish criminal justice system, turkish penal code, biosecurity law.

ÖZET

Tıp bilimindeki güncel gelişmeler, beslenme ile sağlık arasındaki ilişkinin geçmişte zannedilenden çok daha güçlü olduğunu ortaya koymaktadır. Bu nedenle, temel beslenme aracı olan gıdanın üretilmesi, muhafaza edilmesi ve piyasaya sürülmesi sürecindeki ihlal fiilleri, insan sağlığı üzerinde doğrudan çok ağır sonuçlar yaratmaktadır. Şu halde, kamu sağlığının korunması yönünden, gıda güvenliğini ihlal eden davranışlara karşı etkin bir cezalandırılma mekanizmasının kurulması temel bir zorunluluk haline dönüşmüştür. Türk ceza hukukunda, gıda güvenliğini ihlal eden davranışlar esas itibarıyla "kamu sağlığına karşı suçlar" başlığı altında, 5237 sayılı TCK'nın 185 ve 186. Maddelerinde düzenlenmiştir. Bunun yanısıra, 2010 yılında yürürlüğe konulan 5977 sayılı Biyogüvenlik Kanunu'nda da spesifik olarak GDO'lu ürünlerden kaynaklanan riskleri önlemek üzere ceza normları ihdas edilmiştir. Bu çalışmada, kısaca, Türk hukukunda gıda güvenliğini ihlal eden fiillere karşı ceza hukuku araçlarıyla mücadelenin esasları incelenecektir. Bu bağlamda özellikle, mevcut yasal düzenlemelerin sorgulanması suretiyle, mevzuatın bazı eksik yönleri ortaya konulacaktır. Bu şekilde, gıda güvenliği ihlalleriyle etkili bir mücadele mekanizmasının inşasına katkı sağlanması amaçlanmıştır.

Anahtar Kelimeler: Gıda, gıda güvenliği, kamu sağlığı, Türk ceza adaleti sistemi, Türk Ceza Kanunu, Biyogüvenlik Kanunu.

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I. GENERAL CONCERNS ON FOOD REGULATION AND CRIMINAL JUSTICE IN TURKEY

1) The Concept and Scope of Food that is Adopted in Turkish Criminal Law

Although the right to safe food is protected at the constitutional level, the Turkish legislation on the issue is criticized on account of its' disorderliness and lack of homogeneity leading to an inefficient management of food security[2].

The term "food" is defined in the Law numbered 5996 on Veterinary Services, Plant Health and Food and Feed (Art 3/24)[3]. According to the aforesaid article:

"Food is, with the exception of animals not provided for direct human consumption, new unharvested plants, medical products used for treatment purposes, cosmetics, tobacco and tobacco products, narcotics, psychotropic products, residues and contaminants; any processed, partially processed or unprocessed item edible or drinkable by human, or water, or any item that is used in the production, preparation or process of any product, beverage or gum."

It can be conferred from this definition that in the context of Turkish Criminal Law, food is interpreted expansively as to cover all edible and drinkable (digestible) materials, thus excluding cosmetics, narcotics, medical and tobacco products.

2) The Interaction Between Administrative Sanctions and Criminal Sanctions

In Turkish Law, the right to safe food is viewed under the protection of public health as an element of public order[4]. Because the protection of public health is primarily dealt with under the policing duty of the administrative branch, the authorities to implement regulatory actions, and the application and supervision of the relevant regulations are primarily of an administrative nature. This results in the prioritization of administrative sanctions by general police, municipality police and other relevant law enforcement agencies in case of conduct violating food security[5].

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2 Emin **Koç,** « Gida Güvenliği ve Kamu Sağlığının Korunması », Türkiye Adalet Akademisi Dergisi, Y : 6, Sy : 22, Temmuz 2015, p. 396. Ö Utku Çopur-Senem **Yonak-**Ayşegül **Büyükkoyuncu,** *"Gıda Güvenliği ve Denetim Sistemi,"* p. 10, http://www.zmo.org.tr/resimler/ekler/6bf16f1f0372a63_ek.pdf (Last access date: 03.10.2016).

3 Official Journal of 13.06.2010, No: 27610.

4 Mustafa Özen, *"Kamu Sağlığına karşı İşlenen Suçlar",* İstanbul Üniversitesi Hukuk Fakültesi Mecmuası, C: LXVI, Sy: 2, 2008, p. 163.

5 Kemal **Gözler,** İdare Hukuku Dersleri, 8. Baskı, Bursa, 2008, p. 267; Ramazan Çağlayan, İdari Yaptırımlar Hukuku (Kabahatler Kanunu Yorumu), Ankara, 2006, p. 69; Zeynel **Kangal,** *Kabahatler Hukuku,* İstanbul, 2011, p. 238.

Pursuant to the principle of legality, criminal law may only be applied when the act violating food security is specifically provided in the Turkish Criminal Code or another code regulating an offence.

The distinction between administrative sanctions and criminal sanctions is a formal one. A criminal offence must have been specifically defined in a criminal law statute or other statute including provisions of a criminal nature. According to Art. 45 of the Turkish Penal Code (Law no. 5237) the sanctions applicable to criminal offences are imprisonment and judicial fine. Where the sanction imposed for the violation of an offence is neither one, it is an administrative sanction[6]. Administrative sanctions are imposed directly through administrative decisions taken by applying administrative procedures[7]. It is possible, however, to have these sanctions annulled by objecting to "judges of the peace", which are single-judge institutions established in every city.

As there is an organic and qualitative difference between administrative and criminal sanctions, there is no problem as regards the principle of *ne bis in idem*[8]. Unless otherwise indicated in the law, the two can be applied cumulatively. For example, Art. 32 of the Misdemeanors Code (Law no. 5326) prescribes as an administrative offence the failure to comply with lawful orders issued by competent authorities for the purpose of, *inter alia*, protecting "general (public) health". According to Art. 15 (3) of the same law, where a conduct constitutes both a criminal and an administrative offence, only the criminal provision shall apply; the misdemeanor shall only be punished under the Law no. 5326 where it does not constitute a criminal offence. Where there is no such special provision, the administrative and criminal sanctions may be applied conjunctively. This is because the principle of *ne bis in idem* only prevents multiple sanctions of the same character or nature for the same conduct[9].

In the context of acts violating food security and the protection of public health, administrative regulations are applied efficiently. The same is valid for the protection of consumers through civil law. Thus, it would be accurate to say that Turkish criminal law is *ultima* rather than *prima ratio* in the protection of food security.

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6 Bahri Öztürk-Mustafa Ruhan **Erdem**, *Uygulamalı Ceza Hukuku ve Güvenlik Tedbirleri Hukuku,* 16. Baskı, Ankara, 2016, mn. 229; Kayıhan İçel, Ceza Hukuku Genel Hükümler, 6. Bası, İstanbul, 2014 pp. 59-60.

7 **Kangal,** p. 245.

8 **Kangal,** p. 6.

9 Timur **Demirbaş**, Ceza Hukuku Genel Hükümler, 11. Baskı, Ankara, 2016, p. 58; Ali Kemal **Yıldız,** *"Kabahatler Kanunu – Uygulama ve Sorunlar",* Emniyet Genel Müdürlüğü TCK-CMK-Kabahatler Kanunu ve İlgili Yönetmeliklerin Uygulamalarının Değerlendirilmesi Semineri Tebliğleri, Ankara, 2006, p. 194.

3) Criminal Liability of Legal Persons in Food Fraud Cases

In principle, the criminal responsibility of legal persons is not accepted in Turkish Criminal Law[10]. According to Art. 20 (2) TPC, no criminal sanction may be applied to legal persons, however the "security measures" provided in the Code may be applied. According to Art. 60 TPC, the measures in question consist of either "confiscation" or "withdrawal of the licence" (to operate). According to Art. 60 (4) these measures may only be applied where the law specifically so provides. In other words, the provision regulating a given crime must specifically indicate that security measures may be applied to legal persons.

According to Art. 60 (1), the licence to operate may be revoked under the following conditions[11]:

- There must be a private legal person operating under the permission of a public institution,
- An intentional crime must be committed
- The crime must be committed to the benefit of the legal person
- The crime must be committed with the participation of the organs or representatives of the legal person
- The crime must be committed by misusing the permission granted by the public institution.

However, the judge may refrain from revoking the licence if such measure would cause consequences which exceed the results of the crime, eg, if many innocent people were to lose their job as a result of revoking the licence – thus the principle of proportionality applies[12].

The rules governing confiscation are regulated in Arts. 54-55 of the Penal Code.

In addition, Article 43A of the Misdemeanours Code, added in 2009, provides for administrative fines to be applied on legal persons in case of certain corruption-related crimes committed to the benefit of the legal entity

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10 Mehmet Emin **Artuk-**Ahmet **Gökçen-**A. Caner **Yenidünya,** *Ceza Hukuku Genel Hükümler,* 9. Bası, Ankara, 2015, p. 284.

11 **Artuk- Gökçen- Yenidünya**, p. 960-961; Öztürk-Erdem, mn. 535; **Demirbaş**, p. 662; Mahmut **Koca** – İlhan Üzülmez, Türk Ceza Hukuku Genel Hükümler, 9. Baskı, İstanbul, 2016, pp. 642-643.

12 **Koca**-Üzülmez, Türk Ceza Hukuku Genel Hükümler, 9. Baskı, İstanbul, 2016, p. 643 ; **Demirbaş**, p. 661; Nevzat **Toroslu**-Haluk **Toroslu**, *Ceza Hukuku Genel Kısım*, 21. Baskı, Ankara, 2015, p. 450; İçel, p. 638.

by its' organ or representative, or any person who performs a duty in the framework of the activities of the legal person[13]. Note, though, that this is a sanction of an administrative nature. The crimes in question are the following:

- Swindling
- Bid-rigging
- Fraud during the discharge of contractual obligations with public institutions
- Bribery
- Laundering of proceeds deriving from a crime
- The crime of embezzlement in Art. 160 of the Banking Law
- Smuggling crimes defined in the Law no. 5607 on the Fight against Smuggling
- The crime described in Add.Art. 5 of the Law no. 5015 on the Petrol Market
- The crime of financing terrorism described in Art. 8 of the Anti-Terror Law (no. 3713)

In practice, criminal sanctions are used against natural persons pursuant to Arts. 185 and 186 of the TCC. However, the provisions in question do not indicate that legal persons may be imposed security measures.

Therefore, it must be stated that the subjective responsibility of natural persons is prioritized in any case.

The rule of excluding criminal liability for legal persons is generally accepted in Turkish criminal law academic writings and practice[14]. Although there is a minority view arguing for the implementation of criminal responsibility on legal persons[15], it does not seem likely that it could lead to a reform project since the overwhelming majority opines in the opposite direction. However, the Turkish Constitutional Court is of the view that imposing criminal liability on legal persons would not be in violation of Art. 38 of the Turkish Constitution of 1982 which states that "penal liability is personal"[16].

It has to be noted that certain international instruments dealing with the fight against corruption, and ratified by Turkey, require sanctions to be imposed on legal persons. Examples are the OECD Convention on Combating Bribery of

13 Berrin **Akbulut,** *Türk Ceza Kanunu ile Kabahatler Kanununun Genel Hükümlerinin Yaptırım Hükümleri Dışında Karşılaştırmalı Olarak İncelenmesi,* Ankara, 2010, p. 32.

14 **Artuk- Gökçen- Yenidünya**, pp. 281-282; **Demirbaş**, p. 237; **Toroslu-Toroslu,** p. 372; İçel, p. 251; **Koca-Üzülmez**, p. 108; Özgenç, p. 192; **Zafer**, p. 151.

15 Doğan **Soyaslan**, *Ceza Hukuku Genel Hükümler*, 6. Baskı, Ankara, 2014, p. 544.

16 Judgment of 14 February 1989, Official Journal of 4 February 1991, No. 20776.

Foreign Public Officials in International Business Transactions, and the Council of Europe Criminal Law Convention on Corruption (Art. 18). However, the legislator's response has been to add Art. 43A to the Misdemeanors Code, as explained above. This is in compliance with the conventions in question which do not oblige party States to implement sanctions of a *penal* nature.

II. Criminal Law Dimension of Food Regulation

1) Food Fraud Cases in General

There is growing public awareness as regards food security violations in Turkey. On this account, many non-governmental organizations such as the Food Security Association (www.ggd.com.tr) emerged in the last years, and these NGOs play an especially important role in the management of the legal procedures against corporations violating food security regulations.

In this context, the most important food fraud case we could identify is the case in which it was revealed that Milupa Corporation had been using GMOs (genetically modified organisms) in the Aptamil baby formula. When it was established that GMOs have been used in the baby formula although they are expressly prohibited and criminally sanctioned by the Biosecurity Law, a legal procedure was initiated against the directors of the company by the Ministry of Food, Agriculture and Livestock. Moreover, many families feeding their babies with this formula have made official criminal complaints against the directors[17].

Other than this case, there have been many applications to the "Alo 174" hotline (www.alo174.gov.tr) established by the Ministry of Food, Agriculture and Livestock for consumer complaints on food security violations. However the relevant data is not shared with the public because of personal data confidentiality issues.

2) The Practical Importance of Food Fraud Offences Designed to Protect Food Safety

Crimes concerning food safety are regulated under the heading entitled "Crimes Against Public Health" (Arts. 185-196) of the Turkish Penal Code[18]. Although this section includes crimes such as the trade of spoiled or altered food (art. 186), other crimes such as the production, trade or usage of drugs (Arts. 188 ff) are also embodied in this section. According to the Legal Registry Statistics for the year 2015 provided by the Ministry of Justice, 123320 criminal

[17] http://www.gidahareketi.org/Ailelerden-Milupa-ya-Dava-Hazirligi-1909-haberi.aspx (Last access date: 04.10.2016)

[18] Özen, *"Kamu Sağlığına karşı İşlenen Suçlar",* p. 164.

cases were initiated for crimes against public health in that year[19]. However there is no specification in the statistics as to how many cases were initiated for which specific crime. Therefore it is not possible to determine the number of cases concerning crimes on food safety. Nonetheless, it would be safe to argue that the number of cases in the statistics largely comprises narcotic crimes, and crimes concerning food safety are more rare in practice.

3) Specific Cases of Food Fraud in Turkish Criminal Law:

a. The hoarding of food in order to alter its value

The acts against food safety are in principle dealt with under the aspect of protecting public health. However, acts directed at obtaining un unlawful unfair advantage by food engrossing are criminalized under both the prior Penal Code numbered 765, and the current TPC numbered 5237 (entry into force: 1 June 2005). According to Art. 240 TPC entitled "Avoidance of sale of product or service", anyone who creates an urgent need in the public by avoiding the sale of a certain product or the provision of a service, is punished by imprisonment between 6 months and 2 years[20].

b. The manipulation of price in markets for derivatives based on food commodities

According to Art. 237 TPC entitled "Affecting Prices", spreading false information or using other unfair methods with the purpose of, or in a manner suitable to increase or decrease workers' wages or the price of **food** or products is punishable by imprisonment from 3 months to a year, and a judicial fine. The punishment is increased by one third if the act results in the increase or decrease of workers' wages or the price of food or products. The punishment is also increased by one eighth if the perpetrator is a licensed broker or stoke broker[21].

c. Is it possible to apply the provisions on genocide or crime against humanity for the destruction of a particular ethnic group or for holding a part of the population hostage by provoking a famine or contaminating water resources?

The crime of genocide and crimes against humanity are regulated under, respectively, Art. 76 and 77 of the TPC[22].

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19 http://www.adlisicil.adalet.gov.tr/istatistik_2015/CEZA/33.pdf. (Last access date: 04.10.2016)

20 Refer to Zeki **Hafızoğulları** – Muharrem Özen, *Türk Ceza Hukuku Özel Hükümler – Topluma Karşı Suçlar,* Ankara, 2012, p. 433-434 for detailed information.

21 Refer to **Hafızoğulları** –Özen, pp. 420 et seq. for detailed information.

22 Refer to Durmuş **Tezcan** – Mustafa Ruhan **Erdem** – R. Murat Önok, Teorik ve Pratik Ceza

According to article 76, genocide is the perpetration of the following acts under a plan, against the members of a national, racial, ethnic or a religious group with the purpose of the destruction of the group in part or in whole:

a) Intentional killing
b) Gross damage to physical or psychological integrity
c) Forcing the group to live under circumstances that may lead to their destruction in part or in whole.
d) Taking measures aimed at preventing childbirth in the group
e) Forcibly transferring the children of the group to another group.

As can be seen, apart from the "plan" element, and certain discrepancies in the definition of the underlying acts, the definition mirrors the one provided in the 1948 UN Genocide Convention[23]. Therefore, the acts of causing famine or contamination of water sources are not expressly criminalized. However, it is our opinion that the clause in TPC Art. 76/1(c) (Forcing the group to live under circumstances that may lead to their destruction in part or in whole) is suitable to be interpreted in a manner including the acts of provocation of famine or contamination of water sources. In addition, these acts, if committed with the requisite intent, may also fall under subparagraphs (b) and (c). As a result, it may be argued that the provision on genocide is applicable provided that the acts in question are committed with the requisite *dolus specialis*, ie with the aim of the partial or complete destruction of a group (as such).

Crimes against humanity is regulated under Art. 77 TPC. According to the article, the commission of any of the following acts is considered a crimes against humanity if committed according to a plan and systematically against part of the society, and under political, philosophical, racial or religious motives:

a) Intentional killing
b) Intentional wounding
c) Torture, tormenting or enslavement,
d) Restriction of personal freedom,
e) Subjecting a person to scientific experiments,
f) Sexual assault, sexual exploitation of children,
g) Forced pregnancy,
h) Forced prostitution

Özel Hukuku, 12. Baskı, Ankara, 2015, pp. 54 et seq. and Durmuş **Tezcan** – Mustafa Ruhan **Erdem** – R. Murat Önok, Uluslararası Ceza Hukuku, 3. Baskı, Ankara, 2015, pp. 465 et seq. for detailed information.

[23] **Tezcan-Erdem-Önok**, Ceza Özel, p. 55.

Of the underlying crimes exclusively listed in Art. 77, the provocation of famine or contamination of water sources may at best fall under subparagraphs (a) or (b), provided that the act is intended to cause such results. Furthemore, depriving a person of his or her liberty is specifically included as an underlying crime.

Note, however, that the TPC, in variance with customary international law[24], requires the existence of *dolus specialis* in the form of an *animus discriminandi* for resorting to the provision on crimes against humanity[25]. Further note that the *chapeau* element of crimes against humanity as defined in our law requires the existence of a systematic attack (against the population), excluding the established option of a large-scale attack[26], embodied in the Rome Statute of the International Criminal Court, and part and parcel of customary international law[27]. On the other hand, the words "against part of the society" can be interpreted as meaning "any civilian population", in accordance with customary international law[28].

d. The application of sanctions for crimes against intellectual or industrial property to Turkish farmers that have reused seeds from earlier harvests

The protection of plant seed in the context of crimes against industrial property is regulated under the Law on the Protection of Reclamation Rights on New Plant Kinds numbered 5042 (dated 2004). Art. 56 of this law lists the acts which violate reclamation rights and Art. 66 provides for punishment of imprisonment from 1 to 2 years and a judicial fine up to 1000 days[29] for the perpetrators of such acts.

The unauthorized usage of seeds left from the previous harvest is not listed as a violation of reclamation rights under Art. 56 of the law. Therefore, it is not possible to apply the provision in question to farmers committing such an act.

e. The application of aggravating circumstances intended to sanction unfair administration or undue appropriation of humanitarian under the principle of territoriality

The crimes of embezzlement (Art. 247), abuse of office (Art. 257 (1)) may come into play a "public officer" unlawfully manages or unlawfully confiscates

24 **Tezcan-Erdem-Önok**, Uluslararası Ceza, p. 503.
25 **Tezcan-Erdem-Önok**, Ceza Özel, p. 82.
26 **Tezcan-Erdem-Önok**, Ceza Özel, pp. 490 et seq.
27 **Tezcan-Erdem-Önok**, Uluslararası Ceza, p. 503.
28 **Tezcan-Erdem-Önok**, Ceza Özel, p. 73.
29 According to Art. 52 (2) TPC, each day is multiplied with an amount of money varying from 20 to 100 Turkish Lira. The daily amount is determined by the judge by taking into account the perpetrator's economic and other personal situation. "Other personal situation" also refers to conditions of a financial nature (**Artuk- Gökçen- Yenidünya**, p. 877).

humanitarian aid. Where the perpetrator is not a public official, the misuse of humanitarian aid may result in the crimes of abuse of trust (Art. 155) or fraud/swindling, all embodied in the Penal Code. In this context, if the crime of fraud is committed by "exploitation of religious belief or emotions", it constitutes an aggravating circumstance (Art. 158/1(a)) and the punishment is increased (imprisonment of two to seven years, in addition to a judicial fine of up to 5000 days. Whether this aggravating circumstance can apply will depend on the way the crime is committed.

Where the crime is committed abroad: The principle of territoriality is valid in Turkish Law in principle (Art. 8 TPC) and Turkish courts are competent only in cases of crimes committed in Turkey. A crime is considered to have been perpetrated in Turkey if the act is partly or fully committed in Turkey or the result of the crime occurs in Turkey (Art. 8 (1)). However, Turkish Courts have jurisdiction to try crimes committed outside Turkey under certain circumstances. The conditions for a crime committed outside of Turkish territory to be brought before a Turkish Court are determined under Arts. 10-19[30].

Firstly, Turkish Courts are competent if the crime is committed by a person carrying out a duty on behalf of Turkey, and in the exercise of such duty, even if there has been a conviction by a foreign court on the matter (Arts. 9-10)[31].

Secondly, the active personality principle may apply. If the perpetrator of a crime committed outside of Turkish territory is a Turkish national, Turkish Courts are competent if: (i) the act requires a punishment of imprisonment of at least one year, (ii) the perpetrator is in Turkish territory, (iii) there has been no conviction for this act by a foreign court, and (iv) the act is prosecutable in Turkey (Art. 11 (1)). If the act requires less than one year of imprisonment, a complaint by the victim or by the foreign government (ie, the government of the state where the crime was committed) is required (Art. 11 (2)). Where funds belong to an international organization, and the crime has been committed abroad, this option is the applicable one[32].

Finally, the passive personality principle may apply. In case of a crime committed outside of Turkish territory by a foreigner against Turkey, Turkish Courts are competent if: (i) the act requires a punishment of at least one year of imprisonment according to Turkish law, (ii) the perpetrator is in Turkish territory (Art. 12 (1))[33].

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30 Refer to **Tezcan-Erdem-Önok**, Uluslararası Ceza, pp. 115 et seq. for detailed information.
31 **Artuk-Gökçen-Yenidünya,** p. 1043.
32 **Artuk-Gökçen-Yenidünya,** pp. 1063-1068.
33 **Artuk-Gökçen-Yenidünya,** p. 1069.

In case the crime is committed against a Turkish national or a private legal person established according to Turkish law, Turkish Courts are competent if: (i) the act requires a punishment of at least one year of imprisonment according to Turkish law, (ii) the perpetrator is in Turkish territory, (iii) no judgment has been rendered on account of the same act by a foreign court, and (iv) the injured party has lodged a complaint (Art. 12(2))[34].

4) Criminal Liability for Deaths and Injury as a Consequence of the Production and Commercialization of Harmful Foodstuffs.

a. The factual causation ("condition sine qua non test") between the harmful foodstuffs and the deaths or injuries established

In Turkish Law, there is no specific provision governing the relation of causality amongst the rules in the general part of the Criminal Code. In academic writings, however, the great majority of writers adopt the *conditio sine qua non* theory, and some amongst these writers restrict this theory through the further application of the German-based "objective imputability" principles[35]. However, the Court of Cassation has in the past relied on the "adequate causality" theory[36], whereas more recent judgments seem to rely on the *conditio sine qua non* theory.

These theories and criteria are also applicable in the determination of the relation of causality with regard to deaths and injuries occurring as a result of production and trade of hazardous food products.

According to the adequate causality theory[37], in order to be regarded as a "cause", the condition shall be generally "appropriate and suitable" to realize a given consequence. A person shall not be held responsible for a result that is outside of his domination, and therefore not predictable to himself or himself. If the adequate causality theory is applied, production and trade of hazardous food products may be an effective cause for the result of death or injury. However, all other causes that are influential to the consequence, for instance the failure to comply with the storage conditions of food product or the consumption after the expiry date are taken into account. Within these causes, the ones that are not generally adequate to create the result of death or injury will be disregarded, and causality will be established between the consequence and the most appropriate cause.

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34 **Demirbaş,** p. 174.

35 For some of the criteria that may be employed to this end refer to Öztürk-Erdem, pp. 205-209; **Hakeri**, pp. 202 et seq; **Koca-Üzülmez**, pp.. 132-134; Özbek *et al*., pp. 248 et seq.

36 **Centel-Zafer-Çakmut,** pp. 279-281.

37 **Centel-Zafer-Çakmut,** pp. 274-276; **Zafer**, pp. 211-213; **Koca-Üzülmez**, pp. 130-132 ; İçel, pp. 267-268.

There is no need to explain the meaning of the commonly well-known *conditio sine qua non* theory. It suffices to show that had any given factor not existed, the result in question would not have materialized. In this sense, the harmful foodstuff need not be the only cause of the harmful result. However, the contribution of this factor to the harmful result must be established beyond reasonable doubt. This will be a matter determined by expert witnesses. Furthermore, the perpetrator may escape liability by proving that the same harmful result would have occurred even if the product had not been consumed[38]. There is no judicial guidance as to what level of certainty would be required in this aspect.

In addition, according to the circumstances of the case, so-called criteria concerning the "objective imputability" of the result to the perpetrator may be applied in order to restrict the responsibility of the producer. Academic writings have diverging interpretations of this institution and the Court of Cassation, to our knowledge, has never openly relied on these criteria to exclude liability. However, "voluntary assumption of the risk"[39], where the victim knowingly puts himself or herself under peril, may preclude the perpetrator's liability. This may be the case, for example, with the consumption of expired products, or of harmful products which have been so-declared publicly and recalled by the firm.

b. Negligent actions of the victim that are taken into account in deciding on the criminal liability of the manufacturer of a defective product

In applying the adequate causality theory, it is important to identify whether the negligent act of the victim "cuts/severes" the relation of causality between the defect of the producer in the manufacture of the product and the result that took place.

In this context, for instance, although a food product is defected, if it is consumed by the consumer/victim after the expiry date, this inattentive act of the victim is taken into account.

However, if the same result would have occurred even if the victim had consumed the product prior to the expiry date, the negligent act of the victim does not have any effect on the responsibility of the producer.

c. Refusal to withdraw products where its' harmful effects were unknown when offering them on the market

Where the dangerous effects of a product were unknown to the producer, the following conditions must be cumulatively satisfied to escape criminal liability based on negligence: (i) all necessary research in order to learn about

[38] **Centel-Zafer-Çakmut,** p. 269; İçel, p. 264; **Koca-Üzülmez**, p. 127.
[39] **Hakeri**, pp. 202-203.

possible detrimental effect must have been conducted before the launch of the product to the market, and the producer must have displayed or the attention and diligence that might be expected of him or her, and (ii) the producer must still have been unable to find out about the detrimental effects.

When these conditions are met, since the legal order cannot impose on anyone an impossible duty, and as the producer is unaware of the detrimental effects of the product despite all of the sufficient efforts, he or she shall not be held liable due to the subsequent detrimental effects.

Where the producer is later put on notice or has learnt about the possible detrimental effects, and refuses to recall the products despite this information, then criminal liability may arise. In fact, in such case we are of the opinion that criminal action may be based, according to the circumstances of the specific case, not only on inadvertent/unconscious negligence, but on advertant/conscious negligence, or even on *dolus eventualis* of the producer. This determination will depend, of course, on factors such as what the producer exactly knew, the level/degree of foresight about the harmful consequences, the degree of action or inaction, the probability of the harmful consequence occurring, *etc*.

d. The duty of due diligence obliging operators *(managers)* to verify the quality of food

Although it might be said that the managers who are on a later step in the distribution chain than the producers carry a secondary responsibility, managers also have an important role in the food or supply chain, which shows that they always face a risk of encountering criminal responsibility.

The criminal responsibility of a manager may come into play when the regulations to conserve the food delivered by the producers are not adhered to.

However, there is also a responsibility to show care in the inspection of the quality of the product delivered to them. This issue has indeed been subject to a judgment of the high court in a case related to the sale of counterfeited alcoholic drinks by businesses. In a case where a business manager was selling counterfeited alcohol which was therefore obtained at lower prices instead of alcohol products bearing revenue stamps, the Court of Cassation has held that it is not reasonable within the natural flow of life that the manager did not know the product was not original, and concluded that that the manager had intentionally violated his obligation to inspect the quality of the product he was selling, thus holding him criminally responsible[40].

[40] Judgment, 8th Criminal Chamber of the Court of Cassation, Date: 29.02.2000, No. 1996/12626, 2000/2052.

Regardless of this obligation to verify the quality of food, it should also be stressed that, the fact of being in compliance with the legal norms relating to product safety may not by itself automatically exclude criminal liability for the commission of crimes of manslaughter or negligent bodily harm. In criminal law, there is only one origin of subjective responsibility resulting from negligence and that is not foreseeing a dangerous or harmful consequence or not preventing such a consequence although foreseeing it, because of a breach of the duty of care[41]. For this reason, merely adhering to legal norms related to food safety may not suffice to rule out responsibility based on negligence. The only way to avoid responsibility based on negligence is not to fulfill all the elements required for criminal negligence. These conditions are that[42]: (i) the crime is one which may be committed negligently, (ii) the act is voluntary, (ii) there exists a link of causality between the conduct and the harmful consequence, (iv) that the unwanted consequence is foreseeable. If any of these conditions is not met, responsibility based on negligence is discarded.

e. The awareness of the manufacturer on the health risks attached to food products

In cases where the manufacturer is aware of the health risks attached to food products, he may not be sanctioned for an offence committed with criminal intent or for an offence that carries the same sentence as an offence committed with criminal intent. First of all, it is important to stress that he manufacturer's awareness does not imply that he accepts or wants the harmful effects to manifest.

Criminal responsibility caused by eventual intent may not arise merely when a producer who is aware of the health risks connected to food products, continues the production although he/she foresees that harm to human health or even death or injury may occur because of this production.

Our penal code refers to "probable intent" which exists when '*the individual commits an act while foreseeing that the elements in the legal definition of an offence may occur*' (Art. 21 (2) TPC). This provision has led to academic criticism in that it fails to make any reference to the will component of intent[43]. There are different theories explaining this component *dolus*

41 Özgenç, p. 246; **Koca-Üzülmez**, pp. 193-195.

42 Öztürk-Erdem, pp. 289 et seq. ; **Artuk-Gökcen-Yenidünya**, pp. 339 et seq.; **Toroslu-Toroslu,** pp. 221 et seq.; İçel, pp. 406 et seq.; **Demirbaş**, pp. 387 et seq.; **Hakeri**, pp. 254 et seq.; **Centel-Zafer-Çakmut**, pp. 376 et seq.; Özbek *et al*., pp. 514 et seq.; **Zafer**, p. 266.

43 Öztürk-Erdem, mn. 497 ; **Demirbaş**, p. 380; **Artuk-Gökcen-Yenidünya**, p. 308 ; **Centel-Zafer-Çakmut**, p. 369; İçel, p. 396; **Koca-Üzülmez**, p. 165 ; **Soyaslan**, p. 429; **Hakeri**, p. 234 ; Özbek *et al*., p. 274.

eventualis cases[44]: for example, theory of possibility, theory of probability, various normative theories, various volitive theories (indifference theory, approval theory). The 'consent (approval) theory' (*rıza/kabullenme teorisi – Einwilligungs-Billigungstheorie – criterio del consenso* (*della ratifica*)) seems to be prevalent in Turkish academic writings: *dolus eventualis* exists when the perpetrator commits the act while foreseeing that the result may occur (or, depending on the view adopted, taking this probability seriously), and, from the viewpoint of the will component of intent, consenting to or accepting the possibility that the foreseen result may occur[45]. Therefore, a perpetrator acts with *dolus eventualis* if he foresees the result's occurrence as possible and accepts the fact that his conduct could cause the result. The Court of Cassation also requires the proof of an element of acceptance or approval of the result[46].

Therefore, unless it is proved that the producer has "accepted/approved/consented to" the harmful result, academic writings and the Court of Cassation will not resort to the provisions on "probable intent".

5. Other Crimes Against Food Safety

a. Offenses against food safety both in the Turkish Penal Code (TPC)

Some of the crimes against food safety are regulated in the TPC under the heading entitled "Crimes Against Public Health". On the other hand, there are some special laws like the Biosecurity Law that provides for certain crimes aimed at protecting food safety.

The most salient crimes on the subject in the TPC are the crime of "contamination of food with poisonous materials" (Art. 185) and "trade of spoiled or altered food" (Art. 186).

According to Art. 185 TPC, contaminating drinking water or any type of food or material that is to be eaten or used or consumed with poisonous material or spoiling these in any other manner so as to endanger people's lives or health shall be punished with a term of imprisonment of 2 to 15 years. The commission of these acts by breach of the duty of care is punishable by imprisonment between three months and a year[47].

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44 **Artuk-Gökcen-Yenidünya**, p. 309.

45 Öztürk-Erdem, mn. 498; **Artuk-Gökcen-Yenidünya**, p. 308; **Toroslu-Toroslu,** p. 206; **Demirbaş**, p. 371; **Hakeri**, p. 234; **Centel-Zafer-Çakmut**, p. 364; **Koca-Üzülmez**, p. 165; **Soyaslan**, p. 429; Özbek *et al*., p. 275; **Zafer**, p. 241.

46 For example, Grand Chamber judgment of 26 May 2015, No. 618/164.

47 Refer to **Hafızoğulları**-Özen, pp. 78 et seq. for detailed information.

As can be seen, both the intentional and negligent commission of the crime is penalized. Note, however, that the mere conduct of poisoning or in any other manner spoiling certain food or drinks does not constitute the crime in question. Such conduct must create a concrete risk: people's lives or health must have been put at risk. In this sense, this is a crime constituted by concrete endangerment of the protected legal value[48]. Merely contaminating natural sources such as water may be punished under Articles 181-182 TPC prohibiting the pollution of the environment (the former article punishes the intentional commission of the crime, the latter punishes the negligent version).

According to Art. 186 TPC, anyone who sells, provides or possesses spoiled or altered food in a manner endangering people's lives and health is punishable by imprisonment between one year and five years and a judicial fine of up to one thousand and five hundred days. If the crime is committed during the carrying out of a profession or art based on an official permit, the punishment is increased by one third.

The perpetrator need to infringe upon food regulations in order to commit an offence against food safety. The purpose of food regulations in Turkish Law is mainly to provide for food safety by securing the technical and hygienic production, process, conservation, storage and marketing of the food product. Hence, the food safety regulations firstly determine the minimum technical and hygienic standards of food producing companies. Thus, there must be an act violating food safety regulations for the crimes concerning food safety in either the penal code or special laws to materialize. It is not possible for an act that does not violate food safety regulations to constitute the elements of a crime concerning food safety.

b. The legislation policy of criminal offences to sanction the production or marketing of fraudulent foods

The most basic penal norm concerning the punishment of production and trade of counterfeit food products is the Art. 186 TPC mentioned above. Fiveyears of imprisonment is applicable for this crime and the punishment may be increased by one third if the crime is committed during the carrying out of a profession or an art based on an official permit.

Other than this crime, the penal regulations regarding products with GMOs provided in Biosecurity Law Art. 15 is also important. According to Art. 15/1, the import, production, or dispersion to the environment of GMOs and products with GMOs is a crime punishable by imprisonment from 5 to 12 years and a judicial fine of up to 1000 days.

[48] **Hafızoğulları-**Özen, p. 80.

Again, pursuant to Biosecurity Law Art. 15/2, usage, exposure for sale, sale or transfer of GMOs or products with GMOs exported or produced in accordance to the standards provided by law, outside the purposes or area designated by law; or purchase, acceptance, delivery or possession of such a product with commercial purposes, knowing its status is a crime punishable by imprisonment between 4 to 9 years and judicial fine up to 7000 days. With regard to the latter part of the criminal definition the word "knowing" makes it clear that these acts (purchase, acceptance, delivery or possession) are only punishable when committed with direct intent.

Finally, according to Biosecurity Law Art. 15/3, the usage, exposure to sale, sale, transfer of products obtained by GMOs exported or processed in accordance with the standards determined by law outside the purposes or area designated by law or the purchase, acceptance, delivery or possession of such products knowing their status is a crime requiring a punishment of imprisonment between 3 to 7 years and a judicial fine of up to 3000 days.

c. Responsibility of the actors in different steps of the food production and distribution chain

The food industry consists of different actors carrying out subsequent responsibilities. Hence, we may think of different actors within the chain that leads to the consumer: production, distribution, transport, storage, presentation to the consumer, etc.

When the offences concerning food safety in Turkish Law are considered as a whole, it may be seen that the TPC does not make a distinction between different phases of the food production and provision chain in the legal definitions of crimes and the determination of any such distinction is left to judicial practice. For this reason, the judge or court will use judicial discretion to decide upon the criminal responsibilities in each case according to the specific circumstances of each situation.

A distinction between different phases is made in the Biosecurity Law in the provision regarding food safety violations concerning products with GMOs, and conduct related to each phase constitutes a different crime requiring differing punishments.

The offences in Arts. 15/2 and 15/3 Biosecurity Law may also be mentioned as specific criminal definitions that sanction the traffic of prohibited substances, because of the danger that they may enter the human food chain (pesticides, fattening substances, prohibited hormones, cattle feed, additives…), even though they have still not been used.

In Turkish law, the non-withdrawal of harmful foods, the harmfulness of which became known after it was made available to consumers may also be sanctioned. In such a case, punishment of acts concerning an intentional violation of the obligation to withdraw harmful products is implemented pursuant to Art. 186 TPC.

d. Other General Considerations

In principle, the offences defined to protect food safety do not require the perpetrator to hold a specific quality. In other words, offences concerning food safety can be committed by anyone, the perpetrator need not bear a special quality or characteristic. However, as it may be seen in the example of Art. 186 TPC, the commission of these crimes by taking advantage of attributes facilitating its' commission is considered as an aggravating circumstance increasing the penalty.

In Turkish law, there are no offences where a regime of objective liability is applied. As a constitutional principle laid down in Art. 38, and as also emphasized in Art. 20 TPC, criminal responsibility is personal and no one can be held responsible for another person's action in Turkish Penal Law. This basic principle is also valid for offences concerning food safety and there is no provision regulating objective responsibility (strict liability) regarding offences concerning food safety.

There is also no offence designed of poisoning in which a person intentionally adulterates food or water supplies with the purpose of inflicting death or serious harm to the health of an indeterminate number of people. However, if all other conditions are met, the crime of genocide or crimes against humanity may come into play in such a case. We are also of the opinion that such action could constitute the aggravating circumstance of the crime of intentional killing, namely "intentional killing with bestial sentiments" (Art. 82/1(b) TPC), which is punishable by aggravated[49] life imprisonment.

As a general principle, legal persons cannot be held criminally and/or civilly liable for these offences. As explained above, in Turkish law, legal persons may not be imposed criminal punishment but only sanctions qualifying as security measure (Art. 20/2 TPC). In addition, according to Art. 60 (4), such security measures may only be applied with regard to crimes in which the law specifically indicates that such measures may be applied.

In the case of commission of an act violating food safety in the course of the functions of a legal person, the criminal responsibility of the natural

[49] In contrast to (normal) life-time imprisonment, the enforcement regime is much more strict, and the rights of the convict are fewer in number and narrower in scope.

persons in managing positions acting as the organ of the legal person would come into play. As for legal persons, Arts. 185-186 TPC do not allow for the imposition of security measures on legal persons.

As for violations of the relevant provisions of Art. 15 of the Biosecurity Law, if these crimes are committed in the framework of the activities, and to the benefit, of a legal person, this legal person may be imposed an *administrative* fine which ranges from 100000 to 200000 Turkish Lira. In addition, Art. 60 TPC may also apply (confiscation and withdrawal of the license to operate).

In case the offence was committed by a subsidiary company, the liability of the parent company should also be argued. In such a case, the relationship between the organs of the controlling company and the affiliated company must be analyzed. If the affiliated company organs have participated in the commission of the crime by means of instigation, instruction or inducement of the organs of the controlling company, the responsibility of the controlling company's organs will arise. However, if the controlling company is not in any way involved in the commission of the crime, the controlling company cannot be held responsible merely on account of the actions of the affiliated company.

Regarding the question of the most-frequent sanctions for these offences, it is certain that the most implemented sanction in practice is a judicial fine. Prison sentences are rare on these matters. In case of the implementation of security measures, the withdrawal (cancellation) of the license to operate is imposed on legal persons.

The participation of organized crime is also not frequent in the production, distribution, transport, storage, etc. of harmful foods. As far as we could determine, crimes concerning food safety do not manifest themselves in the form of crimes in which persons in the production and distribution chain act in concert and in which the provisions on participation may be applied, but they rather emerge as individual acts committed by a single actor within the chain.

6. Principle of Precaution and Assessment of Health Risks

The application of Turkish criminal law always require recognition of an actual danger to consumer health[50]. Thus, mere production and/or marketing of products which would (hypothetically), in the case of consumption, be harmful, is not sufficient in itself to constitute an offence. Indeed, when the offences in the TPC are analysed, it may be seen that both the crime of contamination of water with poisonous material (Art. 185) and the crime

[50] Özen, *"Kamu Sağlığına karşı İşlenen Suçlar",* pp. 165, 174 and 182.

of trade of spoiled or altered food require a concrete danger to manifest itself, thus falling under the category of crimes constituted by concrete endangerment of the protected legal value[51]. As explained before, for the crimes under Arts. 185 and 186 TPC to apply, people's lives or health must be endangered by the act. This means that in our system, the existence of an abstract threat caused merely by the commission of the act is not sufficient.

The severity of the sentences of food safety offences increase in the last link of the food chain that brings the product to the consumer and it is not of greater relevance to those who have prepared, stored or trafficked harmful foods[52]. In this context, when the offences provided under the Biosecurity Law are examined, the offences foresought for the person producing or importing the product with GMOs provides for a higher penalty than the offences punishing persons selling or trading such products. Therefore, it would not be wrong to state that the penalty increases as the offence is further from the consumer in the food chain[53].

However, if a food (e.g. a novel food) needs authorization for its commercialization, it is not designed as an offence to commercialize it without prior authorization in Turkish law. In other words, there is no specific penal norm regulating non-authorised food commercialization conduct in our criminal law system.

It also does not constitute a criminal offence to market foods in breach of food regulations that enforce the principle of precaution, without demanding further confirmation of harmfulness in the criminal context. For an act to constitute a crime against food safety, it is not sufficient that it only violates food safety regulations; the act must, pursuant to the principle of legality in crime and punishment, also be expressly provided in the law as a crime. In the context of acts that could be encountered on this issue, we have already stated that a concrete danger is required for the crime of trade of spoiled or altered food to apply. Thus, it does not suffice that food is marketed in a way violating food safety regulations, there must also be evidence proving that such marketing act has created a concrete danger to people's lives and health.

The determination of the harmfulness of a product is an important problem. In this respect, firstly it has to be determined whether the product is harmful for consumers in general or is it enough for it to be harmful to a particular group (children, people with kidney disease…). Eventhough the Code has not

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51 **Hafızoğulları**-Özen, p. 80.

52 M. Fadıl **Yıldırım,** *"Genetiği Değiştirilmiş Ürünlerden Sorumluluk",* Sorumluluk ve Tazminat Hukuku Sempozyumu (28-28 Mayıs 2009), Ankara, 2009, p. 258.

53 Mustafa Özen, *"5977 Sayılı Biyogüvenlik Kanunu'nda Düzenlenen Suçlar",* Türkiye Barolar Birliği Dergisi, Sy: 113, 2014, p. 302.

sought for harm and the threat of harm is deemed sufficient for the relevant provisions to apply, there is no specification as to whom the threat of harm should be directed against. In other words, in the Turkish criminal justice system, a violation of food safety regulations endangering people's lives or health is sufficient and the crime is completed in case the product creates a threat of harm for anyone.

The application of the sanctions to making food available to consumers that is unfit for human consumption, although not necessarily harmful, is also another problem. In this case, it must again be examined whether the product not suitable for human consumption creates a threat for human lives or health. If such a threat cannot be proven, implementation of a sanction against the users of the product is not possible.

As a further note, academic writings have diverging view as to the nature of the requirement that the act must create a concrete danger of harm. Is this an element of the crime or is it an "objective condition for punishment"? We are of the opinion that the emergence of such danger should be considered an element of the crime[54]. In that case, in case of Art. 185 (1) the intent of the perpetrator must also cover the possibility of damage. This is by virtue of Art. 21 (1) which states that intent must cover all the elements in the legal definition of the offence, or to better phrase it, intent must cover all the material (objective) elements in the definition of the offence. When this approach is adopted, the perpetrator may also be punished for the attempted commission of the crime. The same reasoning applies to the crime laid down in Art. 186 (1). As regards the negligent commission of the crime (Art. 185 (2)), the emergence of a risk must be foreseeable to hold the perpetrator accountable.

In case of adopting the view that the emergence of a concrete danger constitutes an objective condition for punishment, the intent of the perpetrator need not cover such danger[55]. However, in this case, the perpetrator can only be punished in case such danger arises, otherwise, the perpetrator cannot be punished based on the provisions regarding attempted crime[56].

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54 For the opposite opinion see Özgenç, p. 650; **Demirbaş,** p. 208.

55 **Centel-Zafer-Çakmut**, p. 212; Öztürk-Erdem, mn. 238; **Toroslu-Toroslu,** p. 455; **Demirbaş,** p. 209; Özgenç, p. 651; **Koca-Üzülmez**, p. 359; **Soyaslan**, p. 231 ; Özbek et al.,p. 466; **Zafer**, p. 392.

56 Öztürk-Erdem, mn. 240; **Demirbaş,** p. 210; İçel, p. 215; Özgenç, p. 651; **Koca-Üzülmez**, p. 360; Özbek et al.,p. 467.

7) Food Fraudulent Activities in Turkish Law

a. General Concerns

Because of the fact that administrative sanctions have priority on acts violating food safety in Turkish Law, the criminal cases on the issue have a very limited field of application. In addition, there are significant difficulties in reaching the records of these cases. An important example of a case that is related to food sold to consumers fraudulently is the case in which Kahta Criminal Court of First Instance has convicted a business manager who sold spoiled poultry to consumers to one year of imprisonment pursuant to Art. 186 TPC[57].

On the other hand, a variety of cases in which counterfeit alcohol products have been sold to consumers have been reported in the press. For example, in October of 2015 12 persons have been killed due to "false" alcohol[58]. In 2011, 5 Russian tour guides have also lost their lives as a result of consuming "false" drinks containing high concentrations of methyl-alcohol[59]. As these cases have resulted in death or danger of death, criminal cases have been based on the crimes of negligent or intentional homicide. According to the specific circumstances of the case, suspects have been convicted either based on advertant negligence or *dolus eventualis*.

In 2012 a member of the opposition party has submitted a proposal to the parliament which would have added Art. 183A to the Turkish Penal Code, imposing a term of imprisonment between 2-8 years to anyone who produces alcoholic drinks without a permission or licence. However, this proposal was not followed through by the Parliament.

b. Misleading Advertisements on Fraudulent Products

Turkish criminal justice system foresee no offences other than fraud which are intended to punish the commercialization of food that, because of its presentation, may be misleading with regard to its quality and quantity. The commercialization of fraudulent product generally comes into question in Turkey in the context of advertisements concerning food supplements with misleading content. There are efforts taken against these advertisements by the Ministry of Customs and Trade. There have been hefty sums of administrative fines enforced against these misleading advertisements by the

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57 For the complete Turkish text of the judgment see http://www.gidahareketi.org/Files/bozuk-tavuk.pdf.

58 http://www.haberturk.com/gundem/haber/1146203-istanbulda-sahte-ickiden-10-kisi-oldu [retrieved 09.08.2016)

59 http://www.milliyet.com.tr/antalya-da-5-icki-markasina-yasak-geldi/ekonomi/ekonomidetay/30.06.2011/1408718/default.htm [retrieved 09.08.2016)

"Board of Advertisement". However, the creation of a specific type of crime on this issue is not at hand.

Moreoever, there is no type of crime regulating the commercialization of misleading products and the production of misleading advertisement. In Turkish Law, it is only possible to apply the provisions on "Crime of Unfair Competition" pursuant to Art. 62 of Turkish Commercial Code if the act in question violates the rules of fair competition. In our opinion this is a serious deficiency in the fight against food safety violations through criminal law and there is an urgent need for the creation of a penal norm that is efficient and proportionate to the importance to the issue.

Misleading advertising or deceptive marketing of foods or of the product characteristics can be linked to the following aspects:

- Quantity and quality of the food (horse meat instead of beef)
- Origin of the ingredients of the product
- Denominations of origin
- Nutritional values and effects (slimming products …)
- Natural or ecological nature (free of certain substances, waste products, free of GM foods)
- Medicinal properties of the food
- Food production that is respectful of basic working rights and other human rights (fair trade)

Misleading advertisement means all advertisement that may mislead the target audience and lead the target to error regarding the advertised product. The standards to be adhered to on the subject of advertisements of food products is provided expressly in Art. 6 of the 2011 Turkish Food Codex Labelling Regulation. According to the article, labelling of food may not be misleading as to any of the following:

Qualities of the food; especially its nature, identification, specifications, composition, amount, durability, country of origin, method of production or facility.

Referencing effects or specifications the food does not possess,

Emphasizing a qualification that the product possesses or the existence or lack of a specific component or nutritional element although the product shares the same qualifications with similar products,

Using appearance, definition or visuals that emphasize the existence of a component in the product although such naturally existent or normally used component has been substituted with a different one.

The sanctions that are envisaged should vary in accordance with the aspect of the food product at the centre of the deceptive marketing campaign. However, in Turkish law, the basic sanction in this context is an administrative fine and it may not be said that sanctions differ in accordance with the field of the food product. There is also a need for a special definition or aggravating factor for those cases in which false or misleading marketing can affect consumer health.

Again in Turkish law, there does not seem to be an application of aggravating circumstances in such cases of misleading advertisements. However, the maximum available administrative fine is imposed. It must also be noted that an act that could harm consumer's health may constitute the crime provided under Art. 186 TPC.

III. International Trafficking of Foods and Harmful Substances

As a matter of international trafficking, it has to be examined whether it should be designed as an offence in home country to market foods that are legally produced in other countries, but that contravene the legislation in force in the home country.

In Turkish law, this issue has only been regulated as an offence in the context of products with GMOs under the Biosecurity Law Art. 15/2,3. According to the article; usage, exposure for sale, sale or transfer of products with GMOs exported or produced in accordance to the standards provided by law, outside the purposes or area designated by law is an offence.

It should also be discussed whether it is legally acceptable to produce food in the home country destined exclusively for export, with significantly lower levels of food safety than legally required at home, but which are legal in the country to which they will be exported.

In Turkish law, it is necessary for every food product produced in Turkey to be in conformity with food safety standards. Therefore, the production of a food product not in accordance with food safety standards on the argument that it will be exported to a country with lower standards is legally unacceptable.

Another problem is, whether it is legally acceptable for legal persons – or their subsidiaries- to be able to produce or to distribute foods in other countries, with a notably lower food quality than legally required in the country where those legal persons have their headquarters. In the same vein with the above explanation, according to Turkish law, the location of the head offices of legal persons or affiliated corporations or the level of food safety standards of the country of head offices is irrelevant. The only criterion on this

subject is the necessity of production in accordance with Turkish food safety standards.

Accordingly, there is no legal requirement to comply with the quality standards applicable in other countries at the production phase.

In addition, hormones, herbicides or other substances that are illegal because they are harmful to health in Turkey may not be produced or exported to other countries where they may be acceptable. In Turkish Law, it is not possible to produce or export hormones, herbicides or other product that is prohibited by Turkish Law because of their harmful effects to health.

IV. Prevention and Enforcement

In the fight against food safety offences, the role of the food inspectorate in the prosecution of these offences has a decisive role. Thus, it has to be carefully designed to what extent the institution of criminal proceedings depend on its active involvement.

In Turkish law, the Ministry of Food, Agriculture and Livestock has intervened in criminal cases of these crimes as third party in the past. In some cases, victims of food fraud have contacted the Ministry, which has then taken an active role in the investigation by informing the relevant State prosecutor of the complaints and by following the subsequent criminal proceedings. It should be noted that consumer associations may also intervene as third parties.

There also has to be an agency that specializes in investigating food fraud. The functions and effective powers of investigation of this agency should be designed by law. Such an organ is also supposed to have the possibility of cooperating with similar (administrative) agencies from other states.

In Turkish law, a "Food and Control General Directorate" has been established under the Ministry of Food, Agriculture and Livestock. Under this General Directorate there are controlling officers in all 81 cities of Turkey which carry out the duties of supervision and official control of food selling and producing businesses with the purpose of protection of food safety and public health. When international cooperation on the issues of food safety is required, official assistance functions are carried out by the General Directorate. This unit also intervenes in criminal cases as a third party.

The most effective units other than the directorate are local authorities (administrations). Every local administration (municipalities) has a municipal police (constabulary) unit which has an important duty in the protection of food safety pursuant to the Municipal Police Organization Regulation Art. 10.

However, as far as we could determine, there are no special units which have duties concerning food safety violations under the central police force, the Offices of State Prosecutors or Tax Administration Departments.

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LA FONCTION ECONOMIQUE DE L'IMPOT

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RESUME

L'impôt représente la plus importante ressource afin de financer les dépenses publiques. L'impôt est un instrument très important de la politique économique et financière de l'Etat. La fonction classique de l'impôt sert à la couverture globale de la charge publique. Par contre, l'impôt est utilisé non seulement comme un moyen de financement des charges de l'Etat, mais aussi comme un moyen d'intervention dans le domaine économique et social. Selon les Etats, le rôle de l'impôt varie en fonction de leur politique fiscale et financière.

L'impôt est un instrument de régulation de l'économie. Une relation stricte existe entre l'impôt et la vie économique. Lorsque l'on aborde la fonction économique de l'impôt, il nous faut également traiter l'interventionnisme de l'Etat et le rôle de la fiscalité incitative. En effet, l'impôt peut être utilisé à des fins diverses : pour le développement des investissements étrangers ou nationaux, pour la protection ou le développement d'un secteur industriel, commercial, agricole, etc. De même, pour lutter contre la crise économique, l'impôt peut être utilisé comme un moyen. L'efficacité de la politique fiscale pour résoudre les problèmes d'instabilité durant la crise économique est bien connue.

Mots clés: Les fonctions de l'impôt, l'incitation fiscale, la politique fiscale, l'économique crise, les investissements

ÖZET

Kamu harcamalarının finansmanında vergi en önemli kaynaktır. Vergi, Devletin mali ve ekonomik politikaları açısından da çok önemli bir araçtır. Verginin klasik fonksiyonu kamu giderlerini karşılamaktır. Buna karşılık, vergi sadece devletin giderlerini karşılamak için kullanılan bir kaynak değildir, vergi aynı zamanda ekonomik ve sosyal alana da müdehale aracıdır. Her devletin kendi mali ve vergisel politikalarına göre verginin fonksiyonu değişebilmektedir.

Vergi, ekonominin düzeltilmesi için de kullanılılabilir. Ekonomik hayat ile vergi arasında sıkı bir ilişki bulunmaktadır. Verginin ekonomik fonksiyonu dediğimiz zaman, devletin vergi teşvikleri yolu ile ekonomiye müdehale etmesi anlaşılmaktadır. Milli ve yabancı yatırımları geliştirmek için, tarım, ticaret, sanayi gibi belirli bir alanı geliştirmek veya korumak gibi farklı amaçlar için vergi kullanılabilir. Bununla birlikte, ekonomik krizlerle mücadele edebilmek için de vergi bir araç olarak kullanılabilmektedir. Ekonomik kriz dönemlerinde ekonomideki problemleri çözmede vergi politikalarının etkililiği bilinen bir durumdur.

Anahtar Kelimeler: Verginin fonksiyonları, vergi teşvikleri, vergi politikası, ekonomik kriz, yatırımlar

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INTRODUCTION

L'impôt, au sens général, est une participation aux dépenses publiques que l'Etat prélève sur les revenus des personnes physiques et morales. Selon Gaston Jèze[1], « L'impôt est une prestation de valeur pécuniaire, exigée des individus d'après des règles fixes, en vue de couvrir des dépenses d'intérêt général et uniquement en raison du fait que les individus qui doivent le payer sont membres d'une communauté politique organisée». Cette définition est considérée comme la plus classique et la plus connue par Michel Bouvier[2]. Dans cette définition, la capacité contributive du contribuable n'est pas précisée, mais afin de réaliser l'équité fiscale, le législateur doit toujours prend en compte la capacité contributive du contribuable. Cela est important en matière de justice fiscale.

Il est incontestable que l'impôt qui constitue la part la plus importante des recettes de l'Etat[3], est nécessaire pour financer ses dépenses et celles des collectivités territoriales. La fonction classique de l'impôt sert à la couverture globale de la charge publique. Il s'agit là de sa fonction budgétaire. L'Etat doit encaisser correctement les impôts pour lui permettre de couvrir les dépenses publiques. Plusieurs facteurs doivent intervenir pour la mise en œuvre et la réalisation de ce principe fondamental, comme la sincérité de la déclaration, la régularité du contrôle fiscal, l'application correcte du principe de déductibilité des charges, etc.

L'article 3 de loi organique relative aux lois de finances (LOLF) en France définit les ressources budgétaires de l'Etat. « Les seules ressources fiscales de l'Etat sont constituées par les impôts »[4]. L'impôt représente la plus importante ressource [5] afin de financer les dépenses publiques. Il est certain qu'il est

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1 JEZE, Gaston (1930) **Cours de finances publiques 1929-1930**, Paris, Marcel Giard, p. 354. Selon lui, il faut avoir « six éléments essentiels, irréductibles de l'impôt moderne » : une prestation pécuniaire, sans contrepartie, un paiement forcé, des règles fixes, une destination d'utilité publique et enfin l'impôt dû par les individus.

2 BOUVIER, Michel (2012) **Introduction au droit fiscal général et à la théorie de l'impôt**, 11ème edition LGDJ, p.23.

3 SAÏDJ, Luc (2003) **Finance Publique**, 4ème édition Dalloz Paris, p. 363 : Les impôts directs et indirects constituent 90% des recettes budgétaires de l'Etat.

4 CAMBY, Jean-Pierre (2011) **La réforme du budget de l'Etat, la loi organique relative aux lois de finances**, 3ème édition, L.G.D.J Paris, p. 30.

5 SAÏDJ, p. 363. En France, les recettes fiscales nettes dans la LPF 2012 étaient de 272,5 milliards d'euros et, pour 2013, elles sont de 298,5 milliards d'euros (http://www.economie.gouv.fr/files/projet-loi-finances-2013-plf-chiffres-cles.pdf consulté le 11 avril 2013). En Turquie, dans le budget de l'Etat pour 2015, les impôts directs et indirects constituent 89,% des recettes budgétaires de l'Etat (465.229.389.397 TL). <http://gib.gov.tr/sites/default/files/fileadmin/user_upload/VI/GBG/Tablo_1.xls.htm> consulté le 11 novembre 2016.

indispensable pour financer les dépenses inscrites dans le budget de l'Etat. Les dépenses publiques sont du ressort de l'Etat. A défaut de recettes publiques, l'Etat doit trouver d'autres ressources en recourant par exemple aux emprunts d'Etat en émettant des obligations, etc. Lorsque le recouvrement de l'impôt est insuffisant par rapport aux prévisions budgétaires, un déficit est constaté. En général, l'équilibre budgétaire est toujours recherché. C'est la raison pour laquelle l'administration doit prendre toutes les mesures nécessaires afin de recouvrer correctement les impôts

En France et en Turquie, comme dans la plupart des pays modernes[6] à travers le monde, « le droit fiscal repose, pour l'essentiel, sur le principe déclaratif »[7]. Les contribuables déclarent tous les éléments nécessaires pour la détermination de leur base imposable. L'administration fiscale vérifie leur exactitude, en « évaluant la matière imposable à partir des indications portées dans les déclarations »[8]. La déclaration est un moyen d'évaluation de la base d'imposition du contribuable. Le dépôt de déclaration est une obligation qui doit être faite dans les délais précisés par la loi[9]. Tous les contribuables doivent respecter et appliquer les règles procédurales relatives à l'imposition.

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6 La fiscalité belge prévoit la déclaration des revenus des entreprises par formulaire 275-1 avant le 1er juin de l'année suivante pour les exercices clôturés au 31 décembre (Francis LEFEBVRE (2012) **Belgique, juridique, fiscal, social**, 8ème Edition, Paris, p. 243). En Espagne, l'impôt sur les sociétés doit être acquitté spontanément lors du dépôt de la déclaration de résultat, soit au plus tard 25 jours après la date de l'approbation des comptes par l'assemblée générale qui doit se tenir dans les 6 mois suivant la date de clôture de l'exercice (TIRARD, Jean-Marc (2010) **La fiscalité des sociétés dans l'UE**, 8ème éditions, Groupe Revues Fiduciaire Paris, p. 180). Aux Pays-Bas, les sociétés doivent déposer leur déclaration d'impôt sur les sociétés à la date fixée par l'inspecteur des impôts. Depuis le 1er janvier 2005, les déclarations doivent être souscrites par voie électronique. (TIRARD, p. 375).

7 LAMBERT, Thierry (1985) **Le contribuable face à l'administration fiscale** Psychologie et Science Administrative, p. 104, <http://www.u-picardie.fr> consulté le 11 novembre 2016.

8 BOUVIER, p. 42.

9 Il est possible de préciser les différentes procédures pour l'imposition des personnes physique et des entreprises. Selon la fiscalité française, « quel que soit le régime d'imposition (réel normal ou réel simplifié), l'entreprise soumise à l'IS doit déclarer son résultat obligatoirement par voie dématérialisée (par internet). Les contribuables doivent déposer leur déclaration soit dans les trois mois de la clôture de l'exercice, lorsque la date de clôture n'intervient pas le 31 décembre ; soit au plus tard le deuxième jour ouvré qui suit le 1er mai pour les entreprises dont l'exercice est clos le 31 décembre N- 1. Dans le cas de cessation de l'activité, la déclaration doit être déposé dans 60 jours. » www.impot.gouv.fr La fiscalité turque prévoit la déclaration de revenus par l'entreprise à l'article 14 de la Loi relative sur l'impôt sur les sociétés (LRIS). Les entreprises doivent déposer leurs déclarations entre le 1er et le 25ème jour du quatrième mois de la clôture de l'exercice.

Le droit fiscal turc et celui de la France acceptent une présomption de sincérité de la déclaration[10] déposée par les contribuables. Selon cette présomption, la déclaration du contribuable doit être présumée exacte par l'administration, mais l'administration peut apporter la preuve contraire dans le cadre de ses compétences de contrôle et de rectification[11]. Le contrôle de la régularité des déclarations est assuré par l'administration fiscale. Si l'administration soupçonne une irrégularité ou une fraude, elle engage la procédure du contrôle fiscal. La charge de la preuve incombe à l'administration[12]. Danıştay a confirmé cette présomption dans sa décision du 24 septembre 1986[13]. Le contrôle constitue une tâche importante de l'administration fiscale exercée dans le cadre des dispositions légales[14]. Lorsque les contribuables ne déclarent pas correctement leurs revenus, la principale source de recettes [15] de l'Etat, constituée par l'impôt et les taxes, peut ainsi diminuer.

L'impôt est un instrument très important de la politique économique et financière de l'Etat. Lorsque l'Etat ne soutienne pas les politiques monétaires et de dépenses avec les politiques fiscaux, celle-ci peut pâtir de l'absence de politique fiscale[16]. L'impôt peut être utilisé pour favoriser un secteur d'activités particulier, comme par exemple le développement des entreprises ou bien encore l'aménagement du territoire[17].

Il est incontestable que l'impôt joue un rôle financier ou budgétaire. S'agissant de l'accroissement de la population et des nouvelles technologies, l'impôt a un rôle essentiel à tenir pour satisfaire les besoins d'investissements

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10 BOI-CF-DG-10-20120912, n° 1. » L'administration fiscale française accepte que les actes ou déclarations déposés par les contribuables bénéficient d'une présomption d'exactitude et de sincérité, et les insuffisances, inexactitudes ou omissions relevées dans ces documents sont présumées être commises de bonne foi. » <http://bofip.impots.gouv.fr/> KAMOUN Fériel (2002) **La preuve en droit fiscal**, Mémoire de DEA en droit des affaires, Université de Sfax-Tunisie, p. 20.

11 BIENVENUE, Jean-Jacques, LAMBERT, Thierry (2010) **Droit Fiscal**, 4ème édition PUF, Paris, p. 122. SABAN, Nihal (2015) **Vergi Hukuku**, 7. Baskı, Beta Yayınları, İstanbul, p. 556.

12 ÖZDİLER KÜÇÜK, Eda (2011) **Vergi Hukukunda Karineler**, Adalet Yayınevi, Ankara, p. 141.

13 Danıştay 3. Daire, E.1986/364, K.1986/1749 du 24.09.1986, <http://www.vergi.tc/yargi-karar/1986-1749-1986-364/802f1a4b-4642-48b8-ab96-0c464a5e760a> consulté le 12.11.2016.

14 La loi sur la procédure fiscale turque prévoit le contenu du contrôle fiscal aux articles 127 à 152. En fiscalité française, ces dispositions sont prévues aux articles suivants : L10, alinéa 3 du LPF (la demande de renseignements), L16B du LPF (le droit de visite et saisie de documents), L80 F à J du LPF (le droit d'enquête), L16-0 BA du LPF (la procédure de flagrance fiscale), L228 du LPF (La procédure d'enquête judiciaire).

15 JEZE, p. 349.

16 KIRBAŞ, Sadık (1991) **Çeşitli Yönleriyle Vergileme Ve Türk Vergi Sistemi,** Sayıştay Dergisi, S. 3, p.4.

17 CASTAGNEDE, Bernard (2008) **La politique fiscale**, Edition de PUF , Que sais-je ?, Paris, p.5.

sociaux, résoudre les problèmes de transport, de télécommunication et d'hébergement. La responsabilité croissante de l'Etat dans le temps se traduit inévitablement par des besoins financiers, d'où l'augmentation de ses revenus au moyen de l'impôt. Parallèlement à l'évolution du rôle de l'Etat, sa fonction sociale et économique devient plus importante. L'impôt est désormais utilisé non seulement comme un moyen de financement des charges de l'Etat, mais aussi comme un moyen d'intervention dans le domaine économique et social. Selon les Etats, le rôle de l'impôt varie en fonction de leur politique fiscale et financière. Chaque pays détermine sa politique fiscale selon l'acceptation du principe de l'État social[18]**.** En fiscalité turque, cette fonction trouve sa source dans la Constitution Turque (l'art. 73) « La répartition juste et équilibrée de la charge fiscale constitue l'objectif social de la politique financière. » On constate ainsi que l'Etat doit utiliser les impôts à des fins sociales.

L'impôt joue un rôle essentiel dans l'activité économique et socio-politique de n'importe quel pays[19]. C'est pourquoi, il convient d'examiner ses fonctions économiques et sociales.

La fonction sociale de l'impôt peut être décrite comme une redistribution de revenu. Quand on aborde la fonction sociale de l'impôt, il faut se référer tout d'abord à l'un des principes fondamentaux de la fiscalité : l'imposition selon la capacité contributive. Ce principe existe depuis la déclaration du 1789[20]. Selon ce principe, les charges fiscales doivent être prélevées équitablement. Le paiement de l'impôt, selon la capacité contributive, est reconnu dans la Constitution Turque[21] et la Constitution française[22].

La fonction sociale de l'impôt se traduit par une redistribution des revenus qui peut être modulée en faveur ou en défaveur d'un groupe social[23].

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18 Au lieu des termes "l'Etat social", on peut utiliser "l'Etat providence". Ce dernier s'oppose à celle de "l'Etat gendarme". Cette expression comprend l'ensemble des interventions économiques et sociales de l'Etat. Pour plus information voir RAMAUX, Christophe (2007) **Quelle théorie pour l'État social ? Apports et limites de la référence assurantielle *Relire François Ewald 20 ans après* L'État providence**, Revue Français des Affaires Sociales, 2007/1 (no 1) p. 166.

19 GÖKBUNAR, Ali Rıza (1998) **Vergileme İlkeleri ve Küreselleşme** Celal Bayar Üniversitesi İİBF Yönetim ve Ekonomi Dergisi, S:4, p.177.

20 L'article 13 de la déclaration prévoit que « la contribution commune (…) doit être répartie entre tous les citoyens en raison de leurs facultés ».

21 L'article 73 de la Constitution turque du 7 novembre 1982 « Chacun est tenu de contribuer aux dépenses publiques en payant ses impôts selon sa capacité financière. »

22 L'article 34 de la Constitution française du 4 octobre 1958 « La loi fixe les règles concernant… la nationalité, l'état et la capacité des personnes… ».

23 LEROY, Marc (2009) **La sociologie fiscale**, Socio-logos, Revue de l'association française de sociologie(en ligne), 4/2009, mise en ligne le 7 mai 2009, <http://socio-logos.revues.org> consulté le 11 novembre 2016.

Généralement, cette redistribution peut s'effectuer par l'intermédiaire de l'impôt sur le revenu progressif des personnes physiques ou, selon le système, par la taxation des revenus des plus fortunés. L'exonération fiscale prévue par la loi constitue un des moyens de la redistribution des revenus. Les taux progressifs de l'imposition des revenus des personnes physiques sont applicables dans les systèmes fiscaux turc et français. Contrairement à la Turquie, le système fiscal français dispose d'un autre impôt sur les personnes physiques aisées. Il s'agit de « l'impôt de solidarité sur la fortune (ISF)[24] ». En 2008, il a rapporté 4,2 milliards d'euros[25] soit environ 1,5 % des recettes fiscales de l'Etat ou 0,5 % du total des prélèvements obligatoires[26]. Pour l'année 2016, si le patrimoine total des personnes riches était supérieur à 1,3 millions d'euros, elles devaient déposer leur déclaration à l'ISF avant le 16 juin 2016, accompagnée des pièces justificatives. En 2015, 342942 contribuables ont payé l'ISF et l'Etat a encaissé 5,22 milliards d'euros.

« A ces deux fonctions traditionnelles, budgétaires et sociales, s'ajoute une troisième tout aussi importante dans notre monde contemporain : il s'agit de la fonction économique qui consiste à renforcer la compétitivité des entreprises nationales »[27]. Tous les impôts ne présentent pas un égal intérêt en matière de politique fiscale conjoncturelle. La fonction économique de l'impôt s'inscrit principalement dans le cadre d'une politique structurelle ou sectorielle visant à la réalisation d'objectifs économiques ou sociaux définis par les pouvoirs publics[28].

L'impôt est un instrument de régulation de l'économie. Une relation stricte existe entre l'impôt et la vie économique. A notre époque, compte tenu de leur situation économique, les Etats ne peuvent plus être indifférents à la rentabilité et à l'efficacité de la fiscalité. L'impôt joue un rôle permettant aux gouvernements, par l'intermédiaire de leur Parlement, d'augmenter la fiscalité dans les domaines jugés non prioritaires et de l'alléger dans les secteurs jugés prioritaires.

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[24] « Les personnes physiques qui ont leur domicile fiscal en France, et qui disposent d'un patrimoine dont la valeur nette en France et hors de France est supérieure à 1,3 million d'euros au 1er janvier 2016, sont soumises à l'impôt de solidarité sur la fortune (ISF) et doivent souscrire une déclaration. Il en est de même des personnes physiques qui n'ont pas leur domicile fiscal en France mais qui y possèdent des biens d'une valeur nette supérieure à 1,3 million d'euros. » Voir <www.impot.gouv.fr> consulté le 15 novembre 2016

[25] Annuaire statistique 2008, <www.impot.gouv.fr> consulté le 15 novembre 2016

[26] Rapport sur les prélèvements obligatoires <http://www.performance-publique.budget.gouv.fr/> consulté le 15 novembre 2016

[27] BOUVIER Michel - GUENE Charles (2013) **Pour une conception claire de l'impôt,** Figaro 10 décembre 2013, <www.lefigaro.fr> consulté le 23 mars 2014.

[28] CASTAGNEDE (2008), p.8.

Lorsque l'on aborde la fonction économique de l'impôt, il nous faut également traiter l'interventionnisme de l'Etat et le rôle de la fiscalité incitative. En effet, l'impôt peut être utilisé à des fins diverses : pour le développement des investissements étrangers ou nationaux, pour la protection ou le développement d'un secteur industriel, commercial, agricole, pour la réduction de la consommation de certains produits comme l'alcool ou le tabac. Dans cette dernière situation, l'impôt joue un rôle dissuasif.

A la suite de l'examen général de ces trois fonctions, on va essayer d'expliquer, dans un premier temps, l'effet de l'incitation fiscale sur les investissements (I) en présentant les avantages fiscaux et, dans un deuxième temps, la politique fiscale en période de crise économique (II).

I - L'EFFET DE L'INCITATION FISCALE SUR LES INVESTISSEMENTS

Les incitations fiscales sont utilisées, ces dernières années, pour décourager les activités nuisibles ou encourager les activités socialement et économiquement appréciées de manière positive[29].

Les incitations fiscales peuvent être identifiées comme un soutien à l'initiative économique. Les Etats peuvent utiliser les incitations fiscales afin d'améliorer leur économie, en attirant les investisseurs dans leur pays. Les Etats adoptent ces dispositions fiscales incitatives qui peuvent se traduire par un moindre encaissement des recettes fiscales. Même si le but des Etats est louable, il est difficile d'affirmer que « *tous les incitations fiscales sont efficaces pour favoriser l'économie »*. Il convient de se poser les questions suivantes :

• Les investissements ont-ils augmenté en nombre , en montant , et quel a été leur contenu?

• Les investissements ont-ils bien été réalisés ?

• Quel a été leur impact sur le chômage ? Celui-ci a-t-il diminué ?

• Grâce à ces investissements, les autres investisseurs ont-ils été influencés positivement ?

Selon les réponses à ces questions, il est possible d'affirmer ou non que les investissements réalisés dans le cadre des dispositions fiscales incitatives ont eu un impact positif sur l'économie.

Certaines mesures d'incitation fiscales ont une influence sur la prise de décision de l'investissement. On peut énumérer certaines mesures comme la réduction du taux de TVA, la modification du taux d'imposition sur les

[29] MONIER Jean-Marie (2008) **La politique fiscale: objectifs et contraintes,** Les Cahiers Français Document d'Actualité, La Documentation Française, p. 4.

bénéfices des sociétés, la modification des règles d'amortissement, etc. Ces mesures affectent l'investissement de deux façons, directement sur le coût du capital et indirectement par leurs conséquences sur les ressources d'autofinancement[30]. Lorsque l'Etat adopte une incitation fiscale temporaire, son impact est limité dans un laps de temps court. Par contre, les incitations fiscales durables ont un impact positif dans la réalisation de l'investissement.

L'une des mesures importantes pouvant être prise par les gouvernements consiste à augmenter les investissements privés étrangers. Pour cela, il faut un système juridique et une politique fiscale stables. Pour favoriser les investissements privés, les incitations fiscales peuvent être utilisées par les gouvernements comme un moyen de stimuler l'économie et renforcer la compétitivité du pays afin qu'il devienne un pays fiscalement attractif par rapport aux autres pays. « La globalisation économique oblige les décideurs politiques pour rester compétitifs à privilégier les investissements en réduisant les impôts »[31]. Dans une économie globalisée, les investisseurs ont la possibilité de choisir entre plusieurs pays. Ils cherchent à s'implanter dans le ou les pays où l'ensemble des taxes et impôts est le plus faible. Cette préférence tient au fait que les entreprises cherchent toujours le ou les pays les plus avantageux économiquement et fiscalement. La concurrence fiscale internationale joue un rôle important dans la prise de décisions d'investissement. Comme on a pu le voir, la fiscalité incitative a été utilisée comme un moyen pour attirer les investissements des entreprises. La diminution du taux de l'impôt sur les sociétés, l'exonération d'une partie du revenu, l'allongement des délais de paiement de l'impôt, la prise en charge par l'Etat d'une partie des charges sociales ou la diminution des taux de cotisation sociale influent d'une manière importante dans le choix du lieu de l'investissement par l'entreprise.

En effet, les investissements qu'ils soient publics ou privés sont le principal facteur de croissance économique. Avant d'investir, les investisseurs privés vont s'attacher à un examen attentif de la fiscalité applicable aux entreprises ainsi qu'aux charges sociales qui vont leur incomber. Si les charges fiscales et sociales supportées par les entreprises ont un effet indirect sur la croissance économique, la décision des investisseurs a elle un effet direct sur les investissements.

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30 MUET Pierre-Allain/ AVOUYI-DOVI Sanvi (1987) **L'effet des incitations fiscales sur l'investissement**. In: Observations et diagnostics économiques : revue de l'OFCE, n°18, p. 149-150. Dans cette articles les auteurs sont analysés les impacts de l'incitation fiscale sur les investissement avec les mesures spécifique et il sont calculé les impact sur les coût du capital.

31 LEROY, op.cit.

Deux types d'incitations fiscales existent. Il s'agit de l'incitation fiscale générale et de l'incitation fiscale sélective.

Les incitations fiscales générales sont constituées par les abaissements de taux applicable à l'imposition et par l'allégement des charges fiscales des entreprises. Les incitations générales s'appliquent à toutes les entreprises nationales et étrangères. Afin de stimuler les investissements, l'Etat doit communiquer afin de promouvoir les incitations fiscales qu'il a décidées.

Les incitations fiscales sélectives peuvent servir à l'amélioration de certaines activités ou au développement d'une activité économique particulière ou bien encore à favoriser certaines régions, comme les zones franches industrielles. Ces incitations sont destinées à attirer les investissements nationaux et étrangers.

Les incitations fiscales peuvent être utilisées également pour protéger le patrimoine culturel. Il en est ainsi de l'exonération des œuvres d'art qui ne sont pas soumises à l'impôt sur la fortune. Toutefois la culture est taxée quand elle devient une activité lucrative[32].

Le droit fiscal est par ailleurs un instrument de la politique économique du gouvernement. Actuellement, en France et en Turquie, comme dans la plupart des pays modernes, le droit fiscal et la politique financière sont devenus des instruments de la politique économique des gouvernements.

Des dispositions incitatives existent à des fins différentes. Certaines mesures peuvent être de construction inégalitaire. C'est la raison pour laquelle, les conditions, les durées, les bénéficiaires des dispositions incitatives doivent être bien précisés par les Etats pour leur permettre d'atteindre leurs objectifs. En France, « le Conseil constitutionnel reconnaît la validité des mesures d'incitation, résultant de l'octroi d'avantages fiscaux, dès lors qu'elles sont fondées sur des critères objectifs et rationnels en fonction des buts recherchés »[33].

« Les incitations fiscales recouvrent l'ensemble des mesures consistant à accorder un traitement fiscal plus favorable à certaines activités ou à

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32 LEROY, op.cit.

33 FOUQUET Olivier (2011) **Le Conseil constitutionnel et le principe d'égalité devant l'impôt**, Nouveaux Cahiers du Conseil Constitutionnel, n° 33, Dossier : Le Conseil constitutionnel et l'impôt, octobre. Cons. const., 29 avril 2011, n° 2011-121 QPC, S^té^ Unilever France, Constitutions 2011. 380, obs. A. Barilari : application du taux réduit de la TVA aux corps gras alimentaires d'origine laitière et non aux margarines et graisses végétales ; Cons. const., 28 juillet 2011, n° 2011-638 DC, AJDA 2011. 1596, LFR 2011, cdt 24 : crédit d'impôt en faveur du développement de l'intéressement salarié.

certains secteurs que celui appliqué aux autres pans de l'économie »[34]. Des avantages fiscaux, des dégrèvements et des exonérations peuvent ainsi être consentis. Dans la pratique, la plupart des pays, développés ou en cours de développement, ont mis en place des incitations fiscales afin d'attirer les investisseurs et de stimuler la croissance économique.

Les incitations fiscales pour l'investissement sont généralement fixées par la législation ou font l'objet de mesures adoptées par le gouvernement. Quand celui-ci décide d'augmenter les investissements dans son pays, cette prise de décision peut se répercuter dans plusieurs domaines du droit : droit fiscal, droit social, droit commercial, etc.. Plusieurs ministères interviennent ainsi dans la réalisation du programme d'investissements du gouvernement. Dans cette situation, la coordination est très importante pour les investisseurs, mais, dans la pratique, il n'est pas toujours aisé de réaliser cette coordination.

A la suite de ces explications générales, il est possible d'énumérer les avantages des incitations fiscales pour l'investissement[35] :

- les investisseurs bénéficient de taux de rentabilité plus élevé qui leur permettent de réinvestir davantage de profits.
- les incitations influencent, outre les recettes fiscales, les objectifs économiques tels que la création d'emplois ou le développement de certaines régions.
- les incitations illustrent la volonté d'un pays à faciliter l'investissement.
- le taux d'imposition effectif des capitaux doit être faible pour attirer les capitaux étrangers et dissuader l'épargne intérieure de quitter le territoire national.
- accorder des allègements fiscaux similaires à ceux qu'offrent la concurrence ou se résigner à perdre des investissements.

Les décisions d'investissements des sociétés sont influencées par les politiques fiscales[36]. Ainsi, une incitation fiscale pourrait être mise en place dans le secteur du textile ou dans une région. En Turquie, le taux de l'impôt sur les sociétés est de 20%. Si une entreprise exerce une activité dans le cadre des dispositions précisées dans l'article 32 de Loi relative sur l'Impôt sur les Sociétés, son taux d'imposition est diminué de 90%. Ce taux est ramené à 2 %.

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34 **Fiscalité et développement**, OCDE, <http://www.oecd.org/fr/ctp/fiscalite-internationale/Transparency_and_Governance_principlesFR_June2013.pdf.> consulté le 23 mars 2014.

35 Voir MASTERS Andrew (2006) **Etude de cas sur les incitations fiscales**, Réaliser potentiel d'investissement rentable en Afrique, Séminaire de haut niveau organisé par l'institut du FMI en coopération avec l'Institut multilatéral d'Afrique, Tunisie.

36 KIRBAŞ, p.5.

Dès les années 1980, les impôts ont pris une place très importante dans la politique économique de la Turquie. Le Conseil des Ministres a été habilité par la Constitution Turque[37] à modifier les dispositions relatives aux exemptions, aux exceptions et aux réduction et les taux de l'imposition, dans la cadre des limites précisées par la loi. Par ce pouvoir, le Conseil des Ministres peut modifier les politiques économiques et financières, selon la situation de l'Etat et de la situation économique des autres pays. Dans un monde globalisé, un Etat ne peut pas définir sa propre politique économique, fiscale et financière sans prendre en compte les autres pays.

Le Conseil de Ministres a utilisé ces pouvoirs plusieurs fois. Il a mis en vigueur des exceptions à l'impôt sur les sociétés, afin de promouvoir les exportations et donc favoriser le commerce extérieur. Dans la législation turque, différents types d'incitation fiscale sont prévus en matière d'investissement. On peut citer l'incitation pour les activités de recherche et de développement, l'incitation pour l'exploration pétrolière, l'incitation pour une région particulière, l'incitation pour le développement des nouvelles technologies, etc. La Présidence de la Direction des Impôts a publié la liste des lois qui contiennent des incitations fiscales pour les investissements[38].

En 2012[39], le Conseil des Ministres a pris une décision sur les aides de l'Etat en matière d'investissement. Le but de cette décision est le suivant : rediriger les investissements les plus élevés selon les objectifs fixés dans le plan de développement et le plan annuel, à savoir l'augmentation de la production et des offres d'emploi, les investissements stratégiques, l'augmentation des investissements directs des étrangers, etc. Cette décision a été modifiée plusieurs fois par les Conseil de Ministres.

De même, le 15 juillet 2016, le législateur a adopté une loi afin d'améliorer l'environnement de l'investissement[40]. Cette loi a été modifiée à plusieurs reprises dans le cadre de l'investissement. En Turquie, les incitations fiscales ont été utilisées activement afin d'améliorer l'économie par les investissements internationaux et nationaux et développer certaines régions. Avant de prendre des décisions incitatives, il convient d'envisager les résultats économiques, sociaux, et fiscaux à attendre de ces mesures.

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37 L'article 73, alinéa 3 de la Constitution Turque de 1980 "Le Conseil des ministres peut être habilité à modifier, dans les limites maximales et minimales définies par la loi, les dispositions relatives aux exemptions, aux exceptions et aux réductions ainsi qu'aux taux des impôts, droits, taxes et charges financières similaires ».

38 Voir <http://www.gib.gov.tr/yardim-ve-kaynaklar/yatirimlarda-vergisel-tesvikler/ll-konularina-gore-vergisel-tesvikler>

39 La Décision du Conseil des Ministres (Bakanlar Kurulu Kararı) 2012/3305 du 15 juin 2012.

40 Yatırım Ortamının İyileştirilmesi Amacıyla Bazı Kanunlarda Değişiklik Yapılmasına Dair Kanun (La Loi modifiant certaines lois afin d'améliorer l'environnement de l'investissement) no 6728 du 15 juillet 2016.

II. LA POLITIQUE FISCALE EN PERIODE DE CRISE ECONOMIQUE

Une politique fiscale se définit de différentes façons. Au sens large, il est possible de mettre dans le contenu de la politique fiscale, la pression fiscale, la répartition du prélèvement, des dispositions techniques d'imposition, la décision relative à l'assiette ou aux tarifs de différents impôts et taxes[41]. A contrario, il est possible de donner comme définition de la politique fiscale, au sens étroit, l'utilisation de l'impôt à des fins économiques, sociales ou bien environnementales.

Les gouvernements peuvent adopter différentes mesures en intervenant au niveau de la pression fiscale, sur les taux applicables aux différentes impositions. « L'impôt est alors utilisé pour favoriser, de la part des agents économiques, des comportements répondant aux objectifs des politiques publiques dans différents domaines, tels que l'aménagement du territoire, le développement de la recherche, les économies d'énergie ou encore la protection de l'environnement»[42].

Si la politique fiscale des gouvernements est insuffisante pour accroître les recettes publiques, les pays demeurent dans des situations difficiles pour faire face à la crise économique. C'est pourquoi, il est toujours préférable d'anticiper et de prendre les mesures nécessaires avant que la crise économique n'éclate. « Les gouvernements cherchent toujours à trouver le juste milieu entre la maximalisation des recettes publiques et la promotion des investissements. Malheureusement, jusqu'à présent aucun gouvernement n'a été capable de déterminer ce qu'est un système équitable »[43].

Dans le monde globalisé, les changements économiques ont une incidence sur la définition des politiques fiscales des gouvernements. Dès que des difficultés économiques surviennent dans un pays développé ou dans un pays à grande économie, des répercussions sont ressenties dans les autres pays, au niveau des importations, des exportations ou des déficits budgétaires.

Les gouvernements peuvent se fixer comme objectif un abaissement de la pression fiscale. Les gouvernements pensent en effet que la pression fiscale est un facteur important pour l'attractivité du territoire et la compétitivité des entreprises. Toutefois, il faut être vigilant quand on décide d'abaisser

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41 CASTAGNEDE (2008), p.3.

42 CASTAGNEDE, Bernard (2012) **La politique fiscale et la crise en Union Européenne**, discours prononcé à l'occasion de la cérémonie de remise de titre de docteur honoris causa de la faculté de droit de l'Université d'Athènes du 25 mai 2012, <http://www.univ-paris1.fr> consulté le 11 novembre 2016.

43 SIDIBE Moussa (2004) **Fiscalité minière au Mali: analyse critique des dispositions fiscales et douanières du code minier de la République du Mali**, Université paris Dauphine - DESS d'Administration Fiscale (DESS 227).

la pression fiscale, car cela peut se traduire par un accroissement du déficit budgétaire. Selon une étude de la Commission Européenne[44], la pression fiscale n'est pas elle-même un facteur d'aggravation de la crise économique ou financière.

Une crise économique et financière est l'un des facteurs du changement de politique fiscale d'un pays. La crise économique de l'année 2008 a eu des répercussions économiques, financières et sociales dans de nombreux pays. Suite à cette crise économique, l'Union Européenne a joué un rôle afin de diminuer l'impact de la crise. La Commission Européenne a présenté un plan de relance pour la croissance et l'emploi[45] pour sortir de cette crise. Ce plan prévoyait des mesures pour les marchés financiers, pour aider les individus ayant perdu leur emploi, pour les entreprises, pour l'environnement, et enfin des solutions à l'échelle globale. Dans cette circonstance, la France a adopté son plan de relance en décembre 2008 sur l'allègement des charges fiscales des entreprises. Ensuite elle a abaissé le taux de TVA sur les restaurants en la faisant passer de 19,6% à 5,5%[46].

Cette situation a montré très clairement que les gouvernements utilisaient souvent la politique fiscale pour sortir de la crise. Une relation stricte existe entre la crise économique et la fiscalité. La politique fiscale n'est pas la seule raison de la crise, mais elle influence quand même la crise. Par contre, pour sortir de la crise, la politique fiscale est l'instrument le plus important.

Pour lutter contre la crise économique, l'impôt peut être utilisé comme un moyen. L'efficacité de la politique fiscale pour résoudre les problèmes d'instabilité durant la crise économique est bien connue.

Un autre moyen pour sortir de la crise économique consiste à renforcer la pression fiscale en augmentant les taux d'imposition[47]. Le recours à l'augmentation des taux de l'impôt est une solution pour augmenter les ressources publiques de l'Etat. Toutefois, cette solution ne donne pas toujours les résultats escomptés. En effet, l'augmentation des taux d'imposition devient une nouvelle charge pour les contribuables qui sont déjà frappés par la crise économique. Ainsi, l'augmentation des taux donne, parfois, un résultat négatif contraire aux objectifs fixés. Du point de vue des entreprises, l'augmentation des taux d'imposition et des cotisations sociales alourdissent leurs charges

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44 **Taxation trends in the European Union, Focus on the crisis: The main impacts on EU tax systems**, édition 2011, <https://ec.europa.eu> consultée le 11 novembre 2016.

45 Un plan européen pour la relance économique du 26 novembre 2008 <http://europa.eu/rapid/press-release_IP-08-1771_fr.htm> consulté le 12 novembre 2016

46 CASTAGNEDE (2012), p.5.

47 CAN, İsmail (2003) **Ekonomik Krizlere Karşı Uygulanması Gereken Vergi Politikası**, Maliye Dergisi, Maliye Bakanlığı Araştırma ve Planlama ve Koordinasyon Başkanlığı, S.142, Ocak-Nisan, p. 102.

fiscales et sociales. L'entreprise qui a vu diminuer ses ventes en raison de la crise, se trouve dans une situation plus délicate en raison de l'augmentation de sa charge fiscale. Les entreprises cherchent alors des solutions pour sortir de cette situation et, en premier lieu, elles peuvent être amenées à procéder à des licenciements de salariés. Lorsque cette mesure s'avère insuffisante, les entreprises peuvent alors déposer le bilan et être déclarées en faillite. Dans cette situation, les Etats constatent des pertes de recettes alors qu'ils souhaitaient les accroître.

Enfin, il est possible de dire que l'inflation, la dévaluation et l'harmonisation de taux de l'impôt jouent un rôle primordial pour la prévention de la crise financière La diminution des dépenses publiques et de l'endettement public sont aussi importants dans la lutte contre la crise économique. Pour faire face à celle-ci, on a besoin d'une ressource publique forte et constante. Cette dernière peut être obtenue par une augmentation des recettes fiscales et non par l'endettement public[48].

CONCLUSION

La principale fonction de l'impôt est un rôle financier. Il sert à financer les dépenses publiques. La fonction économique de l'impôt devient plus importante avec l'accroissement du rôle de l'Etat. La politique fiscale est, en effet, un élément de la politique budgétaire qui contribue au pilotage d'ensemble des économies nationales. L'impôt est désormais utilisé pour favoriser de la part des agents économiques des comportements répondant aux objectifs des politiques publiques définies par les gouvernements. Ainsi les incitations fiscales qui peuvent avoir pour objectif l'abaissement du niveau de pression fiscale peuvent aussi être regardées comme des éléments d'attractivité du territoire et être utilisées comme un moyen d'accroître les ressources publiques en favorisant les investissements privés et en améliorant la compétitivité des entreprises du pays.

Dans le cadre de la précision de la politique fiscale, il convient de mesurer son impact sur les contribuables et de vérifier que les mesures prévues permettront bien d'atteindre les objectifs fixés. Est que les mesures prévus permettront atteindre des objectifs fixes[49].

Comme la plupart des pays modernes, dans un monde globalisé, la Turquie met en œuvre sa politique fiscale en tenant compte de la situation financière des Etats économiquement puissants, de la concurrence fiscale internationale, de l'accroissement des investissements nationaux et internationaux.

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48 CAN, p.102.

49 AKDOĞAN, Abdurrahman (1999) **Vergilendirme Politikası, Gelir ve İkame Etkileri Açısından İzlenebilecek Gelir Vergisi Politikasının Değerlendirilmesi**, G.Ü.İ.İ.B.F. Dergisi, S: 2/99, p. 103.

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LEGAL PERSPECTIVES AND THE "CYPRUS ISSUE"

Hukuki Perspektifler ve "Kıbrıs Sorunu"

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SUMMARY

In the study, the complex and multi-dimensional *"Cyprus issue"* is taken from the perspective of legal analysis. In this respect, the ***Treaty of Guarantee,*** compulsory elements to be considered to accept an entity as a state, *"recognition of states",* authorities of states including declaration of *"exclusive economic zone"* are some fundamental aspects taken into consideration. These relevant topics together with the *"unique"* matters relevant to EU-Turkey accession relationship are concentrated upon in detail where the *"Cyprus issue"* is an essential aspect to take into consideration in this respect.

The dimensions with regard to the interpretations of the *"Cyprus issue"* in terms of international organizations -with emphasis on the UN and CoE- together with international courts also form an important part of the study. In this context, some of the ECtHR and CJEU court judgments of essence are underlined to mark the perspectives of the judiciary organ regarding the ECHR system adopted under the auspices of the CoE and the judiciary organ of the EU.

In this framework, within the scope of study, assessments are made and recommendations are put forward with regard to the *"Cyprus issue"*.

Keywords: Turkey, Turkish Republic of Northern Cyprus, European Union, "Cyprus", Accession, Legal

ÖZET

Çalışmada, karmaşık ve çok boyutlu "*Kıbrıs sorunu"* hukuki analiz anlamındaki bakış açısıyla ele alınmaktadır. Bu çerçevede, ***Garanti Antlaşması***, bir varlığın devlet olarak kabul edilmesi için gereken koşullar, "devletlerin tanınması", "münhasır ekonomik bölge" ilanı da dahil olmak üzere devletlerin yetkileri, incelenmesi gereken bazı temel konulardır. AB-Türkiye katılım süreci anlamında ele alınması gereken tüm bu konular, bu boyutun gerektirdiği diğer *"kendine özgü"* konular da dahil olmak üzere çalışma kapsamındadır. Bu anlamda, AB-Türkiye katılım müzakerelerinde *"Kıbrıs sorunu"*nun ele alınması ayrı bir önem taşımaktadır.

Uluslararası örgütler -Birleşmiş Milletler ve Avrupa Konseyi- ile uluslararası mahkemeler çerçevesinde *"Kıbrıs sorunu"*nun yorumunun boyutları da ayrıca bu çalışmanın önemli bir bölümünü oluşturmaktadır. Bu bağlamda, bazı önemli Avrupa İnsan Hakları Mahkemesi ve Avrupa Birliği Adalet Divanı kararlarının, Avrupa Konseyi nezdinde kabul edilen Avrupa İnsan Hakları Sözleşmesi sisteminin yargı organının ve Avrupa Birliği'nin yargı organının bakış açılarının vurgulanması açısından altı çizilmektedir.

Bu kapsamda, çalışmanın içeriğinde, *"Kıbrıs sorunu"* ile ilgili olarak değerlendirmeler yapılmakta ve önerilerde bulunulmaktadır.

Anahtar Kelimeler: Türkiye, Kuzey Kıbrıs Türk Cumhuriyeti, Avrupa Birliği, "Kıbrıs", Katılım, Hukuki

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I. Introduction

International legal problems especially as to the interpretation of relevant treaty provisions together with the "*recognition issue*" of the Turkish Republic of Northern Cyprus (hereinafter referred as "TRNC") should be taken into consideration to comprehend the main legal issues on the longstanding and complex *"Cyprus issue"*. Furthermore, the membership of *"Cyprus"* to the European Union (hereinafter referred as the "EU")[1] is interpreted as "*converting*" the "*Cyprus issue*" to an internal problem of the EU and that as far as the *"status quo"* continues, membership of Turkey to the EU is impossible[2]. In this respect, the perspective of the EU in relation to Turkey's accession process to the EU is also an important aspect to assess about the problem, especially after *"Cyprus"* being admitted to the EU as a member though there is a contrary provision on the matter in the ***Treaty of Guarantee***.

The interpretations of international organizations like the United Nations (hereinafter referred as the "UN") and the Council of Europe (hereinafter referred as "CoE") concerning the *"Cyprus issue"* are to be focused on to have an outlook on the understanding of the *"international community"* on the matter. There are also important judgments of the European Court of Human Rights (hereinafter referred as "ECtHR") and Court of Justice of the EU (hereinafter referred as "CJEU") that are fundamental to be concentrated upon having implications for both sides.

II. Asssesment of Relevant International Agreements

In Article I/Paragraph 1 of the ***Treaty of Guarantee***[3] it is stipulated that: *"The Republic of Cyprus undertakes to ensure the maintenance of its independence, territorial integrity, and security, as well as respect for its Constitution"* whereas in the same treaty, in Article IV/Paragraph 1, it is regulated that: "*In the event of a breach of the provisions of the present Treaty, Greece, Turkey and the United Kingdom undertake to consult together with respect to the representations or measures necessary to ensure observance of those provisions".* In Article IV/Paragraph 2, it is stated that ***"In so far as common or concerted action may not prove possible, each of the three guaranteeing Powers reserves the right to take action with the sole aim of re-establishing the state of affairs created by the present Treaty".***

1 The term "European Union" (EU) is used for meaning the "European Economic Community" (EEC) and "European Community" (EC) in the text of the study.

2 Yılmaz, Kadir**;** *"A Partitioned State that is in the European Union The Case of Cyprus",* Ankara Bar Review, Vol. 3, Issue 1, 2010, p. 130.

3 For the **Treaty of Guarantee of 1959**, see http://www.mfa.gov.tr/treaty-concerning-the-establishment-of-the-republic-of-cyprus.en.mfa

In the intervention of Turkey to *"Cyprus",* Turkey uses its right as a *"guranteeing power"* as explicitly agreed in the ***Treaty of Guarantee***; this legal situation may be put forward as having the same *"logic"* as a *"justified intervention"* which is realized with the consent of the state that is being intervened[4]. On the other hand, it is claimed that there is a problem of international law in terms of the UN Charter where it is underlined that since the UN Charter promotes the peaceful settlement of disputes, the relevant Article in the ***Treaty of Guarantee*** is put forward as *"null and void ab initio"*[5]. On this argument, it may be highlighted that there is no provision in ***Vienna Convention on the Law of Treaties*** - signed under the auspices of the UN - which explicitly prohibits adoption of such kind of a provision in an international agreement. The UN also refers to the ***Treaty of Guarantee*** as a valid international agreement[6] and there is no resolution of the UN which declares that the ***Treaty of Guarantee*** or any provision regarding this Treaty is *"null and void ab initio".*

On the issue, there is also a **Greek High Court of Appeal Judgment**[7] where it is stated that ***"The Turkish intervention in Cyprus is legal, the real responsibles are the Greek officers".*** In the same parallel, in a **CoE Resolution**[8], it is submitted in Paragraph 3 that "*Regretting the failure of the attempt to reach a diplomatic settlement which led the* ***Turkish Government to exercise its right of intervention*** *in accordance with Article 4 of the* ***Gurantee Treaty of 1960".***

Another issue emerges from Article I/Paragraph 2 of the ***Treaty of Guarantee*** where it is stated that: *"****The Republic of Cyprus undertakes not to participate, in whole or in part, in any political or economic union with any State whatsoever.*** *It accordingly declares prohibited any activity likely to promote,* ***directly or indirectly,*** *either union with any other State or partition with the island".*

4 The recent intervention of Russia to Syria with the consent of President Assad as representing the state Syria is assessed as a *"justified intervention"* in this respect.

5 **;**Kyriakides, Klearchos A.; "*The 1960 Treaties and the Search for Security in Cyprus",* Journal of Balkan and Near Eastern Studies, Vol. 11., No 4., December 2009, p. 431.

6 For the UN perspective on ***Treaty of Guarantee*** see http://peacemaker.un.org/cyprus-greece-turkey-guarantee60

7 For the **Greek High Court of Appeal Judgment** dated 21 March 1979 with no. 2658/79, see ECtHR judgment *Demades v. Turkey*page 13 in "Partly Dissenting Opinion of Judge Metin A. Hakkı and http://www.academia.edu/4215618/TURKEY_S_INTERVENTION_TO_CYPRUS_IS_LEGAL

8 For the **Council of Europe Resolution** dated 29 July 1974 with no. 573 see http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbnQvbncveG1sL1hSZWYvWDJILURXLWV4dHIuYXNwP2ZpbGVpZD0xNTk4NiZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsdC9QZGYvWFJlZi1XRC1BVC1YTUwyUERGLnhzbA==&xsltparams=ZmlsZWlkPTE1OTg2

In this context, it is underlined that the Treaty has been violated by taking "*Cyprus*" into the EU, since it has been a member before Turkey is a member to the EU[9]. On the other hand, it is put forward that there is an "*ambuguity*" with regard to whether there is the prohibition on the union with only one state or states. The Article 31 paragraph 1 of the ***Vienna Convention on the Law of Treaties*** stipulating *"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"* is to be remembered in this context.

Furthermore, it is emphasized that the drafters of the ***Treaty of Gurantee*** desire to imply unification with Greece and/or Turkey. But, even with this logic, it is claimed that the already existing strong relationship between "*Cyprus*" and Greece is much stronger after the membership of "*Cyprus"* to the EU. In this context, it is highlighted that even if it is accepted that the EU is not a single state and therefore not an obstacle for "*Cyprus"* to be a part of, *"Cyprus"* and Greece relationship is defined very close to *"Enosis"* which is clearly prohibited in the ***Treaty of Guarantee*** and it is also stressed that the wording includes *"directly or indirectly union with any other State*"[10].

It may be concluded in this respect that the right approach to adopt to interpret the relevant Article in terms of *the* ***Treaty of Guarantee*** is that since the EU is composed of states, when *"union with any other State"* is prohibited, this prohibition is to definitely include each state that is a member to the EU. Any state's membership to the EU necessitates to be a part of the EU system and this system is formed by the union between states. Therefore, when *"Cyprus"* is part of the EU, it is in a union with other member states of the EU.

III. Analysis of the "Recognition Issue"

In Article 1 of the ***Montevideo Convention on Rights and Duties of States***, it is stipulated that *"The State as a person of international law should possess the following qualifications: a. permanent population, b. defined territory, c. government and d. capacity to enter into relations with the other States".* As an international agreement, the provisions of the ***Montevideo Convention on Rights and Duties of States*** is to be binding for the relevant parties and it is observed that there is no *"recognition"* criteria stipulated in terms of the ***Montevideo Convention on Rights and Duties of States*** as a *"founding requirement"* to accept that an entity is a *"state".*

9 Selami Kuran;*"Müzakere Çerçeve Belgesinin Değerlendirilmesi",* http://selamikuran.com/node/7

10 Yılmaz, Kadir; p. 132.

Parallel with this approach, in terms of contemporary international law, it is accepted that *"recognition"* of the relevant *"state"*s by others is not a "*founding requirement*" to take into consideration to assess whether the relevant entity is a *"state"*[11]. In this regard, it may be concluded that although the TRNC is not *"recognised"* as a *"state"* by any state other than Turkey, TRNC should be accepted as a state since all the criteria for being considered as a *"state"* is existent in terms of the TRNC.

About the "*government*" criteria, it is put forward that although the TRNC possesses a "*government*", it is doubtful that it has full *"internal autonomy"* with Turkey's continued presence with soldiers and contributions to the TRNC budget. It is underlined on the other hand that "*statehood"* is not put into question if a government invites a foreign army to be situated on its territory for mutual defence purposes[12]. If this aspect had an effect in the interpretation of the *"statehood"*, it would be possible to put forward that Syria is not a state relevant to the current situation in the country; this is not even a matter of discussion at this very point.

It is stated that the justification for "*non-recognition"* of the TRNC is its formation as the result of an "*illegal use of force*" which is incompatible with the principles of international law[13]. On the contrary, the Turkish side emphasizes that the TRNC is not established as a result of the Turkish intervention, but, in 1983 by Turkish Cypriots in the exercise of their right to *"self-determination"*[14]. It may be contended that there is no *"illegal use of force"* in terms of Turkish intervention in *"Cyprus"* as marked by a Greek High Court of Appeal judgment and CoE Resolution reflected above emerging from the right explicitly enshrined in the ***Treaty of Guarantee***[15].

In this respect, it is highlighted that although "*recognition*" of a state is deemed to have a *"declaratory"* effect, a "*non-recognized*" state is not considered competent to act in international relations and does not have the same status as the "*recognized*" states in *"international community"*[16]. Also, the effect of this situation in terms of Turkey's accession process is underlined and it is emphasized that certain actions to be taken by Turkey in

11 For conditions for a State see Sur, Melda; Uluslararası Hukukun Esasları, 9. Baskı, Beta, İstanbul, 2015, pp. 104-118.

12 Yılmaz, Kadir**;** p. 135. The same perspective may be advocated in terms of the recent situation in Syria; Russia intervened with the consent of Syrian government and there is still a *"government"* in Syria.

13 Akgün, Cansu**;** "*The Case of TRNC in the Context of Recognition of States under International Law",* Ankara Bar Review, Vol. 3, Issue 1, 2010, p. 8.

14 Akgün, Cansu**;** p. 16

15 p. 3.

16 Akgün, Cansu**;** p. 17.

the EU accession process would imply its political, diplomatic or *"de facto"* recognition of "*Cyprus*" as a member of the EU. In this context, the emphasis is reflected in relation to the fact that Turkey objects the claim of the Greek Cypriot-led government to be the government of the original "*Republic of Cyprus*" which is comprised of the entire territory of the island that represents the whole *"Cyprus"* including the Turkish Cypriots[17]. In this framework, it is to be remembered that there is ***"29 July 2005 Declaration of Turkey"*** that confirms clearly that Turkey does not recognize *"Cyprus"* as a state.

In scope of the UN, which is a *"global"* international organization with 193 state members, there are many resolutions of the UN Security Council - with the main task of the maintenance of international peace and security - regarding the *"recognition issue".* For instance, in the Resolution 550 of 1984[18], the TRNC is described as *"legally invalid"* and the member states to the UN are called upon not to recognize the TRNC set up by *"secessionist acts"* and facilitate or in anyway assist this *"entity".* The same UN refers to the ***Treaty of Guarantee*** as a valid international agreement which includes *"right of intervention"* of guarantor states.

IV. Assessments about Turkey-EU Relationship

A. Focus on EU Summit Presidency Conclusions

The "*EU Summits*" which are the meetings of the European Council are important to take into consideration since they are the highest level meetings of the EU with heads of states and governments of the EU member states. In this regard, the conclusions of these meetings shed light to the opinion of the EU at the highest level regarding the *"Cyprus"* issue.

In **Luxembourg Summit of 1997 Presidency Conclusions[19],** it is stated that[20] the accession negotiations of "*Cyprus*" are to contribute positively to the search for a political solution to the "*Cyprus*" problem through the talks under the aegis of the UN which is identified as a *"must"* to continue with a view to creating a "*bi-community*", "*bi-zonal*" federation. It is also put forward that[21] Turkey's links with the EU depends on the support for negotiations under aegis of the UN on a political settlement in "*Cyprus*" on the basis of the relevant UN Security Council Resolutions.

17 Talmon, Stefan; *"The European Union-Turkey Controversy over Cyprus or a Tale of Two Treaty Declarations",* Chinese Journal of International Law, Vol 5, No. 3, 2006, p. 583.

18 For the **UN Resolution** 550 of 1984, see http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/487/80/IMG/NR048780.pdf?OpenElement

19 For the **1997 Luxembourg Summit** Conclusions, see http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/032a0008.htm

20 Para. 28.

21 Para. 35.

In the **Helsinki Summit of 1999 Presidency Conclusions[22] -** where Turkey is declared as a candidate for membership to the EU - it is underlined that[23] if no settlement is reached on the issue of *"Cyprus"* by the completion of accession negotiations of *"Cyprus"* for the membership to the EU, the Council's decision on accession of *"Cyprus"* is to be made without this situation being a pre-condition in *"Cyprus"*s membership. It is highlighted that in assessing the situation, the Council is to take account of all the relevant factors. In this respect, it may be claimed that the EU declares that it stands on one side of the conflicts, the *"Greek Cypriots",* with the confirmation that albeit the conflict continues, the Council is in a decision to take *"Cyprus"* as a member to the EU.

In the **Copenhagen Summit of 2002 Presidency Conclusions[24],** it is underlined that[25] the European Council confirms its strong preference for accession of *"Cyprus"* to the EU by a "*united Cyprus*" and that[26] in case of a settlement, the Council is to decide upon adaptations of the terms concerning the accession of "*Cyprus*" to the EU with regard to the *"Turkish Cypriot"* community. Furthermore, the European Council declares that in the absence of a settlement, the application of the "*acquis*" to the "*northern part*" of the island shall be suspended and it is put forward that the Council invites the Commission, in consultation with the government of "*Cyprus"*, to consider ways of promoting economic development of the *"northern part"* of Cyprus and bringing it closer to the EU[27]. This last issue is important to highlight since it explicitly reflects the perspective taken at the highest level of EU meeting in terms of the TRNC.

In the **Brussels Summit of 2004 Presidency Conclusions[28],** it is emphasized that the European Council welcomes Turkey's decision to sign the ***"Additional Protocol"*** regarding the adaptation of the ***"Ankara Association Agreement"*** taking account of the accession of the new Member States including "*Cyprus".*

According to the **Brussels Summit of 2006 Presidency Conclusions[29]**, the Council agrees that the EU member states will not decide on opening policy area

22 For the **1999 Helsinki Summit** Conclusions, see http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/ACFA4C.htm

23 Para .9.b.

24 For the **2002 Copenhagen Summit** Conclusions, see http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/73842.pdf

25 Para. 10.

26 Para. 11.

27 Para. 12.

28 For the **2004 Brussels Summit** Conclusions, see http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/83201.pdf

29 For the **2006 Brussels Summit** Conclusions, see http://ec.europa.eu/echo/civil_protection/civil/prote/pdfdocs/gaerc_11_december.pdf

chapters relevant to Turkey's restrictions as regards the "*Republic of Cyprus"* until the Commission verifies that Turkey has fulfilled its commitments related to the ***"Additional Protocol"*** in terms of extending 1963 ***"Ankara Association Agreement"*** and ***"Additional Protocol"*** to the new EU members including *"Cyprus"*. The relevant chapters are stipulated as: Chapter 1: Free movement of goods, Chapter 3: Right of establishment and freedom to provide service, Chapter 9: Financial services, Chapter 11: Agriculture and rural development, Chapter 13: Fisheries, Chapter 14: Transport policy, Chapter 29: Customs Union and Chapter 30: External relations. The Council further agrees that the EU Member States will not to decide on provisionally closing chapters until the Commission verifies that Turkey has fulfilled its commitments related to the "***Additional Protocol".***

In the current situation regarding the *"Cyprus"* effect in scope of the accession negotiations of Turkey to the EU[30], it is observed that eight Chapters of which "*opening benchmark"* is the extension of the "***Additional Protocol***" to *"Cyprus"* is the same as stated above. In this context, *"Chapters Blocked by Southern Cyprus Unilaterally"* are six Chapters as: Chapter 2. Freedom of Movement for Workers, Chapter 15: Energy, Chapter 23: Judiciary and Fundamental Rights, Chapter 24: Justice, Freedom and Security, Chapter 26: Education and Culture and Chapter 31: Foreign, Security and Defense Policy.

B. Approaches on the Accession Partnership Document, National Programme and Progress Report

The EU ***"Accession Partnership Document"***s are one of the basic references to be taken into consideration with respect to Turkey's EU accession process since they reflect the "*pinpoint*" expectations of the EU from Turkey. In this context, in the latest "***Accession Partnership Document"*** of 2008[31], Turkey's support to the settlement of the "*Cyprus"* problem within the UN framework and in line with the EU founding principles is put forward as an expectation of the EU. It is also highlighted that implementation of the "***Additional Protocol"*** adapting the "***Ankara Association Agreement"*** to the accession of *"Cyprus"* and removal of all existing restrictions on "*Cyprus*"-flagged vessels together with taking concrete steps for the normalization of bilateral relations between Turkey and "*Republic of Cyprus*" are the priorities of the EU.

The ***"National Programme"***s of Turkey are other important documents to take into account in the accession process of Turkey to the EU since they reflect

30 See the current situation table on status of EU-Turkey accession negotations http://www.ab.gov.tr/files/5%20Ekim/yatay_muzakere_tablosu__30_06_2016.pdf

31 For the **2008 Accession Partnership Document**, see http://www.abgs.gov.tr/files/AB_Iliskileri/Tur_En_Realitons/Apd/Turkey_APD_2008.pdf

the commitments of Turkey with respect to the process. In this framework, pursuant to the latest "***National Programme"***[32] of 2008, in the "*Preamble"*, it is stated that Turkey is to continue to support efforts of the UN Secretary General based on the existence of two seperate people and democracy, "*bi-zonal*" political equality of both sides, equal status of both founding states and parameters of "*new partner state*".

The annual EU ***"Progress Report"***s are also essential documents to assess the stage in accession of Turkey to the EU since they are composed of positive and negative aspects in the *"eyes"* of the EU with regard to all relevant issues including the "*Cyprus issue".*

In the latest ***"Progress Report for Turkey"*** of 2016[33], Turkey is criticized as *"not fulfilling its obligation to ensure full and non-discriminatory implementation of the Additional Protocol to the Association Agreement"* and also with regard to *"not removing all obstacles to the free movement of goods, including restrictions on direct transport links with Cyprus".* It is also underlined that there is no development in terms of *"normalising bilateral relations with the Republic of Cyprus".* Furthermore, it is highlighted that accession negotiations will not continue on *"eight chapters relating to Turkey's restrictions regarding the Republic of Cyprus"* and that none of the chapters of accession negotiations is to be provisionally closed *"until the Commission confirms that Turkey has fully implemented the Additional Protocol to the Association Agreement".*

It is also emphasized that Turkey is expected to *"commit itself unequivocally to good neighbourly relations, international agreements, and to the peaceful settlement of disputes in accordance with the United Nations Charter, having recourse, if necessary, to the International Court of Justice".* Turkey is called to *"avoid any kind of threat or action directed against a Member State, or source of friction or actions that damages good neighbourly relations and the peaceful settlement of disputes"*[34].

Furthermore, on the recently current *"issue"* with respect to exploiting *"hydrocarbon resources"* in the *"Exclusive Economic Zone",* the EU stresses that there are sovereign rights of EU Member States - referring to *"Cyprus"* - in this sense. The EU underlines that "*Cyprus"* has the right to enter into bilateral agreements and exploit natural resources within the scope of the EU acquis and international law, including the UN Convention on the Law of the

32 For the **2008 National Programme**, see http://www.abgs.gov.tr/index.php?p=42260&l=2

33 For the text of **2016 EU-Turkey Progress Report** see http://ec.europa.eu/enlargement/pdf/key_documents/2016/20161109_report_turkey.pdf

34 p. 7.

Sea. The same call is repeated regarding respect for rights of *"sovereignty"* of EU member States -meaning *"Cyprus"* on the topic - over territorial sea and national airspace. There is also an emphasis on the non-progress of *"normalising bilateral relations with the Republic of Cyprus"* and a further remark on Turkey continuing to veto applications by the *"Republic of Cyprus"* for joining international organisations like OECD[35].

In the ***"Progress Report"*** of 2016, there is also a concern on *"air safety"* which is expressed due to the *"lack of communication between air traffic control centres in Turkey and Cyprus"*[36]. In terms of Turkey's accession process to the EU, it is stressed that a condition to be considered as having fully implemented the relevant EU acquis, Turkey is expected to lift the "*restrictions on vessels and aircraft registered in or related to Cyprus or whose last port of call was Cyprus"*[37].

There are also references to some judgments of the ECtHR relevant to the *"Cyprus issue".* In this context, it is underlined in ECtHR judgment of ***Cyprus v. Turkey*** that there is a problem concerning the enforcement of ECtHR judgment of "*just satisfaction".* It is furthermore emphasized that ECtHR judgments of ***Xenides-Arestis v. Turkey, Demades v. Turkey, and Varnava and others v. Turkey*** are not fully enforced[38]. Lastly, it is highlighted that as part of a *"visa regime", "Turkey continues to apply a discriminatory visa regime towards 11 Member States including the Republic of Cyprus for which the e-visa system refers to the country option Greek Cypriot Administration of Southern Cyprus"*[39].

Since, there is the *"sovereign equality of states"* as a *"general principle of international law",* Turkey as a sovereign state has discretion to recognize or not to recognize an entity as a state. In general terms, all the criticism against Turkey is basicly on the consequences of non-recognition of *"Cyprus"* by Turkey. In this context, it may be concluded that the EU in *"Cyprus issue"* is *"biassed"* taking *"Cyprus"* as an EU member state whilst the conflict continues.

C. Analysis of 2005 Negotiating Framework, 2005 Turkey Declaration, 2005 EU Counter-Declaration

The ***"Negotiating Framework"***[40] is another basic reference on EU-Turkey accession process since it contains the principles which is the "*roadmap*"

35 p. 30.
36 p. 53.
37 p. 54.
38 p. 69.
39 p. 81.
40 For the **2005 Negotiation Framework Document**, see http://ec.europa.eu/enlargement/pdf/st20002_05_tr_framedoc_en.pdf

for Turkey. In this respect, it is stated that the development in accession negotiations is to be guided by Turkey's continued support to reach a comprehensive settlement of the "*Cyprus"* problem within the UN framework parallel to the founding principles of the EU which includes improvement in the bilateral relations between Turkey and the "*Republic of Cyprus*" [41]. It is highlighted that in the period up to accession, Turkey is to be required to progressively align its positions within international organisations with the positions adopted by the EU and EU member States[42].

In the same ***"Negotiating Framework"***, it is put forward that accession to the EU implies the acceptance of the rights and obligations in the EU and its institutional framework, known as the *"Acquis of the EU",* where *"Acquis of the EU"* is constantly evolving via acts - legally binding or not - international agreements concluded by the Communities jointly with EU member States, the EU and by the EU member states among themselves[43]. It is underlined that the rights and obligations in this framework imply termination of all existing bilateral agreements between Turkey and the Communities and other international agreements concluded by Turkey which are incompatible with the obligations of EU membership. It is also specified in this respect that any provisions of the "***Ankara Association Agreement"*** which depart from the "*Acquis of the EU*" are not to be considered as precedents in the accession negotiations[44]. This last remark is rather an important one to highlight since provisions in the "***Ankara Association Agreement"*** - which is the legal basis of all the legal relationship between the EU and Turkey - are in a condition to be put aside with respective provisions in the *"Acquis of the EU".* The international agreements - which are in written form - may be regarded as the most important binding sources of international law.

In this context, it should be remembered that if there is a need for an amendment in an international agreement or the termination of an international agreement, the relevant provisions of the ***Vienna Convention on the Law of Treaties*** shed light on the matter. In parallel, it may be contended that it is impossible to make an amendment in an international agreement beyond the scope of the ***Vienna Convention on the Law of Treaties*** since even for the non-parties to the ***Vienna Convention on the Law of Treaties,*** many of its provisions have also *"customary international law"* effect. Turkey is not a member of the EU and is regarded as a *"third country"* in terms of the relations with the EU; if there is a need to amend any provision or terminate

41 Para. 6.
42 Para. 7.
43 Para. 10.
44 Para. 11.

the "***Ankara Association Agreement",*** procedures in scope of the ***Vienna Convention on the Law of Treaties*** are to be applied. In this respect, it may be concluded that it is contrary to international law to put forward that any provision of the ***"Ankara Association Agreement"*** is not to be taken into consideration if it conflicts with the *"EU Acquis".*

In this respect, about the complications of the ***"Negotiating Framework",*** it is submitted that all agreements between Turkey and the TRNC shall be *"void".* This is underlined due to the fact that according to the EU, it is "*Cyprus*" that represents the whole island and all the "*EU Acquis"* recognizes only the "*Greek Cypriots*". On this issue, as highlighted above, it may be concluded that in the termination of international agreements, provisions of the ***Vienna Convention on the Law of Treaties*** are to be taken into consideration in terms of international law. In this context, it may be contended that it is not possible to terminate an international agreement with the provisions stipulated in the ***"Negotiating Framework"***.

Furthermore, regarding the provision in the ***"Negotiating Framework"*** on Turkey's requirement to progressively align its positions within international organisations with the positions adopted by the EU and EU member states is interpreted to lift the veto against *"Cyprus"*s membership to NATO[45]. Since the *"sovereign equality of states"* is an important *"general principle of international law"* guaranteed by the UN Charter and with the ***"29 July 2005 Declaration of Turkey",*** it is officially declared that Turkey does not recognize *"Cyprus"* as a state, it may be claimed that this argument may not be put forward against Turkey.

According to ***"29 July 2005 Declaration of Turkey"***[46] where ***"Additional Protocol"*** for the extension of the ***"Ankara Association Agreement"*** to "*Cyprus*" is at issue, it is stated that Turkey is to continue to support the efforts of the UN Secretary General for a comprehensive settlement to lead to the establishment of a new "*bi-zonal*" partnership state[47]. It is emphasized that the "*Republic of Cyprus*" referred to in the Protocol is not the original partnership state established in 1960[48] and that Turkey is to continue to regard the Greek Cypriot authorities as exercising authority, control and jurisdiction only in the territory south of the buffer zone and as not representing the "*Turkish Cypriot*s"[49]. Furthermore, Turkey declares that signature, ratification and implementation of the relevant ***"Additional Protocol"*** does not verify any

45 Selami Kuran; http://selamikuran.com/node/7

46 For the **2005 Declaration of Turkey**, see http://www.mfa.gov.tr/declaration-by-turkey-on-cyprus_-29-july-2005.en.mfa

47 Para.1.

48 Para.2.

49 Para. 3.

form of recognition of the "*Republic of Cyprus*"[50].

About the legality of ***"29 July 2005 Declaration of Turkey",*** it is claimed that it can not only be regarded as an expression of Turkey's refusal to recognize "*Greek Cypriot Administration"*s claim of representation of the "*Republic of Cyprus*". It is introduced as much more defined in terms of reflection regarding Turkey's perspective not to enter contractual relationship with "*Greek Cypriot Administration".* It is also put forward that these remarks of Turkey can not be accepted as *"reservations*" in terms of the ***Vienna Convention on the Law of Treaties*** since "***29 July 2005 Declaration of Turkey"*** is not linked with the "*exclusion of the legal effect of certain provisions of the treaty"* rather to the "*exclusion of a party to a treaty"*[51]*.* For the legal character of the statement, it is highlighted that it should be interpreted in "*good faith"*, in accordance with the ordinary meaning to be given to its terms in the light of the treaty which it refers and the decisive criterion defined on the basis of the drafters intend to produce[52].

On the other hand, it is put forward that "***29 July 2005 Declaration of Turkey"*** is to be interpreted as a "*general statement of policy*" that does not have any legal effect on its obligations under the Treaties concerned[53]. It is also claimed that Turkey's signature of the ***"Additional Protocol"*** means that Turkey has impliedly legally recognized "*Cyprus Republic"* and it is underlined that dissolution process for TRNC has started with this step of Turkey. The right path to be followed by Turkey is put forward as the introduction of a "*declaratory clause*" emphasizing that the "***Additional Protocol"*** shall be applied after *"the Cyprus issue*" is settled[54].

The basic problematic matter in terms of extension of the ***"Additional Protocol"*** to *"Cyprus"* is Turkey's*"non-recognition"* of "*Cyprus".* In this context, ***"29 July 2005 Declaration of Turkey"*** may be interpreted to have a legal effect since it is the *"will"* of states that is fundamentally important to take into consideration in international law. It may be remembered that even in terms of *"international customary law"* - which is a non-written binding source of law - the relevant rule in *"international customary law"* cannot be claimed against a state which continuously objects to the relevant rule. In parallel, when an international agreement is concerned - like the ***"Additional Protocol"*** at issue - such a written objection of a state should be taken into consideration and have a legal effect since it reflects the *"will"* of the relevant state.

50 Para. 4.
51 Talmon, Stefan; p. 588-589.
52 Talmon, Stefan; p. 603.
53 Talmon, Stefan; p. 605.
54 Selami Kuran; http://selamikuran.com/node/7

In ***"21 September 2005 Counter-Declaration of the EU"***[55]***,*** it is stressed that the European Community and member states consider that ***"29 July 2005 Declaration of Turkey"*** by Turkey is unilateral, does not form part of the "***Additional Protocol"*** and has no legal effect on Turkey's obligations under the "***Additional Protocol***"[56]. It is added in this respect that Turkey is to apply the ***"Additional Protocol"*** fully to all EU member states, including *"Cyprus"*. Furthermore, it is stated that the European Community and its member states stress that the opening of negotiations on the relevant chapters depends on Turkey's implementation of its contractual obligations to all member states and that failure to implement its obligations in full is to affect the overall progress in the negotiations[57]. In "***21 September 2005 Counter-Declaration of the EU",*** it is also highlighted that the European Community and member States recognise only the *"Republic of Cyprus"* as a subject of international law[58] and finally it is underlined that recognition of all member states is a necessary component of the accession process[59].

V. Relevant Cases of the ECtHR and CJEU

A. The ECtHR Cases

In ECtHR ***Louzidou v. Turkey*** case of 1996[60], a Greek Cypriot claimant files a case against Turkey on the "*right to property*" for an immovable which is situated in the TRNC; it is remarkable to note that these cases are not filed against the TRNC or *"Cyprus".* The ECtHR, in its judgment of ***Louzidou v. Turkey***, makes references to the TRNC Constitutional provision which regulates that the immovables are in scope of the "*property*" of the TRNC[61]; UN resolutions on the *"non-recognition"* of the TRNC[62] and to the decision of the CoE Committee of Ministers which states that the "*Cyprus government*" is the only authority to represent "*Cyprus*"[63].

It is essential to assess in this important ECtHR ***Louzidou v. Turkey*** judgment that there is the acceptance of the TRNC's legal powers to a certain aspect. **In this framework, the ECtHR*"recognises"* the *"legitimacy of certain legal***

55 For the **2005 Counter-Declaration of the EU,** see http://www.mfa.gr/images/docs/kypriako/declaration_by_the_ec_and_its_member_states.pdf
56 Para. 2.
57 Para. 3.
58 Para. 4.
59 Para. 5.
60 For the **ECtHR *Louzidou v. Turkey* case,** file:///C:/Users/bdeniz/Downloads/001-58007%20(3).pdf
61 Para. 17.
62 Paragraphs 19, 42 and 44.
63 Para. 21.

arrangements and transactions… for instance as regards the registration of births, deaths and marriages…" **concerning the TRNC[64]. Judge Jambrek, in the *"Dissenting Opinion"*** to the ***Louzidou v. Turkey*** judgment, emphasizes the same feature: "***It would be going too far to say that no purportedly legal acts of the "TRNC" administration are valid.*** *For example, a marriage conducted by a "TRNC" official, and registered in the "TRNC", would have legal effect outside that "jurisdiction". Similarly, a transfer of property between private individuals in northern Cyprus, registered by an official of the "TRNC", would have legal effect elsewhere in the world[65].* In parallel, **Judge Pettiti, in the "*Dissenting Opinion*"** to the ***Louzidou v. Turkey*** judgment, highlights that: *"It is true that the United Nations General Assembly has not admitted the "TRNC" as a member, but* ***the lack of such recognition is no obstacle to the attribution of national and international Powers"***[66].

On the same issue, there is the **"*Dissenting Opinion*" of Judge Golcuklu** to the ***Louzidou v. Turkey*** judgment which reads as: *"not only does northern Cyprus not come under Turkey's jurisdiction,* ***but there is a (politically and socially) sovereign authority there which is independent and democratic. It is of little consequence whether that authority is legally recognised by the international community.*** *The Commission and the Court have stated more than once that the concept of "jurisdiction" within the meaning of Article 1 of the Convention covers both de facto and de jure jurisdiction.* ***In northern Cyprus there is no "vacuum", whether de jure or de facto, but a politically organised society, whatever name and classification one chooses to give it, with its own legal system and its own State authority***[67]*".*

In again this landmark judgment of ***Louzidou v. Turkey***, in the ***"Dissenting Opinion of Judge Bernhardt Joined by Judge Lopes Rocha",*** it is established that "*Turkey has accepted the jurisdiction of the Court only in respect of the facts which occurred subsequent to 22 January 1990. Such a limitation excludes an inquiry into and final legal qualification of previous events, even if these were incompatible with a State's obligation under the Convention"*[68]. The judges also underline *that: "Turkey can be held responsible for concrete acts done in northern Cyprus by Turkish troops or officials.* ***But in the present case, we are confronted with a special situation: it is the existence of the factual border, protected by forces under United Nations command, which makes it impossible for Greek Cypriots to visit and to stay in their homes and on their property in the northern part of the island.*** *The presence of*

64 Para. 45.
65 II. Para. 5.
66 Para. 8.
67 Para. 3.
68 Para. 2.

Turkish troops and Turkey's support of the "TRNC" are important factors in the existing situation; ***but I feel unable to base a judgment of the European Court of Human Rights exclusively on the assumption that the Turkish presence is illegal and that Turkey is therefore responsible for more or less everything that happens in northern Cyprus.[69]"***

Furthermore, in the *"Dissenting Opinion"* of Judge Golcuklu in the judgment of ***Louzidou v. Turkey***, the Judge introduces the *"central legal problem in the case"* as "*the question of jurisdiction and responsibility for the purposes of the Convention".*It is underlined by Judge Golcuklu in this respect that: *"for the first time, the Court is passing judgment on an international law situation which lies outside the ambit of the powers conferred on it under the Convention's supervision machinery. In this judgment the Court projects Turkey's legal system on to northern Cyprus without concerning itself with the political and legal consequences of such an approach"[70].*

In ECtHR *Xenides-Arestis v. Turkey* case of 2005[71], again, the main argument in the case is on the "*right to property"* for an immovable in the TRNC. In the judgment, there is the expression of the Court that is stated as: ***"international law recognises the legitimacy of legal arrangements and transactions in certain situations akin to those existing in the "TRNC"*** *and that the question of the effectiveness of these remedies provided therein had to be considered in the specific circumstances where it arose, on a case-by case basis"*[72]. It is underlined that the Turkish Cypriot authorities on 22th December, 2005 enacted a *"Law on compensation"* with law no 67/2005 and established an authority to examine the applications called "*Immovable Property Commission".* Since there is the "*non-recognition"* of the TRNC, it is submitted that the *"Immovable Property Commission"* is considered as an *"emanation"* of Turkey[73].

Accordingly, in the ECtHR ***Demopoulos v. Turkey*** case of 2010[74], the ECtHR decides on the applications as inadmissible[75] and declares that *"remedies available in the "TRNC", in particular, the "Immovable Property Commission" may be regarded as a "domestic remedy" of the respondent State*"[76].

69 Para. 3.
70 Para. 2.
71 For the **ECtHR *Xenides-Arestis v. Turkey* case,** see http://hudoc.echr.coe.int/eng#{"itemid":["001-71800"]}
72 Para. d. i.
73 Hakkı, Murat Metin; *"Property Wars in Cyprus: The Turkish Position According to the International Law"*, Turkish Studies, Vol 12., No. 1, March 2011, p. 85.
74 For the **ECtHR *Demopoulos v. Turkey* case,** see file:///C:/Users/bdeniz/Downloads/001-97649%20(6).pdf
75 Last sentence.
76 Para.103.

Parallel to the *"logic"* of the "*Dissenting Opinion"*s of Judge Jambrek, Judge Pettiti and Judge Golcuklu in ***ECtHR Louzidou v. Turkey*** case, there is no legal obstacle at least to accept that some legal acts of the TRNC are valid. In the same parallel, in **ECtHR *Xenides-Arestis v. Turkey*** case, it is accepted by the ECtHR that *"international law recognises the legitimacy of legal arrangements and transactions in certain situations akin to those existing in the "TRNC".*

Furthermore, *"Dissenting Opinion of Judge Bernhardt Joined by Judge Lopes Rocha"* in ***ECtHR Louzidou v. Turkey*** case*,* there is a discussion on Turkey's being considered as the *"Respondent"* in the judgment since they put forward that it is wrong to claim that Turkey is "*responsible for more or less everything that happens in northern Cyprus".*

In the light of the *"Dissenting Opinions"* highlighted above in ***ECtHR Louzidou v. Turkey*** and ***ECtHR Xenides-Arestis v. Turkey*** cases, legal effect should be attributed to the acts of the TRNC. This may be interpreted due to the fact that TRNC is a state since *"recognition"* is not compulsory for acceptance of an entity as a *"state"* in terms of contemporary international law and all other conditions to be considered as a *"state"* are present for the TRNC. Furthermore, it may be put forward that the TRNC is to be taken into consideration in terms of the *"respondent"* state when relevant in the ECtHR; on the other hand, the TRNC is not recognized by any other state than Turkey and relevant cases are not brought against the TRNC in this respect. It may be submitted in this framework that it should be the ECtHR to accept these types of applications against Turkey as *"inadmissible".* It should be remembered that the CoE refers to the *"right of intervention"* of Turkish Government in accordance with the ***Treaty of Guarantee*** and the ECHR system including the ECtHR is adopted under the auspices of the CoE.

B. The CJEU Cases

In CJEU ***Anastasiou and Others v. UK*** case of 1994[77], there is the interpretation issue relevant to 1972 ***"Association Agreement"*** between the EU and *"Cyprus*; the subject of the conflict is the trade on patatoes and citrus fruit[78]. It is underlined in the judgment that the UK does not accept documentation with reference to the TRNC and that it permits the entry of citrus products and potatoes from *"Cyprus"* in accordance with the relevant EU legislation[79]. The CJEU decides that since the TRNC is not recognized by the relevant states, *"in the absence of any possibility of checks or cooperation",*

77 For the **CJEU *Anastasiou and Others v. UK* case,** see http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61992CJ0432:EN:PDF

78 Para. 1. and 2.

79 Para.11.

the *"movement and phytosanitary certificates"* not issued by the *"Republic of Cyprus"* is not to be accepted[80]. Although, this is the conclusion reached by the Court, the CJEU accepts that "*the advantages stemming from the Association Agreement have on several occasions been accessible to the whole population of Cyprus. Thus, the financial protocols concluded pursuant to the Agreement are administered in such a way that the resources made available by the Community are used for purposes that are equally for the benefit of the population established in the northern part of Cyprus"*[81].There is also a reference to the uniform interpretation in EU member states and it is underlined that some EU member states accept certificates issued by authorities other than those of the "*Republic of Cyprus"* where others do not[82].

This inconsistency is reflected as an *"uncertainty of a kind likely to undermine the existence of a common commercial policy and the performance by the Community of its obligations under the Association Agreement"*[83]. About the interpretation of the judgment, it is stated that after the partition in "*Cyprus"* in 1974, the United Kingdom, Germany and some other member states of the EU continued to accept movement and "*phytosanitary certificates"* accompanying citrus fruits and potatoes from the TRNC issued by the *"Turkish Cypriot Chamber of Commerce*" if those certificates are not issued in the name of the "*Turkish Federated State of Cyprus*", the "*Turkish Republic of Northern Cyprus*" or other equivalent term[84]. The reasoning of the CJEU is outlined as the EU's certificate system established on the principle of mutual reliance and cooperation between the competent authorities of the exporting state and those of the importing state and this cooperation is excluded with the authorities of an entity which is not "*recognized"* either by the EU or member states; hence, the certificates issued by the TRNC which is a "*non-recognized"* state are not accepted[85]. This reasoning of the Court is criticized as being far beyond the principle and that it applied economic sanctions which should be a measure that should be reserved for the political bodies responsible for the conduct of the EU's foreign relations[86].

On the other hand, it is put forward that international "*non-recognition*" does not necessarily preclude cooperation between the authorities of the

80 Para. 40, 41 and 67.
81 Para. 45.
82 Para. 52.
83 Para. 53.
84 Talmon, Stefan;*"The Cyprus Question before the European Court of Justice",* European Journal of International Law, Vol. 12, No. 4, 2001, ("CJEU"), p. 731-732.
85 Talmon, Stefan; "CJEU", p. 742-743.
86 Talmon, Stefan; "CJEU", p. 750.

"*non-recognizing*" state and those of the *"non-recognized"* state. **It is added that the practice between 1974 to 1994 is in such a framework that there is a cooperation between EU member states and Turkish Cypriot authorities and that there is no rule of international or EU law which prohibits states from cooperating with *"non-recognized"* authorities in general terms.** It is concluded that cooperation with Turkish Cypriot authorities within the framework of the system of *"trade certificates"* could only be excluded if it implies "*recognition"* of the TRNC[87].

In CJEU ***Meletis Apostolides v. Orams*** case of 2006[88], the enforcement of a judgment of the "*Greek Cypriot Administration"* which is on an immovable in the TRNC is being requested in the UK where the plantiff desires to enforce the judgment taken by the *"Greek Cypriot Administration"* Court. According to the CJEU, although the *"EU Acquis"* is suspended in the *"northern area",* relevant EU Law is to be applied to the judgment given at a *"Cypriot Court"* in the *"Cypriot Government-controlled"* area related with the land in the *"northern area"*[89], furthermore, it is concluded that this judgment is "*enforcable"*.[90]

Although, the EU accepts *"Cyprus"* as a member, this situation does not change the legal situation to consider the TRNC as a state. In this respect, no international actor - be a state or international (or supranational) organization with the union of states - may have a right for a legal act in the territory of another state in conflict with Article 2 of the UN Charter and the CJEU is a judiciary organ of the EU which should act in conformity with international law according to the primary law of the EU. In this context, the CJEU in such cases as above may be expected to deliver *"inadmisibility"* decisions, since, it may be claimed that it has no *"jurisdiction"* to deal with the relevant cases.

VI. Conclusion

It may be concluded that the explicit provision under the ***Treaty of Guarantee*** "*announces"* that it is the right of Turkey to intervene when security is at stake and cannot be maintained on the island. The other provision in the same Treaty about membership of *"Cyprus"* to the EU is assessed to be a "*prohibited move*" since the international organisations are basicly made up of states which are "*derived"* subjects of international law; membership in the EU means at least union with one state. The "*Recognition"*of states is not a "*compulsory*" element to accept that an entity is a state and in this context, it

87 Talmon, Stefan; "CJEU"; p. 743.

88 For the **CJEU *Meletis Apostolides v. Orams* case,** see http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007CJ0420:EN:HTML

89 Para. 39.

90 Para. 71.

may have only a "*declaratory*" effect; since the TRNC has the other elements to be accepted as a "*state"* - regardless of being *"recognized"* by only Turkey - it is a state.

In the EU summit decisions, the approach of the EU may be interpreted as "*biassed*", as it assesses the issues taking into consideration *"Cyprus"* as a state and accepts *"Cyprus"* as a member to the EU. As for the *"Negotiation Framework Document*", it may be highlighted that even only taking the provisions that *Turkey* should abide to the *"EU acquis*" - "*whether binding or not"* - and the legal effect for "*the agreements contradicting"* in this regard may lead to *"risky"* situations about Turkey. In this respect, especially provisions of the ***Vienna Convention on the Law of Treaties*** are to be focused on the invalidity of international agreements. On the issue of the effect of Turkey's signature of the extension of the ***"Additional Protocol"***, it may be concluded that it does not mean Turkey's recognition of "*Cyprus*" since Turkey has made an explicit written declaration on the issue.

Furthermore, on the decisions of the ECtHR and CJEU, although in the ECtHR judgments, "*hints*" for accepting the authorities in the TRNC are present; severe perspectives may be identified in CJEU judgments. In this respect, in CJEU *Anastasiou* judgment, there is a clear emphasis on the "*non-recognition"* of the TRNC where in CJEU *Orams* judgment, the *"EU acquis"* is applied for an immovable within the TRNC. Since the TRNC is a state, it may be submitted that the relevant cases should be directed to the TRNC instead of Turkey with respect to the cases dealt at the ECtHR. In accordance with the relevant cases at the CJEU, although the EU recognizes *"Cyprus"* as a state since the TRNC is a state, it may be submitted that the CJEU may declare that it has no jurisdiction and deliver an *"inadmisibility"* decision.

It may be concluded that "the *Cyprus issue*" is much more political and in this context, it is not easy to *"predict tomorrow from today".* In this study, the rightfulness of Turkey in terms of international law is put forward with legal justifications and in this context "the *Cyprus issue*" is not a "*mission impossible"*.

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THE ORGANIZATION OF TURKISH ADMINISTRATIVE COURTS FROM THE OTTOMAN AGE TO THE YEAR OF 2016

Osmanlı Dönemi'nden 2016 Yılına: Türk İdare Mahkemelerinin Yapısı

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ABSTRACT

The sustainability and the effectiveness of any legal system are as important as its existence. So as to ensure the sustainability of Turkish administrative judiciary system by coping with the huge backlog and also to enhance its effectiveness, the lagislature enacted some crucial legal amendments amounting to a new phase of the system which have just been implemented as from 20 July 2016. In order to be able to comprehend in what way Turkish administrative judiciary was effected by these amendments, it is obvious that previous structure and functions of Turkish administrative courts must also be known along with the content of the amendments. In this frame this article aims at providing an overview of Turkish administrative courts' today together with their yesterday, from the moment of their birth to the year of 2016.

Keywords: Turkish Administrative Judiciary, Judicial Review, Provincial Administration Councils, Turkish Administrative Courts, The Council of State, Regional Administrative Courts, Appeal, Cassation

ÖZET

Herhangi bir hukukî sistemin sürdürülebilirliği ve etkililiği, o sistemin var olması kadar önemlidir. Devasa iş yüküyle başa çıkarak Türk idarî yargı sisteminin sürdürülebilirliğini sağlamak ve etkinliğini arttırmak için yasa koyucu, sistemde yeni bir aşamaya denk gelen ve 20 Temmuz 2016 tarihinden itibaren uygulanmaya başlanan kritik bazı yasa değişikliklerini yürürlüğe koymuştur. Türk idarî yargısının bu değişikliklerden ne şekilde etkilendiğini anlayabilmek için, söz konusu değişikliklerin içeriğinin yanı sıra Türk idare mahkemelerinin geçmiş yapısının ve fonksiyonlarının da bilinmesi gerektiği açıktır. Bu çerçevede bu makale Türk idare mahkemelerinin dünü ile birlikte bugününe, doğuşundan 2016 yılına kadar genel bir bakış sunmayı amaçlamaktadır.

Anahtar Kelimeler: Türk İdarî Yargısı, Yargısal Denetim, İl İdare Kurulları, Türk İdare Mahkemeleri, Danıştay, Bölge İdare Mahkemeleri, İstinaf, Temyiz

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I. INTRODUCTION

Turkey is a part of civil law system. Like on other branches of Turkish law, we can see the Continental Europe's effect also on Turkish administrative law. This effect can be observed particularly on the reviewing system of public

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administrations' acts and actions. Turkey accepted the France as a model and realigned the French system of judicial review according to its own necessities with small variations.

Today in Turkey there is a duality between judicial (law and criminal) courts and administrative courts like it is in France.[1] Differently from ordinary courts, Turkish administrative courts deal only with the problem of legality of public administrations' acts and actions. As a result of this, the defendant party must always be a public administration[2] on cases that are under the responsibility of the Turkish administrative courts. It is possible for a person, a corporation or even a public body grieving because of an administrative act or action to lodge a case with the administrative courts. At the end of this kind of a case, the administrative courts may render a verdict that entails either setting aside of the act or payment of compensation to the claimant because of the action.

Accordingly the phrase of "*Turkish administrative courts*" generally embraces the courts in Turkey which are responsible for judging the compliance of public administrations' acts and actions with law upon a request of any grieved person. This phrase also refers to a judiciary branch apart from the ordinary courts in Turkey that has three tiers; administrative courts and tax courts (*first instance courts*), regional administrative courts (*appellate courts*) and Turkish Council of State (*supreme administrative court*).

The history of the Turkish administrative courts had started in the Ottoman Age following their French counterparts. During approximately two centuries these courts' structure and functions were subjected to lots of alterations. And recently, on 18 June 2014, a new statute[3] was adopted by the Turkish Parliament which has made some crucial shifts with the administrative courts' organization and division of work. Principally the statute did not change the general (three tiers) structure of Turkish administrative justice system but it amended the regional administrative courts' organization and redesigned the division of work between these courts and the supreme administrative court of Turkey.

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1 Association of the Councils of State and Supreme Administrative Jurisdictions of the EU, *Administrative Justice in Europe, Report for France*, http://www.aca-europe.eu/en/eurtour/i/countries/france/france_en.pdf , p.3, 24/09/2016.

2 According to the Turkish administrative law, the word of "administration/public administration" means generally "all institutions of state except the legislature and judicial organs" and "other public corporate bodies that are out of the state's organization". Mukbil Özyörük, *İdare Hukuku Dersleri (Administrative Law Courses)*, Ankara University Law Faculty Publications, Ankara, 1973, p.46 (available at; http://auhf.ankara.edu.tr/auhf-yayinlari-arsivi/mukbil-ozyoruk/idare-hukuku-dersleri/idare-hukuku-dersleri-kitabin-tamami.pdf),Kemal Gözler, İdare Hukuku Cilt I *(Administrative Law Volume I)*, First Edition, Ekin Publications, Bursa, 2003, p.25.

3 Law no.6545, Promulgated on Official Gazette of the Republic of Turkey, on June 28, 2014.

In this context this article's aim is being helpful to the readers who are keen to understand Turkish administrative courts' general historical development, old and current organization system and functions both before and after the law numbered 6545. So in this article, I will strive to analyse Turkish administrative courts' chronological development and the amendments enacted by law no. 6545 by referring to French judiciary system when it is necessary.

II. CHRONOLOGICAL DEVELOPMENT of THE TURKISH ADMINISTRATIVE COURTS

Even the fact that the Republic of Turkey is a new state which has been formally founded in 1923, some institutions of this new state have been originated from their counterparts set up prior to 1923. An examination aimed at looking to the Turkish administrative courts' history thus should be started with the Ottoman Age.

A. The Ottoman Age

The first institution entrusted with the supervision of the public administration in the Ottoman Empire was the *High Council of Judicial Verdicts* (*Meclis-i Vâlâ-yı Ahkâm-ı Adliye*). The Council was founded in 1838 principally as a consultation council of the sultan.[4] However after the Ottoman Tanzimat Movement, it undertook the task of effectuating the rules of Tanzimat Edict (1839)[5], via using legislative, executive and judiciary powers on behalf of the sultan.[6] The Council made decisions about people's claims against public officials and judged them because of their work-related offences like an administrative criminal court.[7]

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4 Mehmet Seyitdanlıoğlu, Tanzimat Döneminde Yüksek Yargı ve Meclis-i Vâlâ-yı Ahkâm-ı Adliye (1838-1876) (*Supreme Judiciary in Tanzimat Age and High Councils of Judicial Verdicts 1838-1876*), in:Adalet Kitabı (*Justice Book*), Edi: Bülent Arı, Selim Aslantaş, Turkish Ministry of Justice Publications. 2007, p.208, 209.

5 The Tanzimat Edict (1839) was the legal document which reflected the some reforms of the Ottoman Tanzimat Movement and enshrined some rights, like right to life, right to honour, right to property for the Ottoman Empire's citizens regardless of their religions. For the full text of the Edict in Turkish, see https://www.tbmm.gov.tr/kultursanat/yayinlar/yayin001/001_00_005.pdf .
The edict was accepted as a constitutional document by some authors. See Bakır Çağlar, Tanzimat Fermanı Nasıl Okunmalı Ya Da Tezler Çatışması (*How The Tanzimat Edict Should Be Read or The Conflict of Theses*), İstanbul University Faculty of Political Science (SBF) Journal, No:3-4-5, İstanbul, 1993, p. 59 and the references therein.

6 Seyitdanlıoğlu, p.208, 209.

7 Seyitdanlıoğlu, p.217, 218, Onur Karahanoğulları, Türkiye'de İdari Yargı Tarihi *(History of Administrative Judiciary in Turkey)*, First Edition, Turhan Publications, Ankara, 2005, p.125, Ayhan Ceylan, Meclis-i Vâlâ-yı Ahkâm-ı Adliye'de Yargı (*Judiciary in High Council of Judicial Verdicts*), Atatürk University Erzincan Law Faculty Journal, Volume 8, No:1-2, 2004, p.47.

The High Council of Judicial Verdicts also acted like a cassation court[8] for judgments of *representative provincial council*s. These provincial councils were set up in 1840 with the aim of giving advices about distribution of local taxes.[9] Even though some legal amendments were made about their structure and functions in 1842, 1849, 1854, 1864, 1871, 1876, and 1913,[10] these councils' main functions were "*hearing people's claims about execution of the administration*" and "*judging public officials because of their offences*"[11] that might lead to establishing a connection between the administrative courts and them.

In 1854 and 1868 there could be seen alterations concerning the structure of the High Council of Judicial Verdicts. These alterations in 1854 and 1868 both had caused a separation between administrative and judicial functions of the Council. The former alteration had remained in force just for seven years.[12] However after the latter separation between the administrative and judicial functions of the High Council of Judicial Verdicts in 1868, a new judicial institution named the *Council of State* (*Şûra-yı Devlet*), a vital part of Ottoman Empire's inheritance to the Turkish current legal system, was set up.[13] Besides the other reasons, "*to impede the administration from interfering with the judiciary*"[14] and "*to create a public institution that was similar to the Conseil d'Etat in France*"[15] were two main reasons of foundation of the Council of State.

The Council of State (*Şûra-yı Devlet*) is today's Turkish Supreme Administrative Court[16] and can be qualified as counterpart of French Conseil d'Etat. It was founded in 1868[17] with both judicial and administrative duties

8 Ceylan, p.42, 47.

9 Karahanoğulları, p.75, 76.

10 For detailed explanations about these amendments; Karahanoğulları, p.76, 84, 85, 99, 104.

11 Karahanoğulları, p.98.

12 For detailed explanations about these structural amendments of the Council in 1854 and 1868; see Seyitdanlıoğlu, p.209 et seq, Karahanoğulları, p.127 et seq.

13 Seyitdanlıoğlu, p.213.

14 Karahanoğulları, p.125.

15 Seyitdanlıoğlu, p.214.

16 As of today, its original name is *Danıştay*. Both *Danıştay* and *Şûra-yı Devlet* (Danıştay's old name in the Ottoman age and also in the Republic of Turkey between 1923-1960) can be translated to English as "*the Council of State*".

17 According to Canatar and Baş, the Council of State's most oldest form was the Council of Bâbıâli (*Dâr-ı Şûrâ-yı Bâbıâli*) founded in 1838 and abrogated in 1839. Mehmet Canatar, Yaşar Baş, Şûra-yı Devlet Teşkilatı ve Tarihi Gelişimi (*Organization of The Council of State and Its Historical Development*), Ankara University Center of Ottoman History Research and Implementation Journal, Volume 9, 1998, p.111.

by following the French sample (Conseil d'Etat).[18] Ruling on disputes between the administration and individuals and adjudicating public officers[19] were two leading examples of its judicial duties. The Council of State's another judicial function in the Ottoman Age was supervising some decisions of *provincial administration council*s,[20] like an appellate body.[21] It was also preparing drafts of statutes and of regulations and giving advices to the public institutions when it was necessary,[22] amongst its other administrative responsibilities. The Council was composed of five chambers that were called *Chamber of Civil Service and War, Chamber of Finance and Charitable Funds, Chamber of Judiciary, Chamber of Construction Works and Trade and Agriculture, and Chamber of Education*[23] in order to carry out its tasks.[24]

Accordingly in light of the foregoing, the roots of the Turkish administrative courts could be found in the Ottoman era. However in that period of time, the task of ruling on the disputes between the public administration and individuals carried out by both the Council of State and the provincial councils cannot be characterized as adjudicating the administrative acts and actions like the judicial review in the modern age. It was because in the Ottoman Age, firstly, the separation between the administrative acts-actions and public officials' acts-actions were not as clear as it is today.[25] Secondly, the Council of State and the provincial councils did not have powers of a court[26] and their decisions thus were not binding like a court judgment.[27] As result, their

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18 Mehmet Akif Aydın, Türk Hukuk Tarihi (*History of Turkish Law*), Fourth Edition, Beta Press, İstanbul, 2001, p.428.

19 Orhan Özdeş, Danıştay'ın Tarihçesi (*The History of the Council of State*), in: Yüzyıl Boyunca Danıştay 1868 – 1968, (*The Council of State – During A Century 1868-1968*), Second Edition, The Council of State Publications, Ankara, 1986, p.66, Süheyla Şenlen, Türkiye'de İdari Yargının Doğuşu ve Tarihi Gelişimi (*Birth and Historical Development Administrative Judiciary in Turkey*), Ankara University Faculty of Political Science (SBF) Journal, Volume 49, No:3, Ankara, 1994, p.405, Canatar, Baş, p.115, 117, The History of the Council of State (Turkish), http://www.danistay.gov.tr/kurumsal-12-danistay-tarihcesi.html.

20 Provincial administration councils were new form of representative provincial councils after the Province Directory Statute enacted in 1864. "Provincial administration council" was the general name of these councils and it was comprising administration councils of prefectures, sanjaks and districts. For detailed explanation for the Province Directory Statute of 1864; see Karahanoğulları, p.94 et seq.

21 Canatar, Baş, p.123, 124.

22 The History of the Council of State (Turkish), http://www.danistay.gov.tr/kurumsal-12-danistay-tarihcesi.html , Şenlen, p.405, Canatar, Baş, p.117.

23 Seyitdanlıoğlu, p.216. For the functions of these five chambers see Özdeş, p.66-67.

24 By passage of time, the number of the Council of State's chambers had been reduced. In 1873 there were only two chambers. Şenlen, p.405.

25 Karahanoğulları, p.87.

26 Karahanoğulları, p.169.

27 Karahanoğulları, p.98, Şenlen, p.405. For example, the Council of State's verdicts were not

function of the ruling on the disputes mentioned above should be identified as hearing the complaints against administrative bodies,[28] determining the suitable way of solution about the conflict and revealing it.

Another important development during the Ottoman Age was promulgation of the General Administration of Provinces Statute. The said statute had come into force in 1913, and remained in force after the Empire collapsed and the Republic of Turkey was founded in 1923. According to this statute's 68th article[29], the complaints against decisions of province's governmental public service bodies should be reviewed by the provincial administration councils and the decisions of the councils should be examined by the Council of State upon request.

When we look at the France for the same period of time, we observe that the *Conseil d'Etat* was founded in 1799 with five sections in order to draft new statutes and other administrative regulations and to resolve problems which might come into existence during the execution of administration.[30] One year after than the Conseil d'Etat's foundation, in 1800, the prefecture councils (*conseils de préfecture*) were founded with a limited jurisdiction in administrative law disputes.[31] Both the Conseil d'Etat and the prefecture councils were institutions of the Revolution. They were envisaged for establishing the independence of the administration[32] from the judiciary and so

being implemented unless the grand vizier approved them.

28 Karahanoğulları, p.159, 162, 167. It should be noted that, in the 85th article of Ottoman Constitution of 1876 there was a rule as follows: "*Every case shall be judged by the court that it belongs. Also cases between individuals and the government are within the competence of ordinary courts*". *Onar*, one of the Turkish leading administrative law scholars, indicated that 85th article of Ottoman Constitution was about administration's acts and actions which were executed under the scope of private law. The acts and actions which were executed via using public power were not under the competence of ordinary courts. Sıddık Sami Onar, İdare Hukukunun Umumi Esasları Cilt I (*General Principles of Administrative Law Volume I*), Third Edition, İsmail Akgün – Hak Publications, İstanbul, 1966, p.89. Also according to the *Karahanoğulları*, this rule was about the disputes that government was one of the parties and were related with civil law. So the Council of State's function about hearing complaints against the public administration had not been superseded by the first Ottoman Constitution and remained after 1876. Karahanoğulları, p.171, 175.

29 For full text of the General Administration of Provinces Statute with new Turkish alphabet (latin alphabet); Ahmet Ferit Tek, İdare-yi Umumiye-yi Vilayet ve İdare-yi Hususiye-yi Vilayet Kanunları (*General Administration of Provinces and Special Administration of Provinces Statutes*), Translator: Yenal Ünal, Journal of History School, No:2009-4, İzmir, 2009, p.77 et seq.

30 L. Neville Brown, John S. Bell, Jean-Michel Galabert, French Administrative Law, Fifth Edition, Clarendon Press, Oxford, 1998, p.46, 47.

31 Bernard Schwartz, French Administrative Law and The Common-Law World, New York University Press, New York, 1954, p.42

32 Nuri Yaşar, İdari Yargı Kararlarının Etkinleştirilmesi Arayışında İdari Yargı, İdari Yargıç ve

did not have full cognizance at the time of their initial setting up. The approval of the head of state was being required for the Conseil d'Etat's decisions and the approval of the prefecture was being needed for decisions of the councils so as to make them definitive.[33] It should also be stressed that, there was a hierarchical relationship between the Conseil d'Etat and the prefecture councils similar to that of a relationship between a lower court and a high court since from the beginning. In this context to make an appeal against the prefecture councils' decisions to the Conseil d'Etat was always possible.[34]

In the course of the nineteenth century both the prefecture councils' and the Conseil d'Etat's jurisdiction extended and evolved.[35] For example by Law of 24 May 1872, the Conseil d'Etat was empowered to quash administrative acts and to render binding decisions without requiring any other organ's approval.[36] This means that in 1872, the Conseil d'Etat became a real court. Additionally in 1889, the procedural rules regarding the prefecture councils' works were laid down like the rules of juridical procedures.[37] So it can be said that, Ottoman samples of the provincial councils and the Council of State was following their French counterparts approximately with a half century delay. Because of this delay, even though the French Conseil d'Etat became a supreme administrative court in the nineteenth century, the Council of State couldn't complete the same transformation in the Ottoman Age.

B. Ages of First (1921-1924) and Second (1924-1960) Constitutions of Turkey

After World War I, during Turkish War of Indepence (1919-1923), a new government and a national assembly were constituted in Ankara instead of Ottoman administration located in Istanbul and they conducted the independence war. In 1922, the new government declared Istanbul government illegal and abrogated all its institutions including the Council of State.[38] However since the General Administration of Provinces Statute of 1913 wasn't abolished by the new assembly, provincial administration councils

Yargısal Emir, (*Administrative Judiciary, Administrative Judge and Judicial Order; In the Search of Activating Administrative Judiciary Verdicts*), First Edition, Filiz Publications, İstanbul, 2002, p.25, 26.

33 Yaşar, p.24.

34 Schwartz, p.43.

35 Brown, Bell, Galabert, p.50, Schwartz, p.42.

36 Brown, Bell, Galabert, p.47, Yaşar, p.27, Karahanoğulları, p.46. This development was qualified by the authors as transforming from '*justice retenue*' to '*justice déléguée*'. See Brown, Bell, Galabert, p.48, Karahanoğulları, p.46.

37 Schwartz, p.43, Karahanoğulları, p.21.

38 Onar, p.90.

remained to exist[39] even the fact that they were not dealing with complaints against the administration under the circumstances of war.

The new assembly which was called as the Grand National Assembly put a new Constitution into force in 1921. The Republic of Turkey was founded in 1923 with an amendment to this constitution. Therefore 1921 Constitution is considered as Turkey's first constitution. 1921 Constitution was very short simply because it was put into effect during the war conditions. It consisted of only 23 articles and did not have any rule related to the judiciary. Making any assessment about the administrative judiciary during 1921 Constitution's term thus seems impossible.[40]

1921 Constitution had remained effective just for three years. Following the Republic of Turkey's foundation, a new constitution was enacted by the parliament in 1924. 1924 Constitution, which remained in force up to 1960, had an article regarding the Council of State on its part of '*executive power*'. The article was as follows: "*Article 51 – There shall be established a Council of State which shall be called upon to decide administrative controversies and to give its advice on contracts, concessions and proposed laws drafted and presented by the Government, and to perform specific duties which may be determined by law. The Council of State shall be composed of persons chosen by the Grand National Assembly, from among those who have held important posts, who possess great experience, who are specialists, or who are otherwise qualified*."[41]

Following the 1924 Constitution's direction, the Council of State was reestablished by code numbered 669 in 1925.[42] This code (Code of the Council of State) was prescribing the rules about structure, workers and functions of the new Republic's Council of State that could be read as follows; "*The Council of State is connected to Prime Ministry and composed of four head of chambers and sixteen members under the administration of one president.* (Article -Art- 1) *The Council of State's secretariat shall be administered by a*

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39 Karahanoğulları, p.206.

40 It should be stated that during 1920 and 1921 there were lots of debates concerning the reestablisment of the Council of State. As result, the new Grand National Assembly did not accept to reconstitute the Council of State but its duties about adjudicating the public officials' offences were entrusted to a new comission composed of parliament members. For details of these debates see Karahanoğulları p.232 et seq.

41 Edward Mead Earle, The New Constitution of Turkey, Political Science Quarterly, Volume 40, Issue 1, March 1925, p.94-95.

42 Promulgated (with old Turkish alphabet) on Official Gazette of the Republic of Turkey, on 7 Kanun-u Evvel 1341 (with gregorian calendar on December 7, 1925). After the World War I, the Council of State started to work anew on 6 July 1927 following the law no. 669. Özdeş, p.93.

head clerk (*secretary general*) *who is also a member of Council.* (Art.2) *The Council of State's president, head of chambers and members shall be selected by the Grand National Assembly from among threefold candidates who have been determined by the Assembly's Interior and Justice Committees jointly when Ministers of Interior and Justice participates these committees.* (Art.3) *The Council of State is consisted of four chambers that are called as Chamber of Regulations, Chamber of Civil Service, Chamber of Finance and Charitable Funds, Chamber of Litigations*[43] *and all these chambers are composed of four members and a head of chamber.* (Art.9) *In order to express an opinion about examining and adjudicating the administrative cases, prosecutors shall be appointed from among secondary workers of the Council by the presidency.* (Art.12) *The Council of State; i) shall give its advice on proposed statutes drafted and presented by the Government and on all proposed administrative regulations, ii) shall examine special matters stated on statutes and regulations, iii) shall give its opinion about all matters presented by the Government, iv) shall judge and conclude administrative cases.* (Art.15) *Following articles shall be examined and concluded by the Council of State under any circumstances; a) Cases lodged by individuals whose rights have been infringed because of administrative acts and actions that are not under the competence of the ordinary courts, b) Controversies occured between the parties of contracts which were signed for implementing public services*, *c) Determination of administrative decisions' meanings, d) Cases lodged against ministers' and prefectors' acts and actions from among those litigated by concerned persons in order for administrative acts and actions to be set aside due to one of their power, form, substance or aim aspects' contradiction with statutes or regulations*, *e) Disputes caused by authority and assignment matters between the public administrations.* (Art.19) *Following articles shall be examined and concluded by the Council of State finally and definetly on cassation; a) Decisions that have been made by an administration council and reexamined by a superior administration council at second stage, b) Decisions made by administration councils of prefectures, c) Judicial decisions made by administrative organs aside from administration councils, d) Judicial decisions about administrative matters made by cassation bodies that were set up by special statutes.* (Art.20) *Administrative cases which was not entrusted to a specific judicial body by statutes shall be examined by the Council of State as first instance.* (Art.23) *The reasons of quashing the decisions that will be examined by the Council of State on cassation are as follows; firstly*, *to deal with a matter beyond the authority and assignment, secondly*, *to make a decision contrary with statutes and regulations*, *thirdly*, *not to comply with the*

[43] Chamber of Litigations was similar to French Conseil d'Etat's "*Section du Contentieux*" in terms of their functions. For "*Section du Contentieux*" see Brown, Bell, Galabert, p.48, 49.

procedural rules. (Art.45) *Verdicts rendered by the Council of State concerning the administrative cases shall be executed by enforcement offices without the need of any other organ's approval* (Art.48)"[44]

As it can be observed from its provisions, the Code of the Council of State (1925) regulated the Council's functions like a supreme administrative court. It also laid the foundations of today's Turkish administrative judiciary and the Council of State (*Danıştay*). Even though the Council of State was mentioned in the "executive power part" of the 1924 Constitution and the Code of the Council of State (1925) made it connected to the prime ministry; these factors do not constitute an obstacle to accept that the administrative judiciary was established in Turkey as of 1924. It is simply because, through the case types prescribed in the Code of the Council of State (1925), effective remedies against the administrative acts and actions were recognized for individuals and also enforcement of the judgments delivered upon these cases were exempted from any other organ's approval. Thus in the Turkish doctrine, *Karahanoğulları* states that, since it allowed to lodge of actions for annulment of administrative acts, the Code of the Council of State (1925) was a step towards the judicial phase of the administration's supervision.[45] And *Özyörük* accepts that the outset of the Turkish administrative judiciary was the foundation of new Republic of Turkey's Council of State by 1924 Constitution.[46]

In the age of 1924 Constitution, in parallel with the Council of State, administrative cases for annulment of administrative acts were prescribed as part of procedures of provincial administration councils. In this regard the 63rd article of the Code of Administration of Prefecture[47] enacted in 1929 was ruling as follows; "*Administration councils of prefecture shall review the annulment cases which are litigated against the administrative acts of prefecture's public service bodies, of governors of district, of district's public service bodies and of heads of subdistrict on account of one of their substance, aim, power and form aspects' contradiction with the statutes or the regulations by grieved people*." The same code was also touching on objection against the administration

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44 In order not to be wordy, stopping to quote from the Code of the Council of State (1925) seems useful. But it should be stated that, in the Code's fourth part (between the 24th and 48th articles) the Council of State's decision-making procedures were meticulously determined like the general courts' procedures. For example, time limits for litigating an administrative case and applying for the cassation examination were set (both as sixty days), time of reaching maturity in order to be able to deliver a judgment and procedures of submitting evidences were determined in the code's fourth part.

45 Karahanoğulları, p.210.

46 Özyörük, p.156, 157.

47 Promulgated on Official Gazette of the Republic of Turkey, on May 5, 1929.

councils' judicial decisions. According to its 66th article; "*It can be objected against the administration councils of districts' decisions to the administration councils of prefectures and it can also be objected against the administration councils of prefectures' both first and second instance decisions to the Council of State according to the Code of the Council of State by concerned people.*"

In 1949, the Code of Administration of Prefecture (1929) was abrogated by a new Code which had the same name. The new Code of Administration of Prefecture (1949)[48] was anticipating nearly the same principles in respect of the judicial review of the administrative acts. Its 62th and 65th articles were ruling that; administration councils of prefecture should review the annulment cases at first instance, these cases should be subject to adjudicating procedural rules of the Council of State, if these cases were lodged before the Council of State at first instance, the Council should render a judgment stating to its lack of jurisdiction and refer the case to the relevant administration council of prefecture, administration councils of prefecture's both first and second instance decisions could be contested before the Council of State according to the Code of the Council of State.

It is educed from the Code of the Council of State (1925) that the relationship between the administration councils and the Council of State described by codes of Administration of Prefecture dated 1929 and 1949 was similar to "*cassation*" (not to appeal)[49]. It is because in its 45th article, the Code of The Council of State used the word of "*cassation*" and stated that the Council of State shall review the judicial decisions of the administration councils in terms of their compatibility with rules about authority, assignment, substantive law and procedural law determined by statutes and regulations. Additionally there weren't any provision in the same code according to which the Council of State could examine evidences of cases and/or characterization of physical facts by the administration councils.

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48 Promulgated on Official Gazette of the Republic of Turkey, on June 18, 1949.

49 *On 'appeal' the litigation as a whole .. 'devolves' upon the apellate jurisdiction whose function it is to consider afresh the questions at issue on their facts as well as at law. Unless it finds the proceedings at first instance to be null and void, its business is to decide, at second instance, the substantive questions brought before it and its decision, in so far as it does not merely affirm the decision at first instance, replaces that decision for all purposes. … 'cassation' is usually held to differ sharply. There is no 'devolutive' effect and the role of a jurisdiction of cassation is said to be exclusively to examine the legality of the decision under attack - .. No proofs are admissible on cassation – the facts must be taken as already found- and the court has only two options: it must either affirm or annul.*" J. A. Jolowicz, Appeal, Cassation, Amparo and All That: What and Why?, in: Estudios en homenaje al doctor Hector Fix-Zamudio en sus treinta anos como investigador de las ciencias juridicas, Tomo III: Derecho Procesal, Universidad Nacional Autonoma de Mexico, 1998, p.2046, 2047. (available at; http://biblio.juridicas.unam.mx/libros/2/643/26.pdf)

It should also be mentioned that during the age of 1924 Constitution, the Council of State's caseload had increased steadily. In order to be able to cope with the backlog, quantity of the Council of State's chambers had also rised. In 1931 a new chamber of litigation was founded by a new statute[50] and the number of the Council's chambers of litigation reached to two. Then number of the Council's chambers of litigation mounted up to three in 1946[51] and to five in 1959[52].

At the same period (between 1921 and 1960) in France, prefecture councils' evolution into administrative tribunals was on-going. In this regard eighty six prefecture councils replaced by twenty two *interdepartmental prefecture councils*[53] in 1926 and some of the Conseil d'Etat's judicial works were transferred to interdepartmental prefecture councils in 1934.[54] Depending on increasing activities of the public administrations, number of administrative cases and workload of the Conseil d'Etat also accrued.[55] In order to tackle the caseload problem, in 1953, prefecture councils became the general competent administrative courts at first instance instead of the Conseil d'Etat and their names changed as "*tribunaux administratifs* (*administrative tribunals*)".[56] In this way the evolution of prefecture councils' into administrative courts was completed and as result of this, except a small number of cases still remained under the competence of the Conseil d'Etat at first instance[57], *the Conseil* assumed the status of the administrative appellate court.

C. Age of 1961 Constitution of Turkey

New Turkish Constitution which was put into force in 1961 showed that the system of judicial review of administrative acts and actions had settled down in Turkey. In this context 1961 Constitution's 114th article was comprising the rules as follows; "*Recourse to judicial review shall be available against all actions and acts of administration. … The administration shall be liable to compensate for damages resulting from its actions and acts*." Obviously, apart from arranging the Council of State's organization, laying down a principle which prescribes '*judicial review shall be available against all administrative*

50 Code numbered 1859, Promulgated on Official Gazette of the Republic of Turkey, on July 21, 1931.

51 With the code numbered 4904, Promulgated on Official Gazette of the Republic of Turkey, on June 1, 1946.

52 With the code numbered 7354, Promulgated on Official Gazette of the Republic of Turkey, on June 22, 1959.

53 Schwartz, p.43, Karahanoğulları, p.21.

54 Karahanoğulları, p.20.

55 Brown, Bell, Galabert, p.51.

56 Schwartz, p.43, 44, Brown, Bell, Galabert, p.51, 52, Yaşar, p.29, Karahanoğulları, p.36.

57 Brown, Bell, Galabert, p.52.

acts and actions' and constitutes a *sine qua non* condition of the rule of law[58] was so significant as of that time.

In respect of administrative judiciary, 1961 Constitution's another vital norm was 140th article which was about the Council of State. Differently from 1924 Constitution, the Council of State took place in 1961 Constitution's part called "*judiciary power*" and it was organized independently from the prime minister or any other governmental body. According to 140th article of 1961 Constitution, the Council of State was first instance administrative court for some litigations and also the supreme administrative court of Turkey. Its functions were prescribed as hearing and settling administrative disputes, giving opinions on drafted statutes, drafted administrative regulations and contracts of concessions. 1961 Constitution provided that the Council's president, head of prosecutors and members should be selected by the Constitutional Court[59] from among double candidates who have been determined by General Assembly of the Council of State and the Council of Ministers separately. It also ruled that the Council's organization, functioning, judicial procedures and issues related to its members should be prescribed by statutes in accordance with the principle of independence of courts and judges' guarentee.

After new constitution's enactment, the code of the Council of State was also shifted. The new code of the Council of State numbered 521 and dated 1964[60] described the Council as "*supreme administrative court, resort of consultation and examination*" and stressed the Council's independence in its first two articles. New code was ruling the following articles; "*The Council of State's decision making organs are as follows; I- A) Chambers, B) General Assembly of The Council of State, C) Assembly of Administrative Chambers, D) Assembly of Litigation Chambers, E) Assembly on the Unification of Conflicted Judgments. II- A) Assembly of Presidents, B) High Assembly of Disciplinary, C) Assembly of Administration and Disciplinary.* (Art. 5) *The Council of State is divided into 12 chambers, nine of them deals with administrative cases and three of them deals with administrative matters. Every chamber is composed of a president and four members*. (Art. 19) *Disputes and cases which are enumerated below and for which another administrative judiciary resort is not determined by statutes shall be concluded by The Council of State directly and finally*; *A) Administrative cases about administrative acts that will be*

58 Yücel Oğurlu, Bünyamin Gürpınar, Introduction to Turkish Law, First Edition, XII Levha Publications, İstanbul, 2010, p.74.

59 The Constitutional Court was founded in Turkey by 1961 Constitution. That is to say 1961 Constitution established the Constitutional Court in Turkey for the first time and also gave it a crucial power over another supreme court.

60 Promulgated on Official Gazette of the Republic of Turkey, on December 31, 1964.

litigated by people whose interests have been infringed in order to have these acts quashed due to one of their power, form, reason, subject or aim aspects' contradiction with statutes; *B) Full jurisdiction cases*[61] *that will be litigated by people whose rights breached because of administrative acts and actions; C) Cases relating to controversies that occured between the parties of contracts signed for fulfilling one of the public services; D) Authority and assignment disputes occured between the bodies that have power of administrative judiciary; E) Cases lodged for solving a problem with regard to determination of meaning and scope of any administrative act concerned with a lawsuit that is being reviewed in ordinary courts, upon the court's decision.* (Art. 30) *Judicial decisions that were finally made by administrative judiciary resorts according to special statutes and for which no superior administrative judiciary organ was prescribed shall be finally reviewed by litigation chambers and the Assembly of Litigation Chambers via cassation.* (Art. 31) *The persons concerned may apply to the public administrations to have an administrative act or action committed regarding themselves which can be subject of an administrative case. In this occasion the competent administrations shall respond in three months at the latest. If an answer is not given to the application in this period, it shall be assumed that the application has been rejected and the persons concerned will be able to bring a case before the Council of State in ninety days as from the last day of the three months' time period.* (Art. 69) *If litigation chambers and the Assembly of Litigation Chambers decide to overrule a decision reviewed by them via cassation, the case shall be reviewed by the administrative judiciary resort whose decision has been overruled, in accordance with overruling decision. However if litigation chambers and the Assembly of Litigation Chambers are of the opinion that information obtained from examination of case's documents or court file about the physical facts of matter is sufficient or the conflict is concerned with just legal points, they shall make decision about the substance of the case in addition to overruling the decision.* (Art.85) *Reasons for overruling a decision in cases reviewed via cassation are as follows; i) to deal with a matter without having competence or assuming a task to do so, ii) to make a decision that is contrary with laws and regulations* (positive law), *iii) not to comply with the procedural rules.* (Art. 86)"

As it can be observed from the said rules, the new code of the Council of State numbered 521 enhanced the number of the Council's chambers, founded new decision making organs, described new types of administrative cases, brought a new oppurtunity in order for individuals to litigate against implicit administrative acts, and arranged relationship between the Council

[61] "Full jurisdiction case" is the special name of compensation cases in Turkish administrative judiciary.

and other administrative judiciary organs in a similar way to both cassation and appeal. The last conclusion can be inferred from 85th and 86th articles of the code. According to these articles the Council's examination over the decisions of other administrative judiciary bodies was still being named as "cassation" and scope of the Council's examination formulated by 86th article as "*determining compatibility of decision with law*" was sign of the cassation. However the Council's function described in 85th article, namely "*to examine whether proofs related to physcial facts were sufficient and if so, to make a new decision about substance of the case*" was consistent with the appeal jurisdiction. It is clear that if the code numbered 521 were anticipating the Council as merely a cassation organ over the other administrative judiciary bodies, it wouldn't allow the Council to review physical facts of cases under its examination.

In the age of 1961 Constitution, the Code of Administration of Prefecture (1949) remained in force and administrative councils of prefecture were still competent to conclude some of administrative litigations. In this period, the basic function of administrative councils of prefecture as first instance administrative judiciary body was the same as that it had in the 1924 Constitution's period. However as indicated above, differently from the term of 1924 Constitution, the Council of State was not merely a cassation body in 1961 Constitution's term. The Council of State had also the power of examining the physical facts of cases concluded by administrative councils of prefecture, like an apellate court.

Another significant point that must be stressed with regard to this age was the amendment of the Constitution enacted in 1971. In 1971 a new supreme administrative court was established apart from the Council of State. This new supreme court was called as the "*Supreme Military Administrative Court*" and assigned to deal with the judicial review of administrative acts and actions involving the military staff and concerned with the military service. 1971 amendment thus caused a duality in Turkey between the ordinary administrative judiciary and the military administrative judiciary which still exists.

Even though first instance administrative courts had started to work in 1953 in France, Turkey couldn't effectuate this vital step during 1961 Constitution's age (1961-1982). But when we look at the age's intellectual debates, we can see that administrative law scholars were insistently stressing the legal[62] and

[62] Article 140 of 1961 Constitution was being accepted as the basis of this legal necessity. Because, as it has been indicated above, article 140 described the Council of State as supreme administrative court of Turkey.

factual[63] necessity of the foundation of first instance administrative courts. For example according to *Güran*, existence of first instance administrative courts was a requirement of both 140th article of the 1961 Constitution and the effectiveness of the administrative judiciary as a public service.[64] Also *Özdeş* stated that if first instance administrative courts were set up it would constitute a reform compatible with the order of the Constitution and necessities of Turkey.[65] These considerations were showing that, foundation of first instance administrative courts was too close for Turkey as of the beginning of the 1980's.

Overall the new Constitution of 1961 settled the principle of "*availability of judicial review against all administrative acts and actions*" in Turkish positive law and arranged the Council of State as an independent judicial body from the executive branch of the state. It also allowed the legislature to set up first instance administrative courts by describing the Council as the *supreme* administrative court. However this crucial step couldn't be put into effect during 1961 Constitution's term.

D. Age of 1982 Constitution of Turkey

On 12 September 1980 Turkish armed forces launched a military coup and usurped powers of legislative and executive branches of the state. After the coup, the legislative power was started to being used by the Council of National Security composing of high level commanders of the army pursuant to the Constitutional System Code of 27 October 1980.[66] Even though Constitution of 1961 was not promulgated as an aftermath of the coup, article 3 of the Constitutional System Code provided that no claim could be made concerning unconstitutionality of decrees and statutes of the Council of National Security. Accordingly Turkish Constitution of 1961 became as an ordinary statute[67] as

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63 During the 1961 Constitution's age the Council of State encountered with a huge backlog. In this context the backlog of the Council reached to 94.348 in 1976. So as to deal with the huge backlog, the number of chambers of the Council which were dealing with the administrative cases increased to 12 from 9 during 1961 Constitution's age. See; Orhan Özdeş, Alt Derece İdare Mahkemeleri (*Lower Instance Administrative Courts*), Journal of the Council of State, Special Volume Dedicated to 100th Anniversary of The Birth of Atatürk, 1981, p.22.

64 Sait Güran, Bölge İdare Mahkemeleri ve Danıştay Üzerine Yapısal Bir Deneme (*A Structural Essay Upon Regional Administrative Courts and the Council of State*), First Edition, Istanbul University Law Faculty Publications, İstanbul, 1977, p.443-444.

65 Özdeş, p.24.

66 Promulgated on Official Gazette of the Republic of Turkey, on October 28, 1980.

67 Kemal Gözler, Türk Anayasa Hukuku (*Turkish Constitutional Law*), First Edition, Ekin Publications, Bursa, 2000, www.anayasa.gen.tr/82ay-hazirlik.htm. It could be said that between 28 October 1980 and 9 November 1982 there was not a classical constitution in Turkish legal system which had binding character over normal statutes.

from 28 October 1980 up to 9 November 1982 the date on which the new Constitution (Constitution of 1982) was put into force after a referendum held on 7 November 1982.

During this interim period between the coup and the new constitution's enactment, Turkey witnessed a major change regarding the administrative judiciary system. In January 1982 three ordinary statutes numbered 2575, 2576 and 2577 reorganized the structure of Turkish administrative judiciary by setting up both first instance and regional administrative courts beside the Council of State. Although the new constitution was subsequently put into force in November 1982, the main framework laid down by these three statutes was not changed and three different bodies (first instance administrative courts, regional administrative courts and the Council of State) have remained to be existed in Turkish administrative judiciary system.

1982 Constitution has three rules which are directly related to the administrative judiciary system and very similar to 114th and 140th articles of 1961 Constitution. In this regard article 125 of the new constitution prescribes the principle of availability of judicial review against all administrative acts and actions. The same rule also provides that the administration shall be liable to compansate for damages resulting from administrative acts and actions.

Other provisions of the 1982 Constitution concerning the administrative judiciary are its 155th and 157th articles regulating main principles about the Council of State and the Supreme Military Administrative Court, respectively. According to these rules; "*The Council of State is the last instance for reviewing decisions and judgments given by administrative courts and not entrusted to any other administrative judiciary organ by law. It also deals with specific cases prescribed by law as the first and the last instance. …*" and "*The Supreme Military Administrative Court shall be the first and the last instance for the judicial supervision of disputes arising from administrative acts and actions involving military persons and relating to military service, even if such acts and actions have been carried out by non-military authorities …*". It thus can be said that the 1982 Constitution kept the existence of the military administrative court which had been set up in 1971 and continued to make a seperation between the military administrative acts and the others.[68]

[68] However it is highly possible that Turkey will have to make a constitutional amendment and to abolish the Supreme Military Administrative Court. It is simply because that the European Court of Human Rights (ECtHR) held in its judgment of 17 November 2015 that the Supreme Military Administrative Court could not be considered as an independent and impartial tribunal within the meaning of Article 6 of the European Convention on Human Rights. (see ECtHR, *Tanışma v. Turkey*, no.32219/05, 17 November 2015)

Beside the provisions of the Constitution, the most important rules concerning the organization and the functions of the administrative courts have been prescribed by statutes numbered 2575, 2576 and 2577 which are still in force. According to these laws, Turkish (general[69]) administrative judiciary system is based on the existence of four different court types; *administrative courts*, *tax courts*, *regional administrative courts* and *the Council of State* (the Supreme Administrative Court). In this regard the administrative courts and the tax courts are the first instance courts[70] which means that any individuals may bring an action before these courts and seek redress against administrative acts or actions. Accordingly the regional administrative courts[71] and the Council of State[72] are *principally* the superior administrative judiciary organs with which an application can be lodged against the decisions of the administrative or the tax courts. However in some exceptional occasions enumareted in the law, the Council of State may also deal with an administrative case at first instance.

In Turkey the administrative courts have general competence in respect of judicial review of the administrative acts and actions. This means that, unless otherwise prescribed by law, any case against any kind of administrative act or action must be brought before the administrative courts at first instance. In Turkish law three general exceptions are stipulated for this general principle; *1.* the cases concerning taxes, fees, duties, other similar financial obligations and also their collections shall be adjudicated by the *tax courts* (Law No.2576,

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69 Not the military.

70 As of April 2016, the administrative courts are situated in forty-six cities and the tax courts are situated in thirty-six cities of Turkey. In the following cities of Turkey, there is at least one administrative court: Adana, Hatay, Mersin, Ankara, Antalya, Isparta, Aydın, Muğla, Bursa, Balıkesir, Denizli, Afyonkarahisar, Diyarbakır, Batman, Mardin, Siirt, Edirne, Tekirdağ, Çanakkale, Erzurum, Eskişehir, Gaziantep, Kahramanmaraş, Şanlıurfa, İstanbul, İzmir, Kayseri, Yozgat, Kırıkkale, Çorum, Konya, Aksaray, Malatya, Elazığ, Manisa, Ordu, Sakarya, Kocaeli, Samsun, Sivas, Tokat, Trabzon, Rize, Van, Zonguldak and Kastamonu**.** And also in the following cities of Turkey, there is at least one tax court: Adana, Hatay, Mersin, Ankara, Antalya, Aydın, Muğla, Bursa, Balıkesir, Denizli, Diyarbakır, Batman, Mardin, Edirne, Tekirdağ, Erzurum, Eskişehir, Gaziantep, Kahramanmaraş, Şanlıurfa, İstanbul, İzmir, Kayseri, Kırıkkale, Çorum, Konya, Malatya, Manisa, Ordu, Sakarya, Kocaeli, Samsun, Sivas, Trabzon, Van and Zonguldak.
http://www.hsyk.gov.tr/adliteskilat/idari.pdf , 05/04/2016. After the law no. 6545 details of which will be explained below came into force on 20 July 2016, new administrative courts have been opened also in Adıyaman and Kütahya provinces of Turkey.

71 As of April 2016, there are twenty-five regional administrative courts in Turkey situated in the following cities: Adana, Ankara, Antalya, Aydın, Bursa, Denizli, Diyarbakır, Edirne, Erzurum, Eskişehir, Gaziantep, İstanbul, İzmir, Kayseri, Kırıkkale, Konya, Malatya, Manisa, Ordu, Sakarya, Samsun, Sivas, Trabzon, Van and Zonguldak. However the number of the regional administrative courts has been reduced by law no. 6545. See footnote 85 below.

72 The Council of State, the Turkish supreme administrative court, is situated in Ankara, the capital of Turkey.

article 6), *2.* some important cases enumerated in article 24 of the law numbered 2575[73] shall be dealt with *the Council of State* as first instance administrative court, and *3.* the disputes arising from administrative acts and actions involving military persons and relating to military service shall be brought before *the Supreme Military Administrative Court*. (the Constitution, article 157; Law No.1602)

As it has been indicated above there are two different superior bodies in Turkish administrative judiciary system; *the regional administrative courts* and *the Council of State*. However the existence of two different superior bodies was not a consequence of the existence of a technical separation between the cassation and the appeal in Turkish administrative justice. The assignment of duties between these bodies mainly depended on the natures of the dispute and the number of judges involved in the decision-making process. According to Article 45 of law numbered 2577, parties to the case might object to the decisions of the administrative or the tax courts before the regional administrative courts if the decision was made by a single judge or if the subject matter of the case was one of those enumerated in the same article (for example, administrative acts relating to failure of primary and secondary schools' students in their examinations and also relating to their grades, or local public administrations' acts concerning temporary assignment, temporary suspension from office, allowances, leaves and special residences of public officials).[74] Accordingly if a decision of the first instance administrative court was rendered by committee of the court instead of a single judge and the main subject of the decision was not one of those enumerated in the article 45 of law numbered 2577, the decision might be contested before the Council of State.[75] Finally after the regional administrative courts' or the Council of State's examination about the first instance courts' judgments, it was also open for the parties to the case to make a rectification request before the same body at last instance.

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[73] According to the article 24 of the law numbered 2575, the cases against the following administrative acts must be brought before the Council of State as a court of first instance: a) the decisions of the Council of Ministers, b) the joint decrees regarding the under secretaries of the prime ministry, the ministries and other public institutions, c) the regulations that have been issued by the ministries, public institutions or professional organizations having the characteristics of public institutions and shall be implemented all around the country, d) the acts or actions which were put into practice upon the decisions made by administrative chambers or administrative works committee of the Council of State, e) the matters falling within the competence *ratione loci* of more than one administrative or tax court, and f) the decisions of High Disciplinary Committee of the Council of State and the acts of the Presidency of the Council of State regarding the functions of that committee.

[74] This legal means was called as "*objection*" by law numbered 2577.

[75] This legal means was called as "*cassation*" by law numbered 2577.

Even though there was an organizational seperation between the regional administrative courts and the Council of State, they were functionally conducting the same supervision over the judgments delivered by first instance administrative courts. In this regard both of these superior courts were analysing both the assessment of facts and the interpretation of laws by the first instance administrative courts. This was also valid in respect of the rectification requests raised before the regional administrative courts or the Council of State. Additionally recoursing to the Council of State for cassation review of the regional administrative courts' decisions was not possible. Accordingly, the regional administrative courts and the Council of State were two "*appeal*" organs in Turkish administrative judiciary system supervising the first instance administrative courts' assessments of facts and of law at the same time.

It should also be stressed that as of 1982, when the regional administrative courts were established in Turkey, there was not a specific judicial organ in France similar to the regional administrative courts in Turkey. However in 1987, administrative appellate courts (*Cours Administratives d'Appel*) were set up in five different regions of France in order to reduce the backlog of the Conseil d'Etat.[76] Assignment of tasks between the Conseil d'Etat and the administrative appellate courts were determined according to the subjects of administrative disputes. In this sense the administrative appellate courts became the general appellate courts in France[77] and started to examine a considerable proportion of judgments of the administrative courts (*les tribunaux administratifs*) as an appellate body.[78] However the administrative courts' decisions with regard to remitting cases to the law courts, the disputes concerning municipal and cantonal elections and also the matters referred by law courts in order for a problem of legality of an administrative act to be solved (*recours en appréciation de légalité*) remained under the supervisory authority of the Conseil d'Etat.[79] And unlike in Turkey, recoursing to the Conseil d'Etat for cassation review of decisions of administrative appellate courts (*Cours Administratives d'Appel*) was principally possible in France.[80]

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76 Brown, Bell, Galabert, p.53. As of 2016, there are eight *Cours Administratives d'Appel* in the following regions of France: Bordeaux, Douai, Lyon, Marseille, Nancy, Nantes, Paris and Versailles. http://www.conseil-etat.fr/Tribunaux-Cours/Missions/Cours-administratives-d-appel , 01/11/2016.

77 http://www.conseil-etat.fr/Tribunaux-Cours/Missions/Cours-administratives-d-appel , 01/11/2016.

78 Brown, Bell, Galabert, p.53.

79 http://www.conseil-etat.fr/Tribunaux-Cours/Missions/Cours-administratives-d-appel , 01/11/2016.

80 Brown, Bell, Galabert, p.118.

To sum up, in the age of 1982 Constitution the most important step effectuated in Turkish administrative justice was the foundation of the administrative and the tax courts. Law numbered 2576 set up the first instance administrative courts in 1982, twenty-nine years after the same courts (*les tribunaux administratifs*) had been established in France, country of origin of the Turkish administrative judiciary system. In the same year the regional administrative courts were also established as a second supervisory body in respect of the judgments of the first instance administrative courts. However the foundation of a second supervisory body together with the Council of State was not result of the existence of a technical separation between the cassation and the appeal reviews in Turkish administrative justice system.

III. THE CODE NUMBERED 6545 and THE NEW PHASE of TURKISH ADMINISTRATIVE JUDICIARY

Turkish administrative justice system kept to work with two appellate bodies up to 2014. Even though the burden of supervising the judgments delivered by first instance administrative courts was distributed between two superior courts, the backlog of the Council of State was considerably higher than the backlog of the regional administrative courts due to the fact that the most common administrative disputes were subject to appeal before the Council of State. In this regard seventy percentages of the judgments of the administrative and the tax courts were being examined by the Council of State as of May 2014.[81]

In this general context Turkish National Assembly enacted law no. 6545 on 18 June 2014 and amended several provisions of the laws numbered 2576 and 2577, the pillars of Turkish administrative judiciary. The aims of these amendments were to reduce the backlog of the Council of State, to shorten the length of judicial proceedings and to strengthen the role of the Council of State as a "court of jurisprudence".[82] To this end, law numbered 6545 rearranged the distribution of tasks between the Council of State and the regional administrative courts and stipulated a separation between the appeal and the cassation reviews.

However it should be stressed that the system details of which will be summarised below did not come into force when the law no. 6545 was published in Official Gazette. It was because the 14th article of law no. 6545 provided that the date on which the regional administrative courts will start

81 See the reasoning text of law numbered 6545's draft that was submitted to the Turkish National Assembly on 12 May 2014, http://www2.tbmm.gov.tr/d24/1/1-0918.pdf , 02/11/2016.

82 http://www2.tbmm.gov.tr/d24/1/1-0918.pdf , 02/11/2016.

to function as appellate courts shall be determined by the Ministry of Justice. In this context the Ministry of Justice has determined this date as 20 July 2016.[83] Accordingly the new system regarding the supervision of first instance administrative courts' judgments prescribed by law no. 6545 have just been in force as from 20 July 2016.

In the light of the legal amendments that have been made to laws numbered 2575 and 2576 by law no. 6545, the fundamental principles of the *current* system in Turkish administrative law regarding the supervision of first instance administrative courts' judgments may be summarised as follows:[84]

- Even though all judgments of first instance courts had been subject to appeal in Turkish administrative law before 20 July 2016, law no. 6545 prescribed a category of administrative disputes concerning which the judgments rendered at first instance shall be final. According to this amendment the administrative and the tax courts' judgments concerning pecuniary disputes shall be final and not be subject to any appeal where the value of the subject matter of the dispute does not exceed 5.000,00 Turkish Liras.[85] (Law no. 2577, Article 45 paragraph 1)

- The regional administrative courts became general competent appellate courts in Turkish administrative judiciary system. In this sense except the final judgments that are not subject to appeal and the judgments delivered according to expedite judicial proceedings, all judgments of the administrative and the tax courts may be appealed before the regional administrative courts. (Law no. 2577, Article 45 paragraphs 1 and 8)

- If the regional administrative court finds that the appealed judgment is in compliance with the law, it shall uphold the judgment in question. However if it finds that there is a contradiction with the law, it shall quash the appealed judgment and at the same time it shall deliver a new judgment on the merits of the case. And as the last option, if the appealed judgment has been delivered following the preliminary examination of the case or if the regional administrative court considers that the judgment has been rendered by an incompetent court, the regional administrative court shall quash the

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83 See Official Gazette of the Republic of Turkey, dated November 7, 2015. According to the same article of law no. 6545, the provinces in which the regional administrative courts will be founded and the competence *ratione loci* of the regional administrative courts shall also be determined by the Ministry of Justice. The Ministry of Justice determined these provinces as Ankara, İstanbul, İzmir, Konya, Samsun, Gaziantep and Diyarbakır.

84 For detailed explanations of the amendments made by law no. 6545 and verbatim translation of a considerable part of law no. 6545 see Mustafa Avcı, An Analysis on the Amendments on Administrative Jurisdiction Through Laws No.6545 and No.6552, Law & Justice Review, Year:7, Issue:12, June 2016, p.57 et seq.

85 Equivalent to approximately 1.400,00 Euros as of November 2016.

judgment and remit the case for re-examination. (Law no. 2577, Article 45 paragraphs 3, 4 and 5)

- In respect of the fourteen categories of administrative disputes,[86] the decisions delivered by the regional administrative courts may be subject to cassation review by the Council of State upon request of one of the parties to the case. Accordingly decisions of the regional administrative courts that do not fall under those fourteen categories shall be final. (Law no. 2577, Article 45 paragraph 6 and Article 46)

- The judgments delivered by the Council of State at first instance and also the judgments delivered according to expedite judicial proceedings[87] shall be subject to cassation review before the Council of State, not to appeal before the regional administrative courts. (Law no. 2577, Article 20/A and Article 46)

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86 These fourteen categories are enumerated by article 46 of law no. 2577 as follows: a) The annulment actions brought against regulatory administrative acts, b) The tax cases, the full jurisdiction cases and the actions brought against the administrative acts where the value of subject matter of the dispute exceeds 100.000,00 Turkish Liras, c) The annulment actions brought against the administrative acts which entail termination of exercising a specific profession, of public office or of student status, d) The annulment actions brought against the administrative acts which suspend someone from exercising a specific commercial activity for an indefinite period of time or for thirty or more days, e) The annulment actions brought against the administrative acts of joint decrees concerning assignments, transfers and discharging, and the administrative acts concerning assignments, transfers and discharging of public officials who are head of quarters or in a superior position, f) The cases arisen from land development plans and parcellation acts, g) The cases arisen from the decisions of the Central Commission for Protection of Natural Monuments and the High Committee for Protection of Cultural Monuments made following an objection and from the implementation of Bosphorus Act, law no. 2960 of 18 November 1983, h) The actions brought against the administrative acts with regard to implementation of law concerning mines, stone quarries, forests, geothermal sources and natural mineral waters, ı) The cases lodged about the examinations held all around the country for education, performing a profession or a craft, or access to public office, i) The cases arisen from implementation of law related to issuing of operating licences for coastal facilities like harbors, cruise harbors, yacht harbors, marinas, wharfs, landing piers, pipelines of fuel oil and liquefied petroleum gas, j) The cases arisen from implementation of law no. 3996 of 8 June 1994 and of law no. 4283 of 16 July 1997, k) The cases arisen from implementation of Free Trade Zones Act, law no. 3218 of 6 June 1985, l) The cases arisen from implementation of Protection of Soil and Usage of Land Act, law no. 5403 of 3 June 2005, m) The actions brought against the decisions made by regulatory and supervisory boards regarding the market or the sector for which they are responsible.
It is obvious that the administrative cases that fall under these fourteen categories amount a large proportion of the total backlog of the Turkish administrative courts. So in respect of a large number of administrative disputes, the finalization of case will occur after three levels of jurisdiction and this will make it difficult to reach the aim of law no. 6545, namely to shorten the length of judicial proceedings.

87 According to article 20/A of law no. 2577 expedite judicial proceedings shall be pursued in five specific categories of administrative disputes.

- Following the cassation review, the Council of State may either directly uphold the decision, uphold the decision with a different ground, uphold the decision by rectifying clerical errors, mistakes or oversights that do not require re-trial of the case, or quash the decision and remit the case for re-examination if it is not in conformity with the law. Accordingly it is not possible for the Council of State, as a cassation body, to render a fresh decision on the merits of the case after conducting its supervision. (Law no. 2577, Article 49)

- If the Council of State quashes a decision of the regional administrative court, the regional administrative court can either adopt the quashing decision and render a new decision following it or insist on the lawfulness of its previous decision. On the second occasion, the Joint Administrative Chambers of the Council of State or the Joint Tax Chambers of the Council of State shall decide on the merits of the case and this decision shall be final. (Law no. 2577, Article 49)

- The remedy of "rectification of decision" has been abolished. Before the law no. 6545 it was possible for parties to the case to apply to the regional administrative courts or to the Council of State and to request rectification of decision delivered on appeal. However following the law no. 6545's enactment on 20 July 2016, it is not possible anymore. By abolishing this additional remedy the legislature was aimed at the shortening the length of proceedings.

In summary, law no. 6545 changed the supervision system of judgments of the administrative and the tax courts. Before this law a judgment of first instance court might become final after the appeal and the rectification reviews conducted by the superior administrative courts. And a large proportion of judgments at first instance were examining by the Council of State. After the law no. 6545, except two categories of cases, the regional administrative courts have become general appellate body in Turkish administrative justice system[88] and a technical separation has been put into force between the appeal and the cassation reviews. According to the new system judgments delivered at

[88] Since the regional administrative courts have become general appellate body, it is highly possible that the workload of the Council of State will decrease considerably. As a result of this, on 23 July 2016, the number of the Council of State's chambers has been reduced to 10 from 17 by law no. 6723. This is the first time ever in its history, the number of the chambers of the Council of State has been lessened and the Council's organization has become smaller. Also by the law no. 6723 some posts of members of the Council have been annulled and the number of the Council's members has been diminished to 90 from 195 due to new and lessened workload of the Council. Obviously this amendment will entail transfer of some members from the Council of State to the regional administrative courts and thus help to enhance the regional administrative courts' jurisprudential capacity. For the text of law no. 6723 see Official Gazette of the Republic of Turkey, on July 23, 2016.

first instance may become final after the appeal and the cassation reviews conducted both by the regional administrative courts and by the Council of State in respect of fourteen categories of cases. With regard to the cases that do not fall under those fourteen categories, judicial proceedings may come to an end following just the appeal review before the regional administrative courts.

IV. CONCLUSION

Supervision of public administrations' acts and actions has deep roots in Turkey. The system started to run with the High Council of Judicial Verdicts and the representative provincial councils in 1840s and then it has continuously evolved during the course of decades. The foundation of the Council of State in 1868, regulating the Council of State's functions like a supreme administrative court in 1925 and laying down a principle enunciating the availability of judicial review against all administrative acts and actions in 1961 were some vital steps of this evolution.

It can be observed that "*following the French samples*" was one of the main features of Turkish administrative judiciary's evolution. In this regard Turkish supreme administrative court was initially founded in 1868, approximately six decades after its French counterpart. Also Turkish administrative courts were set up in 1982, twenty nine years after the first instance administrative courts were established in France in 1953. But regional administrative courts can be assessed as an exception to this main feature. It is because when regional administrative courts were found in Turkey in 1982, there was not a separate judicial body in France which was similar to Turkish regional administrative courts. France established administrative appellate courts (*Cours Administratives d'Appel*) in 1987, five years later than Turkey.

Nevertheless, unlike Turkish regional administrative courts, French appellate courts started to deal with a considerable proportion of first instance administrative courts' judgments as an appellate body since from their foundation. In Turkey, there was not a technical separation between appeal and cassation reviews between 1982 and 2016 and the most administrative cases were subject to a superior review before the Council of State not before the regional administrative courts.

However this situation has been changed by law no. 6545 which was adopted in 2014. According to the new system which has been prescribed by law no. 6545 and started to being implemented as from 20 July 2016, the regional administrative courts are general appellate courts in Turkish administrative judiciary and they shall examine a large proportion of judgments of the first instance administrative courts by assessing both facts and law. Pursuant to the

same system the Council of State shall supervise some categories of decisions of the regional administrative courts as a cassation body. Thus, by providing a technical separation between the appeal and the cassation reviews and making the regional administrative courts as main supervisory organs in administrative justice, law no. 6545 established the consistency between the Turkish and French administrative judiciary systems again.

It is certain that the legislature pursued the aims of shortening the length of judicial proceedings in respect of the administrative cases and strengthening the Council of State's jurisprudential capacity with the law no. 6545. Even though it is very early to make a comment on the possibility of these aims' realisation; if the Council of State does not give up its established practice of reviewing the lower courts' cases both as to the facts and law, it seems hard to achieve these aims. Despite that it can be said as of today, judicial review against all actions and acts of administration is available in Turkey and this review is being conducted by the administrative courts, the regional administrative courts and the Council of State pursuant to both Turkish law and the European Convention on Human Rights[89]. In order to enhance these judicial bodies' capacities to perform such a review, a vital step has just been effectuated as from 20 July 2016. It is hoped that the new system will duly work and settle down and thus become another crucial cornerstone of Turkish administrative judiciary's long history.

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[89] According to Article 90 of the Turkish Constitution, in the case of a conflict between international agreements concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail. See https://global.tbmm.gov.tr/docs/ constitution_en.pdf , 04/11/2016

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THE EFFECTIVENESS OF MURABAHAH IN ISLAMIC LAW IN TERMS OF HOUSE FINANCING: COMPARING THE UK AND MALAYSIA

Konut Finansmanı Açısından Murabaha'nın İslam Hukukundaki Etkinliği: Birleşik Krallık ve Malezya Karşılaştırması

Oytun AZKANAR*

ABSTRACT

Islamic banking has significantly developed in recent years. Due to the prohibitions in Islamic banking system, contrary to the conventional banking system, some of the tools were discovered by Islamic banking practitioners. Murabahah is one of the most popular Islamic financial tools, particularly in terms of house financing. Growing market share of Islamic banking does not solely attract Islamic world, but also, it has become popular even in non-Islamic countries, e.g. England On the other hand, implementation of such Islamic financial banking tools, like Murabahah, varies significantly between states. This article aims to set forth the current issues in Murabahah house financing system by comparing two different countries; the UK and Malaysia. The desire for being a leader among the Western countries provided the UK a strong position in Islamic banking market. Similarly, an Asian competitor Malaysia has also sustained their predominant role. Thus, murabahah house financing transactions and issues will be analyzed comparing these two leading countries.

Keywords: murabahah, riba, house finance, Malaysia, the UK

ÖZET

İslami bankacılık son yıllarda dikkate değer bir şekilde gelişmektedir. Geleneksel bankacılığın aksine, İslami bankacılık sistemindeki yasaklar sebebiyle, İslami bankacılık uygulayıcıları tarafından birtakım araçlar keşfedilmiştir. Murabahah, özellikle konut finansmanı açısından, söz konusu İslami bankacılık araçları arasında en önemlilerinden birisidir. İslami bankacılığın büyüyen Pazar payı sadece İslam dünyasını kendisine çekmekle kalmayıp, Müslüman olmayan ülkelerde dahi, İngiltere gibi, popüler olmaya başlamıştır. Diğer yandan, murabahah gibi İslami bankacılık araçlarının uygulanması ülkeler arasında farklılıklar göstermektedir. Bu makale, konut finansmanı sisteminde Murabaha ile ilgili sorunları, Birleşik Krallık ve Malezya gibi iki farklı ülkeyi karşılaştırarak, ortaya koymayı amaç edinmektedir. Batılı ülkeler arasında lider pozisyonda olma isteği Birleşik Krallık'a İslami bankacılık pazarında güçlü bir pozisyon sağlamaktadır. Benzer şekilde, Asyalı rakibi Malezya baskın pozisyonunu sürdürmeye devam etmektedir. Bu yüzden, murabahah konut finansmanı sistemi ve sorunları bu iki lider ülkeyi karşılaştırarak analiz edilecektir.

Anahtar Kelimeler: murabahah, riba, konut finansmanı, İngiltere, Malezya

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I. INTRODUCTION

Islamic banking has significantly developed in recent years.[1] The main reason why Islamic banking is so popular today is the cost of the oil price.[2] Due to the high oil price, Gulf Cooperation Council States and Iran have increased their wealth and these countries have sought financial instruments which are not prohibited by Islam.[3] Contrary to conventional banking transactions, Islamic banking transactions do not include *riba* (interest) because *riba* is prohibited by *Qur'an*.[4] Therefore, Islamic banking transactions have become more attractive for countries which want to protect themselves from *riba*.

House financing may be the most important transaction in both conventional and Islamic banking. Particularly, the Global Financial Crisis in 2008 (GFC) demonstrated the significance of house financing transactions. As a result of bursting house bubble in the USA, GFC was triggered and it had adverse effects on economies.[5] The house financing system was not the only reason for GFC but it played a crucial role. On the other hand, after the GFC, house finance has continued to grow. For instance, in the USA, mortgage loans reached US$395 billion in the second quarter of 2015 which was almost more than US$100 billion (US$297 billion) compared to the second quarter of 2014.[6]

Apart from the USA, house financing transactions are also important for almost every country today. In addition to conventional banking practices, Islamic finance system has introduced several tools for house financing which have become popular even in Western countries. For instance, the UK is the most dominant player in Islamic banking among Western countries. The UK's reported Islamic finance assets in 2014 reached US$19 billion.[7] On the other

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1 Karina Robinson, "Islamic Finance Is Seeing Spectacular Growth," *The New York Times*, November 5, 2007, accessed December 25, 2015, http://www.nytimes.com/2007/11/05/business/worldbusiness/05iht-bankcol06.3.8193171.html.

2 Tina Savona and Shahriar Mofakhami, "Structuring Islamic Finance Transactions: Interaction with the Law of Secured Finance," *Journal of Banking and Finance Law and Practice* 20 (2009): 306.

3 Ibid.

4 Omar Masood, *Islamic Banking and Finance* (Palgrave Macmillan, 2011), 9.

5 Warwick J. McKibbin and Andrew Stoeckel, "The Global Financial Crisis: Causes and Consequences," *Asian Economic Papers* 9 (2009): 60.

6 Trefis Team, "Q2 2015 U.S. Banking Review: Mortgage Originations," accessed March 25, 2016, http://www.forbes.com/sites/greatspeculations/2015/08/28/q2-2015-u-s-banking-review-mortgage-originations/.

7 Financial Services Organisation, UK Trade & Investment, Foreign & Commonwealth Office and HM Treasury, "UK Excellence in Islamic Finance," *Government UK*, October 24, 2014, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/367154/UKTI_UK_Excellence_in_Islamic_Finance_Reprint_2014_Spread.pdf.

hand, Malaysia is the leading country in terms of Islamic financial assets. At the end of 2013, Malaysia's Islamic financial assets reached US$135.5 billion.[8]

The conventional banking system, in house financing, depends on interest. Therefore, some of the transactions were created by Islamic finance regulators in order to prevent people from interest based transactions. Particularly, for house financing, three methods are commonly used in Islamic finance: *Murabahah, ijarah wa iqtina,* and *musharakah mutanaqisah.*[9] Among those methods, *murabahah* is the most common way for house financing in Islamic banking[10], but some of the issues are also under debate.[11]

Throughout that article, I will try to explain the main issues in *murabahah* and I will also aim to determine whether *murabahah* is an effective way for house financing by considering the UK and Malaysia practices.

In the first section, I will give a brief definition of *murabahah* and I will identify the difference between *murabahah*, *ijarah,* and *musharakah.* In fact, both methods are commonly used in Islamic financial transactions; *murabahah* is distinguished from other methods because, unlike *ijarah* and *musharakah*, a client has the possession of the house after signing the *murabahah* contract.

The second section will be about the difference between conventional banking practices and Islamic banking practices in terms of interest. Due to the prohibition of interest in Islam, *murabahah* contracts include mark-up prices rather than interest, but the determining the mark up price is not so easy and most of the Islamic banks use conventional banking interest tools for determining the mark up price. Therefore, some of the views suggest that there is no difference between mark up and interest.

In the third section, *murabahah* will be discussed on the basis of tax treatments. *Murabahah* transactions include two separate sales. The first one is the bank's purchasing the house from the homeowner and the second one is selling the house to the customer. In fact, those two sales aim to one

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8 Baljeet Kaur Grewal, "Islamic Finance for Asia: Innovasion, Inclusion, and Growth" (Islamic Finance for Asia, Asian Development Bank Headquarters, Manila: Paper presented at the Conference on Islamic Finance for Asia, Islamic Financial Services Board and Asian Development Bank, Asian Development Bank Headquarters, Manila, 04-05 November 2013, n.d.), http://www.ifsb.org/docs/May%202015_IFSBADB%20Islamic%20Finance%20for%20AsiaDevt,%20Prospects%20and%20Inclusive%20Growth.pdf.

9 Luqman Zakariyah, "Legal Maxims and Islamic Financial Transactions: A Case Study of Mortgage Contracts and the Dilemma for Muslims in Britain," *Arab Law Quarterly* 26, no. 3 (2012): 261.

10 Murat Çizakça, *Islamic Capitalism and Finance* (Edward Elgar Publishing, 2011), 151.

11 Muhammad Taqi Usmani, *An Introduction to Islamic Finance* (Kluwer Law International, 2002), 44.

financial result, some of the countries charge double stamp duty taxes. On the other hand, in some countries, unlike conventional banking transactions, Islamic banking transactions are not subject of tax deduction and that leads to *murabahah* transactions' being undesirable comparing to conventional banking transactions.

Early payment and late payment transactions will be analyzed in the fourth section. In *murabahah* transactions, once the price is fixed by the bank and the client, any price difference may invalidate the transaction. On the other hand, not allowing the rebate on early payment and prohibiting late payment charges create other problems. If an Islamic bank did not make a discount on early payment, it would result in an unfair competition between Islamic and conventional banking systems. Similarly, if an Islamic bank did not charge a late payment fee, dishonest clients might take an advantage of it and that would damage the Islamic finance system.

In the fifth section, I will refer to the binding power of promise in *murabahah* transactions. In *murabahah* transactions, after a bank purchases a house from its owner, it immediately sells it to the client and finalizes the *murabahah* transaction. At that situation, a client makes a promise to buy the house from the bank. The client's binding power is also debatable in terms of claiming through the courts. If the client breaks his promise, the consequences will inevitably result in.

Finally, the courts' interpretations and implementations in the UK and Malaysia will be considered with regards to *murabahah*. Although both the UK and Malaysia are keen on *murabahah* transactions, courts in those countries interpret *murabahah* transactions differently. In the light of the some important *murabahah* cases, those differences will be illustrated.

The number of *murabahah* transactions in terms of house finance has increased dramatically in recent years. However, the effectiveness of those transactions is not completely satisfied and some of the issues in *murabahah* are still under attack.

II. DEFINITION OF MURABAHAH AND THE DIFFERENCE BETWEEN MURABAHAH, IJARAH AND MUSHARAKAH

A. Definition of Murabahah

Murabahah is a type of cost-plus agreement between a client and an Islamic financial institution (IFI). The IFI purchases a good from a third party and then sells it to the client with a fixed mark-up profit.[12] *Murabahah* contracts are

[12] Ibid., 37.

also identified as trade contracts because one party sells its good to another party with a mark-up price.[13]

Originally, *murabahah* was a kind of sale agreement rather than financing instrument.[14] The client, who wants to buy a house, applies to the IFI and the IFI purchases the house from the property owner. After that transaction, the bank sells the house at a mark-up price to the client. After the IFI purchases the house, the client has two options. The client can purchase the house from a bank immediately or he can buy the property on deferred payment.[15] For instance, in Malaysia, *bai bithaman ajil* (BBA) is the predominant instrument for house financing in terms of deferred payment.[16] BBA is a kind of deferred installment which provides clients to pay their debts on a long term basis.[17]

Pursuant to *Shari'ah* rules, a sale can be valid under some circumstances.[18] First of all, sale agreement cannot be valid unless the subject of the sale exists during the sale.[19] Secondly, the seller must have the possession of the subject at the time of the sale.[20] Thirdly, the sale should be certain.[21] Fourthly, the subject should have some value.[22] Fifthly, the subject of the sale should not be prohibited by Islam (*haram*).[23] Finally, the price should be certain.[24]

As a financing term, *murabahah* transactions must meet some conditions in order to be valid with regards to *Shari'ah. Murabahah* does not include interest and it depends on cost-plus profit.[25] In *murabahah* transactions, IFIs do not provide a loan to clients; in fact, they only sell the property to customers with a mark-up price.[26] The IFI must have the ownership of the property at the time of the sale.[27] In practice, IFIs give permission to clients

13 Hans Visser, *Islamic Finance: Principles and Practice* (Edward Elgar Publishing, 2009), 57.
14 Usmani, *An Introduction to Islamic Finance*, 41.
15 Abbas Mirakhor and Iqbal Zaidi, "Profit-and-Loss Sharing Contracts in Islamic Finance," in *Handbook of Islamic Banking*, ed. M. Kabir Hassan and Mervyn K. Lewis (Edward Elgar Publishing, 2007), 52.
16 Gholamreza Zandi, Noraini Mohd Ariffin, and Alireza Shahabi, "Some Issues on Murabahah Practices in Iran and Malaysian Islamic Banks," *African Journal of Business Management* 6, no. 24 (2012): 7069.
17 Ibid.
18 Usmani, *An Introduction to Islamic Finance*, 38.
19 Ibid.
20 Ibid.
21 Ibid., 40.
22 Ibid., 39.
23 Ibid.
24 Ibid., 38–40.
25 Ibid., 42.
26 Ibid.
27 Ibid.

being their agent and clients buy the property on the IFIs' behalf. During that time, clients act as a trustee. When the bank sells the property to the client, the trustee relationship finalizes and the ownership of the property transfers to the customer.[28] *Ijarah wa iqtina* and *musharakah mutanaqisah* are also Islamic house financing arrangements. They are used especially in the UK.[29]

B. The Difference between Murabahah, Ijarah wa Iqtina and Musharakah Mutanaqisah

Ijarah is typically a leasing contract between an IFI and a client. In an *ijarah* transaction, 'the owner of a property transfers its usufruct to another person for an agreed period, at an agreed consideration.'[30] Like *murabahah* contracts, *ijarah*, originally, is not a financing transaction.[31] In practice, the IFI purchases the house and it rents the house to the client for a period of time. At the end of the rental agreement, the property is transferred to the client.[32] *Ijarah* contracts cannot be valid, like *murabahah*, unless some specific conditions are met.[33] The period of lease and the rental must be determined at the beginning of the leasing.[34] In addition, the bank must have the ownership of the leased property during the leasing period.[35]

Musharakah mutanaqisah (diminishing *musharakah*) is another method for house financing. A client and a financier jointly own the house.[36] For instance, the IFI may contribute 90 percent of the house price and the client may contribute 10 percent. After purchasing the house, the client pays rent to the IFI over a period of time. After each payment, the client's share increases and as a consequence the IFI's share decreases. At the end of the installments, the client has the whole share of the IFI and he gains the ownership of the property.[37]

Ijarah and diminishing *musharakah* are different from *murabahah* contracts. First of all, *ijarah* and diminishing *musharakah* are similar to each other. In both *Ijarah* and *musharakah* contracts, clients gain the property rights at the end of the contract. During the contract period, the financier still has the ownership of the property. Secondly, unlike diminishing *musharakah*, in *murabahah* contracts, clients do not have to contribute any money and they

28 Ibid.
29 Zakariyah, "Legal Maxims and Islamic Financial Transactions," 261.
30 Usmani, *An Introduction to Islamic Finance*, 70.
31 Ibid., 72.
32 Zakariyah, "Legal Maxims and Islamic Financial Transactions," 262.
33 Usmani, *An Introduction to Islamic Finance*, 70.
34 Ibid.
35 Ibid., 71.
36 Zakariyah, "Legal Maxims and Islamic Financial Transactions," 262.
37 Ibid.

do not have to purchase shares. Thirdly, contrary to *ijarah* and diminishing *musharakah*, in a *murabahah* transaction, clients are requested to provide a security during the installment period.[38] Finally, *murabahah* is a sale agreement between a financier and a client. Therefore, *Shari'ah*'s rules of sale provisions should be carefully implemented in order to give an effect to a contract.

Murabahah transactions for house financing are very common in both Malaysia and the UK. For instance, in Malaysia, BBA is the most popular house financing instrument among financial institutions. Most of the IFIs in Malaysia provide BBA house financing system.[39] As it was mentioned before, in the BBA model, clients can 'defer the payment of the assets for a specific period or to pay by installment'.[40] Apart from BBA, diminishing musharakah and ijarah are also available in Malaysia.[41] Similar to Malaysia, the UK also uses the same house financing instruments.[42]

House financing techniques in Islamic banking include essential elements. *Shari'ah* law requires strict rules and the transactions for house financing must be in accordance with the *Shari'ah*. Particularly, *murabahah* transactions or contracts have been criticized by some of the scholars in different ways. Therefore, the discussions should carefully be analyzed.

III. LEGITIMACY PROBLEM IN MURABAHAH

Murabahah is one of the house financing methods in Islamic finance. The reason why *murabahah* transaction is introduced to the finance sector is that it is based on the Islamic Law (*Shari'ah*) principles.

Two main prohibitions distinguish Islamic banking from conventional banking. The first prohibition is *riba* (usury or interest). Pursuant to holy *Qur'an, riba* is strictly prohibited. There are several passages in the *Qur'an* that clearly warn people to avoid *riba*.[43]

Another prohibition in Islamic finance is *gharar* (hazard). In relation to financial transactions, *gharar* means, any financial transaction which includes a risk or a hazard.[44] In addition, if the essential elements of the contract

38 Usmani, *An Introduction to Islamic Finance*, 44.

39 Nooraslinda Abdul Aris et al., "Islamic House Financing: Comparison Between Bai'bithamin Ajil (bba) and Musharakah Mutanaqisah (mm)," *African Journal of Business Management* 6, no. 1 (2012): 267.

40 Ibid., 268.

41 Ibid., 272.

42 Zakariyah, "Legal Maxims and Islamic Financial Transactions," 261.

43 Chian Wu, "Islamic Banking: Signs of Sustainable Growth," *Minnesota Journal of International Law* 16, no. 1 (2007): 235–7.

44 Fuad Al-Omar and Mohammed Abdel-Haq, *Islamic Banking: Theory, Practice, and Challenges* (Zed Books, 1996), 9–10.

are not determined, the contract will be void in terms of *gharar* due to uncertainty.[45] As a result, *gharar* prohibits all risky, hazardous and uncertain financial transactions.[46] Unlike *riba*, *gharar* is not derived from the *Qur'an*; *gharar* arises from *ahadith*, which means 'an account of the life and conduct of the Prophet Muhammad'[47] and another source of *Shari'ah*.[48]

Conventional banking transactions in house financing are based on interest.[49] A client, who wants to purchase a house and needs a loan, first applies to an IFI and if the conditions are met, a contract will be drafted between a client and an IFI. The client will pay the loan and interest within a long term period. Generally, the interest rate is determined by the IFI before the loan contract is drafted. As soon as the client purchases the house, the bank requests a mortgage on the house. After all the payments made by the client, the bank releases the mortgage.[50] In almost every country, including Malaysia and the UK, conventional banking house financing system operates the same.[51]

As it was mentioned in the previous section, contrary to conventional banking house financing system, *murabahah* transactions depends on cost-plus pricing because of the *Shari'ah* rules. At that point, it is important to emphasize the difference between interest and cost plus pricing. In order to understand the *murabahah* transactions and cost plus pricing better, it is necessary to have a background of the prohibition of *riba* in Islam.

A. Reasons of Prohibition of Riba in Islam

As the main source of Islamic Law, *Qur'an* includes several verses that restrict usury. For instance, Chapter 2, verse 275, states;

'… Allah (God) has permitted trading and forbidden riba… and those who return to charging riba (interest) for the use of money (usury), they will be the acquirers and owners of hellfire and in there they will remain to eternity.'[52]

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45 Ibid.

46 Ibid.

47 Angelo M. Venardos, *Islamic Banking and Finance in South-East Asia: Its Development & Future*, 3rd ed. (World Scientific, 2012), 16.

48 Ibid.

49 Claudio Porzio, "Islamic Banking Versus Conventional Banking," in *Islamic Banking and Finance in the European Union*, ed. M. Fahim Khan and Mario Porzio (Edward Elgar, 2010), 99.

50 Babar Khan et al., "Comparison of Islamic and Conventional Banking Practices Regarding House Finance in Pakistan: A Case of Hazara Division," *Academic Research International* 5, no. 5 (2014): 253.

51 Ibid.

52 *Qur'an, 2:275*, n.d.

In chapter 3, verse 130 and 131 state, 'O ye who believe! Devour not usury, doubled and multiplied; but fear God that ye may (really) prosper.'[53] In addition in chapter 2, verse 276 states, 'Almighty God obliterates and destroys Riba and He grows the charities paid in the way of God…'[54]

Apart from the *Qur'an*, another source of Islamic Law, *hadith* (the sayings of Prophet Muhammad), explains the prohibition of *riba* in *Qur'an*. In Islam, involving a riba-based transaction is regarded as one of the unforgivable sins.[55]

Although *riba* was prohibited by two main sources of Islamic Law, the reasons for that prohibition were not clearly identified. Some of the scholars tried to identify riba restriction. According to Syed Hussain Ali Jafri and Lawrence S. Margolis, Islamic Law does not allow riba for socioeconomic reasons. Those authors claimed that

'Savings in interest-bearing and speculative assets have a destructive potential to the distributive and circulative nature of wealth and capital, and are the root cause of socioeconomic depravity, instability and social injustice.'[56]

Abdullah Saed suggests that the *Qur'an* is interested in protecting people who are poor or economically vulnerable. The *Qur'an* does not allow rich people to exploit economically disadvantaged people. *Riba* is restricted with regards to that purpose. *Riba* creates an extra burden on people who have difficulty in paying his /her loan.[57] M. Umer Chapra also contends that *riba* was prohibited in Islam because the main goal of Islam is to establish the justice and 'justice demands the use of resources in such an equitable manner'.[58] On the other hand, some of the Islamic scholars contended that riba also triggers corruption in society and riba has an adverse effect on economic growth.[59]

Considering the arguments made by scholars, it is possible to say that Islam prohibits *riba* because it is an obstacle for establishing social justice; it may create unfair implications with regards to poor or economically disadvantaged people, and it also damages the socioeconomic structure of the community.

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53 *Qur'an, 3:130-1*, n.d.

54 *Qur'an, 2:276*, n.d.

55 Yahia Abdul-Rahman, *The Art of Islamic Banking and Finance* (John Wiley & Sons, 2010), 41.

56 Syed Hussain Ali Jafri and Lawrence S. Margolis, "The Treatment of Usury in the Holy Scriptures," in *Islamic Banking and Finance*, ed. Amer Al-Roubaie and Shafiq Alvi, vol. 2 (Routledge, 2010), 212–3.

57 Abdullah Saeed, "The Moral Context of the Prohibition of' Riba' in Islam Revisited," in *Islamic Banking and Finance*, ed. Amer Al-Roubaie and Shafiq Alvi, vol. 2 (Routledge, 2010), 245.

58 M. Umer Chapra, "Why Has Islam Prohibited Interest?," in *Islamic Banking and Finance*, ed. Amer Al-Roubaie and Shafiq Alvi, vol. 2 (Routledge, 2010), 250–1.

59 Brian Kettell, *Introduction to Islamic Banking and Finance* (John Wiley & Sons, 2011), 39.

Although the main sources of Islamic Law do not provide any explanations about the reasons for the prohibition of *riba*, I agree with scholars. Particularly, in terms of financing, if a lender borrows money with an interest rate, an increase will occur in his principal at the end of the repayment and at the same time, with regards to the debtor, a decrease will result in debtor's principal. As a result, that kind of transaction will cause an inequitable treatment which is contrary to the *Qur'an*'s main purpose. In order to prevent *riba*, *murabahah* transactions were created which included a cost-plus pricing (mark-up) rather than interest.

B. Comparing Mark-up and Interest

Literally, interest means a charge for borrowing money. Interest is based on 'time value of money, the credit risk of the borrower, and the inflation rate'.[60] Mark-up (cost plus) is also a term used by *murabahah* contracts which identify the margin of profit. Mark-up is basically 'the difference between the cost of a good and its selling price.'[61] On the other hand, interest is the fundamental element of conventional house financing banking and mark-up is particularly used in *murabahah* transactions.[62]

There has been a considerable debate on whether there is a difference between mark-up and interest. Muslim scholars have different approaches in order to identify that issue. Three approaches have been established by scholars. According to liberal view, interest should be allowed in Islam unless money is loaned at excessive rates.[63] Proponents of liberal view asserted that interest based transactions did not exist during the prohibition was created.[64] Thus 'prohibition of interest does not cover modern interest-based transactions.'[65] Liberal view proponents also allege that there is not any definition of interest in *Qur'an* and the Prophet Mohammed did not have a chance to interpret the *Qur'an* because verses of the *Qur'an* which prohibit the interest revealed in the last days of the life of Prophet Mohammed.[66]

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60 Mahmood Jawaid, "Riba, Interest, and Usury," December 7, 2010, http://www.mahmoodjawaid.com/Riba-_Interest_-_Usury.pdf.

61 Jack E. Ingels, *Ornamental Horticulture: Science, Operations & Management*, 4th ed. (Delmar Cengage Learning, 2009), 601.

62 Qazi Irfan, "Murabaha Financing vs. Lending on Interest," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, July 22, 2008), http://papers.ssrn.com/abstract=1803651.

63 Talib Siraaj Abdus-Shahid, "Interest, Usury and the Islamic Development Bank: Alternative, Non-Interest Financing," *Law & Policy International Business* 16, no. 4 (1984): 1102.

64 Omar A. Hashmi, "Islamic Home Financing in the United States: Solution or Deception," *Howard Law Journal* 52 (2009): 717.

65 Ibid.

66 Ibid., 718.

Liberal view supporters also claim that commercial loans are not prohibited in Islam because they do not exploit poor people, unlike consumer loans.[67] Liberal scholars also point out the necessity principle in Islam. In extraordinary conditions, Muslims are allowed to eat pork or forbidden animals. Liberals claim that in the modern world, free-interest transactions are no longer applicable and the necessity principle should be implemented.[68]

The second approach belongs to moderate view supporters. In accordance with that approach *riba* refers to 'both usury and bank interest'.[69] Proponents of the moderate view suggest that a purchaser may buy an asset by cash and resell it in a deferred payment with a cost plus price.[70] Cost plus price can be justified as 'compensation to the merchant for the opportunity cost of deferring the receipt of his payment.'[71] Therefore, the moderate view supports the *murabahah* house financing transactions. Moderate view supporters also claim that if transactions are interpreted rigidly, there is no room for adapting current world trade.[72]

Finally, conservative approach proponents allege that all transactions, which include *riba,* give rise to an economic exploitation.[73] Loans are not the only option in house financing and there are many other types of instruments like renting or paying with cash.[74] Conservative view proponents also claim that interest is forbidden by *Qur'an* in any financial transaction and money cannot be a subject of trade.[75] In addition, some scholars contend that there is no difference between mark-up and interest and they oppose Islamic house financing instruments like *murabahah*.[76]

All of the approaches established by different views try to explain the difference between interest and cost plus implications. Although liberal, moderate, and conservative views emphasize the important points in terms of interest, in my view, none of them has convincing reasons.

Liberal view proponents claim that the interest-based transactions did not exist when the *Qur'an* and Prophet Mohammed prohibited the interest. That suggestion is true but it does not mean that *riba* does not cover financial based

67 Ibid.
68 Ibid., 719.
69 Ibid.
70 Ibid.
71 Ibid.
72 Ibid., 720.
73 Ibid.
74 Ibid.
75 Ibid., 721.
76 Ibid.

transactions. In fact, *Qur'an* included some of the verses which were later proved by human beings scientifically after the time of Prophet Mohammed.

For example, in *Qur'an*, Chapter 22, Verse 47 states 'And indeed, a day with your Lord is like a thousand years of those which you count.'[77] In 1905, Albert Einstein, in his Theory of General Relativity, set forth that 'clocks run slower in deeper gravitational wells'.[78] Albert Einstein's theory was also not existed during the time of the Prophet Mohammed but that does not mean Verse 47 of the *Qur'an* is invalid and it also demonstrates that some of the verses of the *Qur'an* may be understood better after years.

Another allegation made by liberal view supporters is that commercial loans should not be excluded in Islamic Law because of their lack of exploitation. Separating the loan types is not so logical in order to legitimate the interest in Islamic Law. Notwithstanding that commercial transactions include the risk of loss or profit; indeed, the results will affect consumers. For instance, if manufacturer A receives $100.000 loan from a bank and repays it, including interest, as $125.000, he will reflect the $25.000 to the consumers in order to make a profit. As a result, commercial loan harms consumers rather than the manufacturer.

Finally, liberals contend that the necessity principle should be implemented in terms of interest based transactions because it is impossible to avoid interest in the modern world. The definition of necessity principle in Islamic Law is under debate.[79] One of the Islamic scholars, Al-Zuhayli, states that

'Necessity occurs when a state of danger or extreme hardship so affects a human being that he is led to be certain that serious harm, *darar*, will be inflicted on his life, body, honour, mind, property or whatever is associated with these objects'[80]

With regards to Al-Zuhayli's definition, a real danger or hardship is the fundamental element for the necessity principle. On the other hand, liberals contend that interest-free transactions are no longer acceptable in the modern world. That approach is not compatible with the definition of necessity principle. First of all, there are other options in financial transactions except interest based transactions. For instance, in house financing *murabahah* does not include interest. Secondly, there is no real danger or hardship against

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77 *Qur'an, 22:47*, n.d.

78 Richard Feynman et al., *Feynman Lectures On Gravitation (Frontiers in Physics)* (Westview Press, 2002), 68.

79 Mawil Izzi Dien, *Islamic Law: From Historical Foundations to Contemporary Practice* (Edinburgh University Press, 2004), 84.

80 Ibid.

people who want to be a part of interest based transactions. Finally, in the modern world, most of the developed countries adopt low-interest rates (The USA, Canada, and the UK have 0.5% interest rates).[81] Therefore, it is not possible to say that modern world trade depends on interest.

The moderate view supporters' ideas are also open to being challenged. In accordance with the *murabahah* transactions, moderate view proponents claim that cost plus or mark-up price can be justified as a compensation for deferred payment. Contrary to that argument, in my humble opinion, there is no difference between mark-up price and interest, thus mark up price cannot be justified in Islamic Law. First of all, in the conventional banking system, financial institutions aim to make a profit on the basis of interest. If a bank grants a loan of $100,000 with an interest rate 5% for one year, at the end of the repayment, it will make $5,000 profit. In a *murabahah* agreement, if an IFI purchases the house for a payment of $100,000 and resells it to the customer $105,000, the bank also makes a profit for $5,000. With regards to the client, in both situations, there will be a decrease in his wealth. As it was mentioned in the previous chapter, Islam aims to establish the justice and also Islam prohibits *riba* because of the possibility of unfair implications with regards to poor and economically disadvantaged people. As it was illustrated in the example, conventional and Islamic banking have the same undesirable consequences on economically disadvantaged people. In both transactions, a client loses $5.000. Furthermore, in a *murabahah* transaction, an IFI may determine the mark-up price $10.000. In that situation, *murabahah* transaction may damage harm to the customer more than conventional banking. Second, notwithstanding that the Islam allows trade, *murabahah* transactions cannot be legitimated that they are merely trade transactions. Financial institutions aim to make a profit and they cannot be seen as real estate agencies. If a financial institution regularly purchases and sells houses and its main object is to make a profit on houses, *murabahah* transaction may be legitimate in terms of Islamic law. IFIs only purchase the house and resell it to the customer with a markup price if a customer desires. As a result, that transaction is akin to conventional banking rather than Islamic finance.

Finally, the conservative approach can be criticized in some ways. First, according to the conservative view supporters, *murabahah* transactions are not in accordance with the Islamic Law and other financing options should be considered in terms of house financing. Rejecting the whole *murabahah* transactions may not be appropriate because some modifications may give an effect to that house financing system. Secondly, paying the house with cash

[81] Central Bank News, "Interest Rates," 2015, http://www.centralbanknews.info/p/interest-rates.html.

rather than *murabahah* agreement cannot be so easy for people. Again and again, Islam aims to protect disadvantaged people. Islam does not impose people on extra responsibilities which they cannot carry. Forcing people to purchase a house with cash makes them economically disadvantaged because most of the people cannot afford to pay the house price in a lump.

Considering all views about mark up and interest, in practice, the transactions regarding *murabahah* agreements in Malaysia and the UK tend to support the moderate view supporters. In both countries, *murabahah* agreements are the most popular way for house financing. For instance, the deferred payment method called *bai bithaman ajil* was first used and introduced in Malaysia.[82] In the UK, United Bank of Kuwait and HSBC which have also conventional banking services, are the predominant in house financing.[83]

In fact, unlike moderate view, the conservative view is not attractive for financial institutions because those institutions' main purpose is to make the highest profit and conservative view clearly rejects the legality of *murabahah* in terms of house financing. On the other hand, the liberal view is closer to the conventional banking system and if the financial institutions adopt this view, there will be a possible threat for losing their Muslim clients who think that liberal view is not compatible with Islamic Law.

Beyond all discussions about mark up and interest, another important point is to determine the mark up in *murabahah* transactions.

C. Determining the Mark up

Determining the mark up is also problematic in Islamic finance. There is no consensus among scholars how the mark up should be determined. According to Sheikh Taqi Uthmani, IFIs may use interest based indicators such as Kuala Lumpur Interbank Offer Rate (KLIBOR) or London Interbank Offer Rate (LIBOR).[84] On the other hand, some of the scholars, like Saqib Omer Saeed, disagree with Uthmani because he claims that interest itself is prohibited by Islam and determining the LIBOR or KLIBOR as a benchmark invalidates the *murabahah* contracts.[85] Apart from those views, Dr Aznan Hasan introduced a different model which included both conventional and Islamic banking

82 Zandi, Ariffin, and Shahabi, "Some Issues on Murabahah Practices in Iran and Malaysian Islamic Banks."

83 Masood, *Islamic Banking and Finance*, 245.

84 Mohd Omar et al., "An Islamic Pricing Benchmark" (Research Paper No 16, International Shari'ah Research Academy for Islamic Finance, 2010, n.d.), 41, accessed March 25, 2016.

85 Omer Saeed Saqib, "Is Islamic Banking Really Islamic?," June 25, 2010, http://blogs.tribune.com.pk/story/194/is-islamic-banking-really-islamic/, accessed March 25, 2016.

methods.[86] According to Hasan, Overnight Policy Rate (OPR) might be used in lieu of LIBOR or KLIBOR.[87] Using OPR as a benchmark will be the appropriate solution for countries like Malaysia and the UK because these countries have both conventional and Islamic banking transactions. As it was said by Dr Aznan Hasan, using two benchmarks in a country might involve a risk of arbitrage. In order to avoid arbitrage, the common benchmark should be determined in financial transactions.[88]

In Malaysia, Bank Negara Malaysia (BNM) uses the OPR for monetary policy direction.[89] KLIBOR also used by financial institutions as a benchmark in Malaysia.[90] In the UK, Al Ahli United Bank's *Shari'ah* board approved of using LIBOR as a benchmark in Islamic financial transactions.[91] The HSBC Amanah also uses LIBOR in house financing transactions.[92]

Determining the mark up on the basis of interest does not invalidate the whole *murabahah* agreement. As Muhammad Taqi Usmani said, Islamic finance should get rid of that practice because interest was forbidden by Islam however the transaction itself does not contain interest.[93]

D. Appropriate Solution for the Legitimacy of Murabahah Agreements

Considering the discussions made by scholars about *murabahah* transactions, it is possible to say that a general consensus has not established yet. Apart from the discussions, in my opinion, one method will substantially allay the fears of the legitimacy of *murabahah* agreements.

First of all, due to the nature of *murabahah*, it should be separated from financial transactions. *Murabahah* itself is a trade agreement and the Islam permits to trade. Financial institutions only purchase the house with the request of clients and they immediately sell it to them. The activity is akin to finance rather than trade.

New institutions should be established as a subsidiary of financial institutions. Those subsidiaries' main goal should be making a profit via real estate activities. New institutions purchase and sell the houses as a regular

86 Omar et al., "An Islamic Pricing Benchmark," 45.
87 Ibid.
88 Ibid., 46.
89 Ibid.
90 Ibid.
91 Luqman Zakariyah, "Necessity as a Pretext for Violation of Islamic Commercial Law: A Scenario of Mortgage Contract in the Uk," *Journal of Islamic Economics, Banking, and Finance* 8, no. 1 (2012): 40.
92 Ibid.
93 Usmani, *An Introduction to Islamic Finance*, 49.

activity. A client can select the house in the institution's list. After that, the subsidiary forwards the client's application to the financial institution. It is important to note that the mark up price should be determined by the subsidiary because the financial institutions' only role is to provide financial assistance. The transaction itself should be conducted between subsidiary and a client. In so doing, trade and financial activities will be separated.

Another significant point is to determine the benchmark. As I said before, using LIBOR or any interest based indicator does not validate the *murabahah* contract. Mark- up will also be determined in the example of OPR in Malaysia.

That model, of course, has potential risks. For instance, a subsidiary may not sell all the properties to the customers or the insurance costs may be cost a lot for the subsidiary. In fact, those kinds of risks are in the nature of trade. For instance, nobody can guarantee a manufacturer will sell all the carpets in his store. If it is accepted that *murabahah* is actually a trade activity, it should be treated in accordance with its nature.

Legitimacy of *murabahah* transactions is one of the main problems that have to be solved by Islamic scholars, but other problems also exist in *murabahah* like tax issues.

IV. TAX ISSUES AND REGULATIONS IN MURABAHAH AGREEMENTS

A typical *murabahah* agreement involves two actions which are both subject to taxation.[94] The first occurs when an IFI purchases a house from the homeowner and the second one appears during the IFI sells the commodity to a client.[95] In fact, two actions belong to one transaction; double stamp duty obligation may appear for both transactions.[96] Thus, *murabahah* transactions may be less favorable than conventional banking transactions in terms of house financing.[97]

Stamp duty land tax (SDLT) appears even in conventional banking. For instance, in Malaysia, if a client wants to purchase a house valued at RM500.000 in conventional banking, he has to pay RM9.000 as an SDLT.[98] In the UK, although there is an exemption under £125.000, similar to Malaysia sample, if a client wants to purchase a house valued at £500.000, he has to

94 Abdul Karim Aldohni, *The Legal and Regulatory Aspects of Islamic Banking: A Comparative Look at the United Kingdom and Malaysia* (Routledge, 2011), 109.

95 Masood, *Islamic Banking and Finance*, 240.

96 Aldohni, *The Legal and Regulatory Aspects of Islamic Banking*, 78.

97 Ibid.

98 PricewaterhouseCoopers, *2015/2016 Malaysian Tax and Business Booklet* (PricewaterhouseCoopers, 2016), 66.

pay £15.000 as an SDLT.[99] In *murabahah* transactions, SDLTs may be doubled because of two separate actions and an extra burden may be imposed on to clients who want to purchase houses.

In terms of Islam, as it was mentioned in previous chapters, the social justice and the protection of economically disadvantaged people are essential. Therefore, double SDLT is not consistent with the aim of Islam because it creates unjustifiable consequences and some people, who want to be a part of *murabahah*, have to pay more than other ones.

Apart from religious considerations, IFIs also try to increase their profit. When a double SDLT occurs, IFIs cannot easily encourage clients to sign a *murabahah* contract. In fact, other types of Islamic home financing instruments, like diminishing *musharakah*, may be preferable, rather than *murabahah*.

Some countries take double SDLT into consideration and they make some regulations. For instance, in 2003, upon the Union of Muslim Organizations of the UK and Ireland's request, a working group, including Governor of the Bank of England, the Chairman of the Financial Services Authority, the Chancellor of the Exchequer, Ahli United Bank, HSBC, Barclays, representatives of the Treasury and representatives from the Muslim community, was established in the UK in order to find a solution for the issues in Islamic banking in the UK.[100] As a result of the performance of the working group, double SDLT was removed in Islamic banking transactions in the UK and two separate sales were regarded as one agreement.[101]

SDLT was not the only tax problem in the UK in terms of *murabahah* house financing. Pursuant to UK tax laws, 'interest paid by the business is a business expense and should be offset against the business' tax bill'.[102] On the other hand, before 2005, there was no room for implementing the same tax laws with regards to *murabahah* because of the prohibition of interest in Islam.[103] 'The profit paid by the customer to the bank would not have been tax-deductible by the customer.'[104] After section 57 of the *Finance Act 2005* came

99 HM Treasury of the UK, "Stamp Duty Reforms," December 3, 2014, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/382324/Stamp_Duty_15.pdf, accessed March 25, 2016.

100 Edward George, "Towards Islamic House Financing in the UK" (Speech delivered at the Islamic Home Finance Seminar, London, 27 March 2003, n.d.), http://www.bankofengland.co.uk/archive/Documents/historicpubs/speeches/2003/speech193.pdf, accessed March 25, 2016.

101 Visser, *Islamic Finance*, 108.

102 Aldohni, *The Legal and Regulatory Aspects of Islamic Banking*, 110.

103 Ibid.

104 John Dewar and Munib Hussain, "United Kingdom," in *Islamic Finance & Markets*, ed. Rafael A. Morales and Bishr Shiblaq (Getting the Deal Through, 2014), 40.

into effect, *murabahah* transaction has been treated as an interest-bearing loan or deposit thus it can be a subject for a tax deduction in the UK.[105]

It is important to note that treating like an interest-bearing loan or deposit does not mean that *murabahah* agreement should be invalid in terms of *Shari'ah* because of the relationship with interest. In fact, the tax deduction is an advantage for conventional banking in the UK and if Islamic banking does not have the same exception, it will be unfair for clients who want to purchase houses through *murabahah* transactions. The *Finance Act 2005* section 57 made *murabahah* transactions equitable with conventional banking practices with regards to taxes. Treating equally, in my opinion, merely aims to abolish the inequitable practices between conventional and Islamic banking.

The UK is not the only country that gives some relief for Islamic banking in terms of tax regulations. Like the UK, Malaysia also has some provisions in its legislation.[106] Unlike the UK, Malaysia has long been regulated stamp duty obligations. For instance, Malaysian *Stamp Act 1949* (SA) was amended in order to prevent double stamp duty in *murabahah* or *Bai Bitmahan Ajil* transactions.[107] Pursuant to *Stamp Act 1949* (SA), like the UK, Malaysia agreed that two separate sales were regarded as one agreement.[108] *Stamp Duty (Exemption) Order 1996* is another example of stamp duty incentive. 'This Order gives stamp duty exemption for any documents in relation to the refinancing of conventional loans with Islamic financing facilities.'[109] *Stamp Duty (Remission) (No.2) Order 2007* is another example of an exemption from stamp duty. Pursuant to this Order, principals or primary instruments of financing made in accordance with the Shari'ah will be the subject of 20% stamp duty exemption if they are approved by Shari'ah Advisory Council of Bank Negara Malaysia or the Securities Commission (SC).[110] In addition, between 2007 and 2016,

'Islamic banking and Takaful activities conducted in currencies other than Ringgit as well as non-Ringgit Islamic securities approved by the SC and executed under the Malaysian International Islamic Financial Center are exempted from stamp duty.'[111]

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105 Ibid.

106 Dato Dr Nik Norzrul Thani Nik et al., "Legal and Regulatory Issues Concerning Islamic Finance's Development in Malaysia," in *Current Issues in Islamic Banking and Finance: Resillence and Stability in the Present System* (World Scientific, 2010), 86.

107 Ibid., 86–7.

108 Ibid., 87.

109 Ibid.

110 Ibid.

111 Ibid.

Apart from the stamp duty, Malaysia also has other provisions in order to relief Islamic banking activities.[112] For instance, *The Real Property Gains Tax Act 1976* (RPGTA) obliges people who purchase houses and provides gains from the disposal of property in Malaysia.[113] Normally, in a *murabahah* transaction, during the bank sells the property to the client with a mark-up, price difference occurs and that may be a subject of taxation. In order to avoid that situation, RPGTA deems to the IFIs purchasing price and selling price is the same and it states that 'any chargeable assets after 31 March 2007 is exempted from any gains tax.'[114] There are other exemptions in Malaysian laws in terms of Islamic banking regulations such as; *Deduction for Expenditure on Issuance of Islamic Securities (Income Tax Rules 2007)*, *Income Tax (Exemption) (No. 14) Order 2007, Income Tax (Exemption) (No. 15) Order 2007 and Income Tax (Exemption) (No. 6) Order 2008*, but they are out of the scope of this essay because they are not related to *murabahah* transactions.[115]

Besides the UK and Malaysia samples, other countries also have different stamp duty exemptions. For instance, in the Netherlands; people do not have to pay another stamp duty if they sell their house within six months.[116] In Australia, stamp duty is regarded as a state-based tax and its implementation differs from state to state.[117] For instance, in Victoria, double stamp duty was removed in 2004 with regards to *murabahah* and *musharakah* arrangements.[118] On the other hand, in New South Wales, double stamp duty still exists.[119]

Considering all the reliefs and exemptions with regards to Islamic finance and *murabahah* transactions, it can be concluded that countries which want to be a leader in Islamic finance market tend to remove procedural obstacles. In so doing, they desire to attract more capital gains from the Islamic community. For example, after the removal of SDLT in 2003, the UK's revenues significantly increased and in 2007, they reached £26.97 million.[120] Similarly in Malaysia, Islamic house financing has still expanded. In 2013, house financing market in Malaysia increased 30 percent; in 2014, it also increased 25 percent. Today,

112 Ibid.
113 Ibid.
114 Ibid., 88.
115 Ibid.
116 Visser, *Islamic Finance*, 108.
117 Salim Farrar, "Accommodating Islamic Banking and Finance in Australia," *University of New South Wales Law Journal* 34, no. 1 (2011): 431.
118 Ibid.
119 Ibid., 432.
120 Christofer Engzell, "Islamic Banks in the United Kingdom: Growth in the 21st Century" (Research Paper, Department of Economic History, Uppsala University, 2008), 25, accessed March 25, 2016, http://www.diva-portal.org/smash/record.jsf?pid=diva2:134517.

house financing market has reached $20.9 billion in Malaysia.[121]

As a result, government policies have direct effects on the growth of Islamic finance. If a country desires to become an Islamic finance hub, it should regulate its legislation by providing some advantages to Islamic finance. The UK and Malaysia samples demonstrate that these countries' willingness to be the foremost Islamic finance centers force them to relief some tax regulations. In fact, sometimes countries clearly acknowledge their wishes. As it was said by Gordon Brown in 2006 'the UK was well placed to become a gateway for Islamic trade and finance.'[122]

V. EARLIER PAYMENT AND PENALTY OF DEFAULT ISSUES IN MURABAHAH

Prepayment and default procedures are the significant issues in *murabahah* transactions. As the nature of *murabahah* transactions, the cost of the house should be fixed. Any cost other than the fixed price is regarded as invalid. Therefore, the possibility of earlier payment and penalty of default procedures are under debate.

A. Earlier Payment in Murabahah

It has been a long debate whether rebate on *murabahah* is valid. Some of the earlier Islamic scholars claimed that if a person wants to pay his debt earlier, a discount should be made by the lender.[123] Those scholars based their suggestion upon a *hadith* which was reported by Abdullah ibn Abbas.[124] While Jews being expelled from Madinah, some people said to Holy Prophet Mohammed that some people owe them some debts which were not expired yet and the Prophet Mohammed replied that 'Give discount and receive (your debts) soon.'[125]

On the other hand, the majority of the scholars do not accept that view.[126]

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121 Y.-Sing Liau Elffie Chew, "Malaysia's Islamic Mortgages Cool as Controls Cap Household Debt," *Bloomberg Business*, November 19, 2015, accessed December 30, 2015, http://www.bloomberg.com/news/articles/2015-11-18/malaysia-s-islamic-mortgages-cool-as-controls-cap-household-debt.

122 Gillian Tett, "Islamic Finance Hub Envisaged for London," *Financial Times*, June 13, 2006, accessed January 3, 2016, http://www.ft.com/cms/s/9754c508-fa79-11da-b7ff-0000779e2340,Authorised=false.html?ft_site=falcon&desktop=true&_i_location=http%3A%2F%2Fwww.ft.com%2Fcms%2Fs%2F0%2F9754c508-fa79-11da-b7ff-0000779e2340.html%3Fft_site%3Dfalcon%26desktop%3Dtrue&_i_referer=&classification=conditional_standard&iab=barrier-app#axzz3wWTU0QQr.

123 Usmani, *An Introduction to Islamic Finance*, 61.

124 Ibid.

125 Ibid.

126 Ibid.

The majority claim that Abdullah ibn Abbas's report is a weak narration.[127] According to the majority, if an earlier payment aims to get a discount from the lender, it should be prohibited.[128] However, if an earlier payment is not a condition for the agreement and if the lender voluntarily makes a discount, then it is permissible.[129] The majority held that their view derived from the Waqidi's report.[130] Waqidi wrote that '…Abu Rafi'I Salam bin al Haqiq had to get 120 dinars from Usaid bin Huzair. He agreed to get the principal of 80 dinars and remitted the excess'.[131]

Some of the later Hanafi jurists claim that if the debtor pays his debt earlier, a discount should be made.[132] The Organization of Islamic Cooperation (OIC) Fiqh Academy, the Shari'ah committees of Islamic Banks in the Middle East and Shari'ah scholars consider that rebate for prepayment is not different from conventional banking sale techniques, therefore, it should be prohibited.[133] The Accounting and Auditing Organization for Islamic Financial Institutions (AAOFI) *Shari'ah* Standards also does not allow giving a rebate to the client but it also acknowledges that if a bank or IFI voluntarily makes a discount, it will not be inconsistent with *Shari'ah* rules.[134]

Malaysia has an interesting practice about a rebate on early payment. Bank Negara Malaysia (Central Bank of Malaysia) allows banks and IFIs to include rebate clauses in their *murabahah* contracts in order to avoid uncertainty and ambiguity.[135] Furthermore, the banks and IFIs are obliged to include rebate clauses in their *murabahah* contracts.[136] The Shari'ah Advisory Council of Bank Negara Malaysia legitimates that approach on the basis of public interest (*maslahah*).[137] It was said by Shari'ah Advisory Council that consumer protection should be paramount with regards to public interest.[138]

Rebate on early payment has long been a dispute in Malaysia. The courts in Malaysia interpret the rebate claims in each case differently. For instance, in *Affin Bank Bhd v Zulkifli bin Abdullah*[139]the defendant purchased a house using

127 Ibid.
128 Ibid.
129 Ibid.
130 Ibid.
131 Ibid.
132 Muhammad Ayub, *Understanding Islamic Finance* (John Wiley & Sons, 2007), 165.
133 Ibid.
134 Ibid.
135 Ahcene Lahsasna, *Shari'ah Non-Compliance Risk Management and Legal Documentations in Islamic Finance* (John Wiley & Sons, 2014), 189.
136 Ibid., 190.
137 Ibid.
138 Ibid.
139 Affin Bank Bhd v Zulkifli bin Abdullah, [2006] 3 MLJ 67 (n.d.).

BBA and after making several payments, he defaulted.[140] The issue concerned on the court was the amount of money which the defendant was responsible for paying.[141] The court ordered the sale of the property and the remaining balance should be paid by the purchaser.[142] The court also stated that the amount which was paid earlier by the defendant should be reduced from the total cost.[143] Even though *Affin Bank Bhd v Zulkifli bin Abdullah*[144]decision seems to be related to default procedure, the court's rebate order illustrated the Malaysian approach in terms of rebate procedure in house financing.

In a *murabahah* agreement, it is generally accepted in *Shari'ah* that rebate on earlier payment depends on the IFIs discretion. Therefore, a client cannot enforce the IFIs to make a discount if he wants to pay earlier. Unlike that generally accepted view; the High Court of Malaysia does not support that opinion. In *Bank Islam Malaysia Bhd v Azhar bin Osman and other cases*[145]the court stated that although the BBA contract did not include provisions about the rebate, the Islamic Bank must make a discount.[146] As it was stated in the verdict, that decision 'creates an implied term and legitimate expectation on the part of the customer'.[147] However, the High Court's extraordinary decision was not confirmed by the Court of Appeal and subsequently the decision was reversed.[148] The Court of Appeal stated, *inter alia*, that rebate was not relevant to the default procedure and it was only consistent with early payment procedure and the bank had the full discretion to make a discount in terms of early payment.[149] The same approach was also followed by the courts in *CIMB Islamic Bank Bhd v LCL Corp Bhd*[150] and *Bank Kerjasama Rakyat Malaysia Berhad v Flavour Right Sdn Bhd*.[151]

Notwithstanding that, unlike Malaysia, the UK does not have mandatory provisions for implementing rebate, it is generally accepted that banks in the UK will make a discount if a client wants to pay earlier.[152] *Murabahah*

140 Ibid.
141 Ibid.
142 Ibid.
143 Ibid.
144 Affin Bank Bhd v Zulkifli bin Abdullah, [2006] 3 MLJ 67 (n.d.).
145 Bank Islam Malaysia Bhd v Azhar bin Osman and other cases, [2010] 9 MLJ 192 (n.d.).
146 Ibid.
147 Ibid.
148 Tun Abdul Hamid Mohamad and Adnan Trakic, "Granting of Ibra'by Islamic Banks in Malaysia: A Matter of Discretion or Obligation?," *Journal of International Banking Law and Regulation* 28, no. 9 (2013): 360.
149 Ibid.
150 CIMB Islamic Bank Bhd v LCL Corp Bhd, [2011] 7 CLJ 2010 (n.d.).
151 Bank Kerjasama Rakyat Malaysia Berhad v Flavour Right Sdn Bhd, [2011] 1 LNS 1165 (n.d.).
152 Edbiz Consulting Ltd, "Islamic Commercial Real Estate Investment in the UK" (Report, Global Islamic Finance Report, 2012), 89–90.

agreements are not recognized with regards to the Islamic Law principles by the UK courts. In *Islamic Company of the Gulf v Symphony Gems NV & ors,*[153] the agreement was regarded as simply a trade contract by the judge and he stated that 'it is a contract governed by English law. I must simply construe it according to its terms as an English law contract.'[154]

Originally, *murabahah* is a trade transaction. Two sides exchange goods mutually. If *murabahah* is converted to financial transactions, the rebate should not be included in *murabahah* agreements. First of all, the purpose of *murabahah* transactions is to fix the price. Any price difference derives from the sale of the goods may create a risk to invalidate the *murabahah* contract in terms of *Shari'ah*. Secondly, it is hard to agree with the AAOFI Shari'ah Standards views. According to that standard, if a seller makes a discount in relation to an early payment, it won't be inconsistent with the *Shari'ah*. In practice, the IFIs' reason to rebate on earlier payment depends on the interest which was strictly prohibited in Islam. For instance, in conventional banking rebate on earlier payment is permitted and the reason for the rebate is the bank's desire to get its money back immediately. If a bank gets its money early, it has a chance to resell it with another interest rate. Similar to Islamic finance, if an IFI makes a discount on an earlier payment, its reason is to obtain the total amount as soon as possible. If an IFI takes its money earlier, it has an opportunity to sign another *murabahah* agreement and that means making a profit by using mark up. Finally, it is important to note that, as it was claimed by some of the scholars, in my opinion, including a rebate clause in a *murabahah* agreement is not relevant with regards to the validity of the contract. In reality, none of the IFIs or banks voluntarily rebate on their profit. Making a promise about rebating an amount in case of a prepayment also creates other enforcement problems as it was illustrated in the Malaysian sample. Financial transactions, especially house financing transactions, must be far from ambiguity otherwise their consequences may damage both IFIs and clients.

B. Penalty of Default

The penalty of default procedure in *murabahah* agreements is also an arguable point. However there is no consensus on the validity of penalty clauses[155], generally, three different views are considered by Islamic scholars

153 Islamic Company of the Gulf v Symphony Gems NV & ors, [2002] 346969 WL (n.d.).

154 Aldohni, *The Legal and Regulatory Aspects of Islamic Banking*, 115.

155 M. Umer Chapra, "Challenges Facing the Islamic Financial Industry," in *Handbook of Islamic Banking*, ed. M. Kabir Hassan and Mervyn K. Lewis (Edward Elgar, 2007), 347.

in order to explain it.[156]

The first view's supporters claim that any late payment penalty is not compatible with the *Shari'ah*. Opponents of late payment clause support their arguments by using *Qur'an* (2:280) which states that

'If the debtor is in a difficulty, grant him time till it is easy for him to repay. But if ye remit it by way of charity, that is best for you, if ye only knew'.[157]

Islamic *Fiqh* Academy, which is an academic institution for the advanced study of Islam[158], is also one of the supporters of that view. In 2000, the Academy acknowledged that if a debt contract included penalty clauses, it would be against *Shari'ah*.[159]

The second view concerning default payments confirms that late payment penalty clauses should be implemented to agreements however the conditions should be met.[160] Proponents of that view allege that non-payment should not be derived from clients' poverty or hardship.[161] In other words, unless a client is well off, he cannot be responsible for late payment. Supporters of that view depend on their thesis of a *hadith* which states, 'The well-off person who delays the payment of his debt, subjects himself to punishment and disgrace'.[162] In practice, it is accepted by the banks and IFIs that all clients have the financial power to pay their debts unless they are insolvent or bankrupt.[163]

The third approach's proponents assert that late payment penalty clauses should be applied to a *murabahah* contract, but the late payment money cannot be used by the banks as their income; it should be donated to a charity.[164] In other words, in order to deter clients from late payment, late payment penalty clauses can be accepted for charitable purposes. Supporters of that view based their theory on a *Yamin* (vow).[165] Due to the vow's enforceability problem, a *murabahah* agreement should include provisions like;

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156 Sina Ali Muscati, "Late Payment in Islamic Finance," *UCLA Journal of Islamic & Near Eastern Law* 6 (2006): 53.

157 *Qur'an, 2:280*, n.d.

158 Georgetown University, Berkley Center for Religion, Peace & World Affairs, "Islamic Fiqh Academy," accessed March 25, 2016, http://berkleycenter.georgetown.edu/organizations/islamic-fiqh-academy.

159 Islamic Fiqh Academy, *Resolutions and Recommendations of the Council of the Islamic Fiqh Academy 1985-2000* (Islamic Development Bank, 2000), 104.

160 Muscati, "Late Payment in Islamic Finance," 55.

161 Usmani, *An Introduction to Islamic Finance*, 56.

162 Ibid., 57.

163 Ibid., 56–7.

164 Muscati, "Late Payment in Islamic Finance," 56.

165 Usmani, *An Introduction to Islamic Finance*, 59.

The Debtor hereby undertakes that, if he fails to pay rent at its due date, he shall pay an amount calculated at …% [per annum] to the Charity Fund maintained by the Creditor which will be used by the Creditor exclusively for charitable purposes approved by the Shari'ah and shall in no case form part of the income of the Creditor.[166]

Finally, a bank or an IFI may establish their own charity but it is important to note that charity cannot be subject to financial transactions or cannot make a profit from late payment fees.[167]

Another discussion point for the late penalty is determining the penalty type. Some of the scholars, mostly conservatives, do not accept any financial penalty for late payment because they claim that any excessive amount in *murabahah* contracts create *riba*.[168] Those scholars suggest that imprisonment or blacklisting is an effective way for castigating clients.[169] On the other hand, liberal view asserts that a debtor who delays payment without justifiable reasons may be a subject of late payment penalty fee only if the courts impose it.[170]

Due to the nonexistence of a consensus on penalty of default procedure, states have different implementations concerning late payment. For instance, Malaysia adopted financial fee as a penalty for default and two different tools are used by BNM.[171] The first one is *ta'widh* which was interpreted by The International Islamic Fiqh Academy of the Organization of the Islamic Conference as 'reward or financial compensation payment incurred as a result of causing harm to others'.[172] The second one is *gharamah*, which was defined by BNM as 'penalty/charge imposed to customers who delay in financing/debt settlement, over and above the amount of *ta'widh*'.[173] According to the BNM, *ta'widh* can be a subject of IFIs' income because it compensates IFIs' loses.[174] Unlike *ta'widh*, *gharamah* is not accepted as an income, it must be donated to charities.[175] BNM regulated the conditions of *ta'widh* and *gharamah* on May 2010 and after that date, unless a financial obligation derives from exchange contract, it is not permissible to impose *ta'widh*.[176]

166 Irshad Abdal-Haqq, "A Model of Islamic Banking and Finance in the West: IslamiQ," *Journal of Islamic Law & Culture* 6 (2001): 128.
167 Usmani, *An Introduction to Islamic Finance*, 60.
168 Chapra, "Challenges Facing the Islamic Financial Industry," 347.
169 Ibid.
170 Ibid.
171 Ezani Yaakub et al., "A Revisit to the Practice of Late Payment Charges by Islamic Banks in Malaysia," *Jurnal Pengurusan* 42 (2014): 187.
172 Ibid.
173 Ibid.
174 Ibid.
175 Ibid.
176 Ibid., 185.

Islamic banks in the UK charge a late payment fee but they do not classify them as their income. For instance, Al Rayan Bank, in its home purchase plans, clearly identifies that the late payment fees are donated to charities.[177] United National Bank also charges late payment fee for charity purposes in the UK.[178]

The penalty for default in *murabahah* transactions seems to be based on three fundamental views. Notwithstanding that each view points out important features, in my opinion, both of them need to be revised. First of all, rejecting the whole late payment procedure may create some problems. The purpose of the penalty of default procedure is to deter clients from not paying their debts deliberately. If penalty clauses are omitted from *murabahah* contracts, there will be a chaos in Islamic banking transactions because a dishonest client may take an advantage of that loophole by not paying his debt on time. On the other hand, any excessive amount in *murabahah* contracts is prohibited by *Shari'ah*. If a bank makes a profit on late payment fee, the transaction should be invalid. Besides that dilemma, as conservatives say, imprisonment or blacklisting, apart from moral hazards, does not provide any benefit to banks or IFIs.

Secondly, it cannot be so easy to determine who is wealthy or not. Assuming that a person is not insolvent or bankrupt does not mean that he is in a good condition. In practice, bankruptcy and insolvency are rare situations.

Finally, as it is generally accepted by banks and IFIs, charging late payment fees for the purpose of charity donations has two flaws. First of all, even though the late payment fees assist a good purpose, it still derives from the *murabahah* contract and creates additional costs to the clients which are prohibited by *Shari'ah*. Secondly, unlike conventional banking, donating late payment fees does not increase the IFIs or banks profit. Not increasing their profit may lead to unequal competition between conventional and Islamic banking systems. As a result of that unfair competition, IFIs may reflect their loss of profits to clients.

C. An Alternative Proposal for Early Payment and Penalty of Default Clauses

In practice, including Malaysia and the UK, rebate on early payment is generally accepted by banks and IFIs but these institutions have the full discretion to make a discount. Like rebate on early payment, the penalty for

[177] Al Rayan Bank, "Home Purchase Plan," 2015, http://www.alrayanbank.co.uk/media/244565/pb1518-al-rayan-home-purchase-plan-product-lft.pdf, accessed March 31, 2016.

[178] United National Bank, "Schedule of Bank Charges Jan-Jun 2015," 2015, https://www.ubldirect.com/Corporate/portals/0/resources/SOC_January_to_June_2015.pdf, accessed March 31, 2016.

default is also accepted and the common implementation is to charge late payment fee for charitable purposes.

As a general rule of *murabahah* agreements, the price should be certain and if the price is ambiguous, the sale will be void.[179] Rebate on early payment and late payment charges pose a threat to invalidate the *murabahah* contract because of the ambiguous price difference. Therefore, an alternative solution should be implemented in order to solve the problem. In my view, two separate contracts may solve that problem. Apart from the *murabahah* agreement, another contract should be signed before *murabahah* agreement between the client and the IFI which clearly identifies the client's and the IFI's general duties and responsibilities. The first contract should include general provisions and it should cover all financial transactions between an IFI and a client. In other words, clients have to sign that contract just because of being a customer to the bank. The first contract also should entirely independent from *murabahah* contract and it should not include any provisions about *murabahah*. Considering the *murabahah* agreement, if a client wants to pay his debt earlier, the bank must make a discount on the total amount depending on the first contract. Similarly, if a client defaults on payment, the IFI will charge late payment fee claiming that the client breaches his general responsibility for breaking his promise. In so doing, *murabahah* agreement cannot be affected by early or late payment price differences and it will be in accordance with *Shari'ah*. Price differences will derive from the first contract. Clients will have an opportunity to pay their debts earlier and get some discounts. On the other hand, banks and IFIs do not have to donate their late payment fees to charities and they can make additional profits.

That proposal is distinct from liquidated damages in terms of late payment fees. If a *murabahah* contract includes liquidated damages clause, the price difference derives from the *murabahah* contract and it will not in accordance with the *Shari'ah* rules. The main object of separating the contract is to change the source of late payment fees and rebate on early payment.

VI. BINDING POWER OF PROMISE IN MURABAHAH

One of the main challenges in *murabahah* transactions is the binding power of a promise. In a typical *murabahah* house financing transaction, before an IFI purchases a house with the request of a client, a client makes a promise to buy the house immediately from an IFI after it purchases the commodity.[180] The significant discussion is about the legal binding power of the client's promise.

[179] Usmani, *An Introduction to Islamic Finance*, 40.
[180] Ayub, *Understanding Islamic Finance*, 114.

There is no common ground among Islamic jurists whether the promise is binding or not.[181] Many of the Islamic scholars, including some *Maliki* jurists, assert that fulfilling a promise should be obtained by the promisor and breaking a promise is regarded as a shame.[182] On the other hand, those scholars claimed that, besides moral hazard, a promise cannot be enforceable through the courts as an obligation.[183]

Other *Maliki* jurists, many *Hanafis,* and some *Shafi* jurists claim that fulfilling a promise is mandatory and it can be enforceable through the courts.[184] Those jurists based their claims on verses of the *Qur'an*. *Qur'an* (17:34) states that '… and fulfill the covenant. Surely, the covenant will be asked about (in the Hereafter)'[185] and also *Qur'an* (61:2 and 61:3) states that 'O those who believe, why do you say what you not do? It invites Allah's anger that you say what you not do.'[186] In addition to the verses of the *Qur'an*, proponents of that view also support their opinion by quoting the Holy Prophet Mohammed,

'There are three distinguishing features of a hypocrite: when he speaks, tells a lie, when he promises, he backs out and when he is given something in trust, he breaches the trust.'[187]

Another group of jurists, including Ibn Al-Arabi and Al-Ghazali, contend that unless a valid excuse exists, a promise should be binding.[188] Some of the *Maliki* jurists also claim that normally a promise can be binding only if the promisor incurs some damages to the promise.[189]

Alongside those different views, Islamic Fiqh Academy determined the principles of binding promise. According to the academy, four conditions should be met in order to accept the valid binding promise.[190] First of all, a promise should be one-sided.[191] Secondly, consistent with some of the *Maliki* jurists' views, as a result of the promise, an expense should be incurred by the promisee.[192] Thirdly, if the promise is about to buy something, the seller

181 Usmani, *An Introduction to Islamic Finance*, 50.
182 Ibid.
183 Ibid.
184 Walid S. Hegazy, "Contemporary Islamic Finance: From Socioeconomic Idealism to Pure Legalism," *Chicago Journal of International Law* 7, no. 2 (2006): 601.
185 *Qur'an, 17:34*, n.d.
186 *Qur'an, 61:2, 61:3*, n.d.
187 Usmani, *An Introduction to Islamic Finance*, 51.
188 Karim Ginena and Jon Truby, "Deutsche Bank and the Use of Promises in Islamic Finance Contracts," *Virginia Law & Business Review* 7, no. 4 (2013): 627.
189 Usmani, *An Introduction to Islamic Finance*, 50.
190 Islamic Fiqh Academy, *Resolutions and Recommendations of the Council of the Islamic Fiqh Academy 1985-2000*, 86–7.
191 Ibid., 87.
192 Ibid., 86.

must have the possession of the commodity at the time of the sale.[193] Finally, if damage occurs because of the breaking of the promise, promisor should compensate only the actual loss, opportunity costs cannot be included as compensation.[194]

In practice, the stability of *murabahah* transactions in Islamic financial system depends on the binding promises. Otherwise, IFIs will face a risk of not selling the property to the clients. Therefore, I agree with some of the *Maliki* jurists and Islamic Fiqh Academy views for the binding power of a promise. On the other hand, that view still has a flaw. According to the Islamic Fiqh Academy, if a promisor breaks his promise, promisee can be enforced by the courts to purchase the commodity or he can be enforced to compensate the damages of the promisee.[195] In practice, it is very difficult to determine the actual loss of promisee. For instance, let's say an IFI purchases the house from the ownership at $500.000. Before selling the house with an agreed price at $700.000, a client breaks his promise. In that situation, the IFI will be the owner of the house and there is not any damage. If the IFI sells the house immediately to another client, it will be possible to determine the actual loss. For example, if the IFI sells it to $400.000, promisor will be responsible for the loss of $100.000. On the other hand, the IFI may not sell the house immediately. What if an IFI sells the house 10 years later at $700.000? Pursuant to Shari'ah rules, interest was strictly forbidden. Thus, in this case, the IFI cannot claim that it incurred a loss. With this regard, determining the actual loss will be crucial and, unfortunately, Islamic Fiqh Academy says nothing about it.

Under English laws, a promise can be identified as 'an expression of willingness to do something in the future'[196], which 'invokes trust on the future action, not merely the present sincerity'.[197] Notwithstanding that generally a promise cannot be binding in terms of English laws, it is still enforceable if it is included in a deed or supported by required consideration.[198] *Murabahah* transactions included both conditions.[199] With regards to the required consideration, an IFI's damage should be compensated if a promisor incurs an expense.[200] In terms of a promise in a deed, *murabahah* contracts should be written and almost every *murabahah* contracts include 'promise to purchase'

193 Ibid., 87.
194 Ibid., 86.
195 Usmani, *An Introduction to Islamic Finance*, 52.
196 Roger Halson, *Contract Law* (Longman Press Education, 2001), 27.
197 Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Harvard Press, 1981), 11.
198 Aldohni, *The Legal and Regulatory Aspects of Islamic Banking*, 111.
199 Ibid.
200 Ibid.

clauses.[201] Thus, it can be said that promises are binding in England with regards to *murabahah* agreements.[202]

In Malaysia, 'promise to purchase' (*Wa'd)* was regulated by BNM. Pursuant to the guideline, which was issued by BNM, 'promise to purchase' was regarded as a binding obligation for the promisor and *Wa'd* should be separately executed before the *murabahah* contract.[203] It is also accepted that if a promisor breaks his promise, promisee will be entitled to demand compensation for its actual costs incurred by the promisee.[204]

VII. COURTS' INTERPRETATIONS OF MURABAHAH IN MALAYSIA AND THE UK

Malaysia and the UK are both common law countries. Despite the similar law systems, sometimes disputes derive from *murabahah* transactions are interpreted by each court differently. In this section, some of the significant cases will be briefly mentioned in order to demonstrate the different approaches in both Malaysia and the UK.

A. Murabahah Cases in Malaysia

Malaysia has both conventional and Islamic banking transactions. Therefore sometimes determining the applicable law for financial disputes may be problematic. In *Bank Kerjasama Rakyat Malaysia Bhd v Emcee Corporation Sdn Bhd*[205]the Court of Appeal allowed the appeal and it stated that conventional and Islamic banking implementations should be the same and there is no difference between them in terms of the applicable law. Same principles should be applied.[206] In *Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and Other Appeals,*[207] the Court of Appeal followed *Bank Kerjasama* case in terms of applicable law but it stated that comparing conventional banking and BBA was not appropriate.[208]

Public policy in Malaysia, in terms of BBA, was pointed out in *Malayan Banking Bhd v Marilyn Ho Siok Li.*[209] In that case, the Malaysian court followed

201 Ibid., 112.
202 Ibid.
203 Shari'ah Advisory Council of Bank Negara Malaysia, *The Principles and Practices of Shari'ah in Islamic Finance: Shari'ah Parameter Reference 1 Murabahah* (Bank Negara Malaysia, 2009), 26.
204 Ibid., 27.
205 Bank Kerjasama Rakyat Malaysia Bhd v Emcee Corporation Sdn Bhd, [2003] 2 MLJ 408 (n.d.).
206 Ibid.
207 Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and Other Appeals, [2009] 6 MLJ 839 (n.d.).
208 Ibid.
209 Malayan Banking Bhd v Marilyn Ho Siok Li, [2006] 7 MLJ 249 (n.d.).

the *Affin Bank Bhd v Zulkifli bin Abdullah*[210]case and held that the bank was only entitled to demand its sale price excluding the unearned profit and also the court pointed out the significance of public interest and it stated that people who preferred BBA rather than conventional banking loans should not take place in a worse position.[211]

Contrary to *Malayan Banking* and *Affin Bank* cases, the Malaysian High Court in *Malayan Banking v Ya'kup Oje & Anor*[212] held that the bank could demand the wholesale price derived from BBA because *Shari'ah* rules restricted uncertainty or ambiguity and if an agreement did not include rebate clause, the bank could make a discount.[213]

An interesting decision was made by the Malaysian courts in 2008. In *Arab-Malaysian Finance Bhd v Taman Ihsan Jaya Sdn Bhd & Ors,*[214] the court held that BBA in Malaysia was incompatible with *Islamic Banking Act 1983* and *Financial Institutions Act 1989*. The court stated that when a bank purchased the house from a vendor and immediately sold it to the client with deferred payment at a higher price, that sale could not be regarded as bona fide and it was just a financing transaction.[215]

In Malaysia, however, the BBA cases were not limited to those samples, it can be concluded that court decisions cannot be inconsistent with each other. It is also important to note that particularly financial disputes arise from BBA transactions have a significant place in the financial system.

B. Murabahah Cases in the UK

The UK's interest in Islamic finance triggered the disputes derive from *murabahah* contracts in England. However *murabahah* contracts based on *Shari'ah* rules and the UK laws are not consistent with *Shari'ah*, the applicable law sometimes is on the table. For instance, in *Islamic Company of the Gulf v Symphony Gems NV & ors,*[216] although the defendant claimed that, *inter alia*, the contract could not be enforceable because of including the rules against *Shari'ah*, the London High Court held that the contract had provisions about governing law clause and it can be clearly concluded from the contract that the governing law was English law.[217]

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210 Affin Bank Bhd v Zulkifli bin Abdullah, [2006] 3 MLJ 67 (n.d.).
211 Malayan Banking Bhd v Marilyn Ho Siok Li, [2006] 7 MLJ 249, 266 [44] (n.d.).
212 Malayan Banking v Ya'kup Oje & Anor, [2007] 6 MLJ 389 (n.d.).
213 Ibid.
214 Malaysian Finance Bhd v Taman Ihsan Jaya Sdn Bhd & Ors, [2008] 5 MLJ 631 (n.d.).
215 Ibid.
216 Islamic Company of the Gulf v Symphony Gems NV & ors, [2002] 346969 WL (n.d.).
217 Kilian Bälz, "A Murābaha Transaction in An English Court-The London High Court of 13th

The leading case in the UK, *Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd and Others,*[218] also discussed the governing clause of the *murabahah* agreement.[219] Both parties agreed that the contract governed by English law compatible with the Shari'ah law.[220] After a dispute arose, the court held that English law should be the governing law and only one law should be selected as the governing law of the contract.[221] The Appeal Court also affirmed the learned judge's findings.[222]

In both cases, the defenders claimed that credit facilities, in fact, interest-bearing loans thus the transactions against Shari'ah were not taken into consideration by English courts and also English law prevailed over *Shari'ah* rules.[223]

VIII. CONCLUSION

Islamic finance has emerged successfully in recent years and it has continued to grow. *Murabahah* has a significant role for sustaining the development of house financing in Islamic finance. Today, the most common method for house financing is *murabahah* in Islamic banking. *Murabahah* transactions' significance is not only considered by Islamic countries but also, most of the Western countries, including the UK, endeavor to be a leader in Islamic finance market. On the other hand, Malaysia is the other example among the South Asian countries which has specific implementations in terms of *murabahah* transactions.

Generally speaking, countries desire to increase their market share in Islamic finance, like Malaysia and England, provide some reliefs to their clients. For instance; tax exemptions and rebates on earlier payments. On the other hand, it is hard to say that *murabahah* transactions are fully consistent with *Shari'ah* rules. Although it is not wrong to admit that there is no consensus even among Islamic countries how to interpret or implement Shari'ah rules, it has to be accepted that some basic *Shari'ah* rules are similar in every country. Therefore, the legitimacy of *murabahah* transactions, earlier or late payment fees, and binding power of promise in *murabahah* are still on the debate among Islamic scholars.

February 2002 in Islamic Investment Company of the Gulf (Bahamas) Ltd. V. Symphony Gems NV & Ors.," *Islamic Law and Society* 11 (2004): 121.

218 Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd and Others, [2004] 4 ALL ER 1072 (n.d.).

219 Ibid.

220 Ibid.

221 Ibid.

222 Ibid.

223 Mahmoud A. El-Gamal, *Islamic Finance: Law, Economics, and Practice* (Cambridge University Press, 2006), 34.

Finally, considering the growth of Islamic finance, *murabahah* transactions, in order to establish the stability in both Muslim and non-Muslim countries, should be reformed by separating *murabahah* transactions from financial transactions, regulating tax issues, late payment charges, and early payment rebates again, and increasing the attractiveness of *murabahah* transactions. In so doing, the effectiveness of *murabahah* transactions will increase.

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