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TRIAL OF FUGITIVES

Kaçakların Muhakemesi

Assoc. Prof. Dr. Ali Hakan EVİK[1]

ABSTRACT

"*Trial of Fugitives",* one of the private trial procedures regulated under the Articles 247-248 of the Code of Criminal Procedure, has taken its present form after its amendments via the Law No. 6763 and the Statutory Decree No. 680. The most important provision introduced with these amendments is the fact that the suspect may be awarded the decision of fugitiveness just like a defendant, and -if required- measures specific to fugitives may also be imposed, such as "sentence in absentia, issuing a warrant, confiscation, appointment of administrator for the confiscated commodities". With the imposition of the final regulation, the scope of the offenses required for a decision of fugitiveness has been widened, whereas other conditions of fugitiveness were not considerably altered. In our opinion, current version of the clauses, providing that a fugitive who does not represent himself via an attorney will be appointed an attorney under compulsory advocacy principle, that the confiscation measure will be removed once the fugitive is caught or submits himself to justice, that the fugitives have the right to object to the verdicts, are properly regulated. Other than that, a subparagraph has been inserted into the Turkish Nationality Law No. 680. According to this new Subparagraph, elimination of a suspect or defendant who is abroad and cannot be reached (a fugitive in a sense) may lose his/her citizenship following a series of procedures.

ÖZET

Ceza Muhakemesi Kanunu'nun 247-248. maddelerinde düzenlenen özel muhakeme usullerinden "*kaçakların muhakemesi*"; 6763 sayılı Kanun ve 680 sayılı KHK ile değiştirilerek bugünkü halini almıştır. Ortaya çıkan en önemli yenilik; artık soruşturma aşamasında şüpheli hakkında da, tıpkı sanıkta olduğu gibi kaçaklık kararı verilebilecek ve sonrasında gerek duyulursa pek tabi ki; "gıyabi tutuklama, güvence belgesi verme, elkoyma, el konulan malların idaresi için kayyım atama" gibi kaçaklara özgü tedbirlere de başvurulabilecektir. Son düzenleme ile kaçaklık kararının verilebileceği suçlar genişletilmiş, buna karşılık, diğer kaçaklık koşullarında ise pek bir değişikliğe gidilmemiştir. Kendisini bir vekille temsil ettirmeyen kaçağa zorunlu müdafilik kapsamında avukat atanacağına, kaçak kendiliğinden teslim olduğunda veya yakalandığında elkoyma tedbirinin kaldırılacağına, verilecek kararlara itiraz edilebileceğine yönelik hükümler, kanunun mevcut halinde de bulunmaktadır ki bizce; bu olumlu bir şeydir. Bunun dışında yine 680 sayılı KHK ile Türk Vatandaşlığı Kanununa bir fıkra eklenmiştir. Buna göre; yurt dışında bulunan ve kendisine ulaşılamayan şüpheli veya sanık (bir anlamda kaçak) hakkında izlenecek bir dizi prosedür sonrasında Türk Vatandaşlığını kaybettirme kararı verilebilecektir.

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Although this may be an administrative measure and citizenship may be acquired subsequently via State Council decision or reclamation, we think that the regulation of such a heavy measure via governmental decree rather than a law and its imposition by the Council of Ministers without any need for a court verdict was not a convenient step.

Key Words: Criminal Procedure Law, Governmental Decree, Fugitive, Trial of Fugitives, Confiscation and Appointment of Administrator, Compulsory Advocacy, Nationality Law, Expatriation

İdari bir tedbir olup, Danıştay kararı veya geri alma yoluyla vatandaşlığın tekrar kazanılması söz konusu olsa da, bu kadar ağır bir tedbirin Kanun yerine KHK ile düzenlenmesi ve mahkeme kararı olmaksızın Bakanlar Kurulunca uygulanabilecek olması bizce çok da yerinde olmamıştır.

Anahtar kelimeler: Ceza Muhakemesi Hukuku, Kanun Hükmünde Kararname, Kaçak, Kaçakların Muhakemesi, Elkoyma ve Kayyım Atama, Zorunlu Müdafilik, Vatandaşlık Hukuku, Vatandaşlıktan Çıkarılma

INTRODUCTION

"*Trial of Fugitives",* one of the private trial procedures regulated under the Articles 247-248 of the Code of Criminal Procedure no 5237, has taken its present form after its most recent[2] amendments first via the Articles 31, 32 and 33 of the Law No. 6763[3] on November 2016 and then via Articles 12 and 13 of the Statutory Decree No. 680[4] in January 2017.

The previous definition of the fugitive under the Code of Criminal Procedure No 247/1 as "*the person who conceals himself inside the country or who stays abroad in order to make the trial against himself abortive and who cannot be reached by the court for these reasons*"[5], included only the defendants. Since the expressions "*investigation or prosecution*" and "*Public prosecutor or the court*" are inserted into the Article[6], it is now possible to apply the rules regarding the trial of fugitives to the suspects during the interrogations.

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2 It had been previously amended via the Governmental Decree No. 668 and dated 27.07.2016. Please see the Official Gazette No. 29783 with the same date for the provisions of the referred Decree.

3 Please see the Official Gazette No. 29906 and dated 02.12.2016 for the provisions of the Law No. 6763 and dated 24.11.2016 on "*Amendment of the Criminal Procedure Law and of Some Other Laws*".

4 Please see the Official Gazette (Repeating Version) No. 29906 and dated 02.12.2016 for the provisions of the Law No. 680 on "*Amendment of the Criminal Procedure Law and of Some Other Laws*".

5 For the definition included to the teaching prior to the amendment in the Law, please see Bahri ÖZTÜRK, Suç Muhakemesi Hukukunda Gaiplik ve Gaiplerin Muhakemesi, Üçdal Neşriyat, Istanbul, 1984, p. 223.

6 For Yurtcan's opinion that he thought "*the regulation of the fugitiveness as only for the stage of prosecution of the defendant is wrong"* as published upon the introduction of the amendment, please see Erdener YURTCAN, Ceza Yargılaması Hukuku, 12. Edition, Beta, Istanbul, 2007, p. 630.

In this Study, the author will deal with the trial of the fugitives and confiscation procedures in the aftermath of the amendment introduced by the Law No. 6763 and Governmental Decree No. 680. Furthermore, the author will discuss whether these amendments are appropriate, while mentioning shortly the regulation for the "*expatriation*" which may be exercised on the fugitive suspect as well as the defendant after the amendment introduced by the Article 75 of the Governmental Decree No. 680, because it is related/ effective, though indirectly, to the amendment on the Articles 247 and 248 via the Governmental Decree.

I. IN GENERAL

As a person that particularly refrains from an investigation or prosecution as he cannot be reached by any means because he is hiding inside the country or because he is abroad, the term "*fugitive*" differs from the term "*absentee*". The difference is that the absentee who is defined as "*a person who is absent; missing; non-existing; lost and unheard for a long time*"[7] can be reached by the competent authorities but he cannot be brought to the court or it is not deemed appropriate to bring him to the court[8], whereas the fugitive cannot even be reached[9]. Contrary to the fugitive, the "absent" does not intentionally disappear to avoid the court to profit from the absenteeism; he is not even aware of the existence of an investigation or prosecution about him[10]. The "*fugitive*", on the other hand, hides to prevent the conclusion of an investigation or prosecution against him. "*The decision of absenteeism"* is awarded based on the assumption that the suspect or the defendant is absent, while in the case of the fugitive, the decision is not based on an assumption but on a concrete fact (that the fugitive is hiding, concealing). The decision regarding fugitiveness aims to bring out the fugitive so that the on-going investigation or trial can be finalized[11].

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7 Nur CENTEL- Hamide ZAFER, Ceza Muhakemesi Hukuku, 14. Edition, Beta, Istanbul, 2017, p. 939; Ejder YILMAZ, Hukuk Sözlüğü, 5. Baskı, Yetkin, Ankara, 1996, p. 274.

8 CENTEL-ZAFER, p. 939; Ömer ÖMEROĞLU, "*Ceza Muhakemesinde Gaip ve Kaçak Sanığa Güvence Belgesi Verilmesi*", Gazi University Law Faculty Magazine, c. XVII, edition 3, Ankara, 2013, p. 206-207; Cumhur ŞAHİN-Neslihan GÖKTÜRK, Ceza Muhakemesi Hukuku II, 4. Edition, Seçkin, Ankara, 2016, p. 193; YURTCAN, p. 628.

9 Yener ÜNVER- Hakan HAKERİ, Ceza Muhakemesi Hukuku, 13. Edition, Adalet, Ankara, 2017, p. 721.

10 Murat BALCI, "*Ceza Muhakemesi Hukukunda Gaip ve Kaçak Sanığa Güvence Belgesi Verilmesi (CMK m. 246, CMK m. 248/7)*", TBBD, issue: 92, Ankara, 2011, p. 103; ÖMEROĞLU, p. 208; ŞAHİN-GÖKTÜRK, p. 193; Caner YENİDÜNYA-Zafer İÇER, Ceza Muhakemesi Hukuku, Adalet, Ankara, 2016, p. 203.

11 BALCI, p. 109; CENTEL-ZAFER, p. 939; Veli Özer ÖZBEK-Koray DOĞAN-Pınar BACAKSIZ-İlker TEPE, Ceza Muhakemesi Hukuku, 10. Edition, Seçkin, Ankara, 2017, p. 806; ÖZTÜRK, Gaiplerin Muhakemesi, p. 222; Bahri ÖZTÜRK-Behiye Eker KAZANCI-Sesim Soyer GÜLEÇ,

The factors inherent to the fugitiveness[12] can be listed as; "**a)** A prosecution or litigation should have been commenced about the suspect or defendant on allegation of having committed one of the offenses listed under Article 247/2 of the Turkish Criminal Code, **b)** The suspect or defendant who is aware of the investigation or prosecution instigated against him should be acting with the purpose of preventing any conclusion of the concerned investigation or litigation, **c)** The suspect or defendant driven by this purpose should be hiding inside the country or should have fled to abroad, **c)** The suspect or defendant should be inaccessible because he is hiding inside the country or he has fled abroad".

Indeed, it is possible to complete an investigation in the absence of the suspect during the investigation. Nevertheless, we believe that the lawmaker's main motive in the imposition of the confiscation measure is putting pressure on the suspect as well as on the defendant of heavy crimes, so that they come out of their hiding places. Therefore, we believe the adoption of an explicit regulation for the fugitiveness decision during the investigation stage has also been an appropriate step.

As per the fugitiveness procedures, "*fugitiveness decision*" on suspect or defendant should be given by the competent court. For this, an investigation about a suspect should have been commenced or a prosecution against the defendant should have been started, due to at least one of the catalog crimes listed in the Article 248/2 of the Code of Criminal Procedure. As underlined by the Supreme Court[13]; no "*fugitiveness decision*" can be awarded if and only the incident concerns at least one of the catalog crimes.

The crimes listed under the Article 248/2 of the Code of Criminal Procedure are as follows; **a)** Genocide and crimes against humanity, **b)** Migrant smuggling and human trafficking, **c)** Robbery, **d)** Looting, **e)** Breach of trust, **f)** Swindling, **g)** Fraudulent bankruptcy, **h)** Production and trade of drugs or stimulants, **i)** Counterfeit money dealings, **j)** Establishing an organization for the purpose of committing a crime, **k)** Embezzlement, **l)** Corruption, **m)** Bribery, **n)** Mischief in the tender, **o)** Misdeed during the performance of an

Uygulamalı Ceza Muhakemesi Hukukunda Koruma Tedbirleri, 2. Edition, Seçkin, Ankara, 2017, p. 197; Ersan ŞEN, (Online), http://www.haber7.com/yazarlar/prof-dr-ersan-sen/2348647-vatandasliktan-cikarma, 01.10.2017. For detailed information about the other purposes of the measure, see ÖMEROĞLU, p. 195-225.

12 ÖZBEK-DOĞAN-BACAKSIZ-TEPE, p. 807-808; Bahri ÖZTÜRK-M. Ruhan ERDEM, Uygulamalı Ceza Muhakemesi Hukuku, 11. Edition, Seçkin, Ankara, 2007, p. 612; Faruk TURHAN, Ceza Muhakemesi Hukuku, Asil Yayın Dağıtım, 2006, p. 264; YENİDÜNYA-İÇER, p. 209.

13 For the Supreme Court's 11th Penal Department's Decision No 2008/4388 Esas, 2008/4736 and dated 02.05.2008; Supreme Court 4th Penal Department's Decision No. 2007/6573 Esas, 2008/286 and dated 16.01.2008, see (Online), http://www.kazanci.com/kho2/ibb/giris.htm, 05.10.2017.

obligation, **p)** Crimes against the security of the state (Turkish Criminal Code; Articles 302, 303, 304, 305, 306, 307, 308), **r)** Crimes against the constitutional order and its functioning (Turkish Criminal Code; Articles 309, 310, 311, 312, 313), Membership to armed illegal organization or providing arms to such organizations (Turkish Criminal Code; Articles 314 and 315), **s)** Crimes against the state secrets and espionage (Turkish Criminal Code; Articles 328, 329, 330, 331, 333, 334, 335, 336, 337), **t)** Arms smuggling crimes as defined under the Law about the Firearms and Blades and other Instruments, **u)** Embezzlement as defined under the Paragraphs (3) and (4), Article 22 of the Banking Act, **v)** Crimes defined under the Combatting Smuggling Act requiring prison sentence, **y)** The crimes defined under the Articles 68 and 74 of the Code for Protection of Cultural and Natural Properties.

The catalog crimes following the latest amendment now include the Crimes against the Constitutional Order and its Functioning as provided under the Turkish Penal Code (Articles 309, 310, 311, 312, and 313). We would like to assert that the inclusion of the offenses against property such as robbery, looting, etc. within the catalog crimes is a positive development given the fact that until now the perpetrators of such offenses had fled and are still fleeing to abroad as fugitives.

The amendments have also made it possible to give the fugitiveness decision at the investigation stage. However, it should be underlined that at the investigation stage, the alleged offense is judicially not yet definite, and the evidences have not been completely collected, thus "*one of the catalog crimes should not be used as a justification without any material evidence just for the execution of this article*"[14]. Any counter-approach will lead to unlawfully expanding the scope of the fugitiveness decision, so similar care and diligence should also be shown at the stage of the prosecution[15].

The second precondition for a fugitiveness decision is that the suspect/defendant about whom investigation has been commenced, should be duly called to court by the Prosecutor/Court to file his statement/to make his defense. For the suspect/defendant, it is also an obligation to make their statement and interrogation[16]. If the suspect or defendant do not abide by the duly-made calls and present themselves, the compulsory process should be started. In order to consider the summons as lawful, it shall contain the legal rationale for the summons and a caution explaining that a failure to obey the summons would lead to a subpoena.

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[14] ÖZTÜRK-KAZANCI-GÜLEÇ, Koruma Tedbirleri, p. 198; ŞEN, (Çevrimiçi), http://www.haber7.com/yazarlar/prof-dr-ersan-sen/2348647-vatandasliktan-cikarma, 01.10.2017.

[15] ÖZTÜRK-KAZANCI-GÜLEÇ, Koruma Tedbirleri, p. 199.

[16] ÜNVER-HAKERİ, p. 212.

Once a subpoena decision is given about the suspect/defendant who does not abide by the summons, the subpoena will be fulfilled by the relevant law-enforcement agency in accordance with the Code of Criminal Procedure No 146. In the case of a failure to execute the subpoena (due to inability to find the concerned person in his official / known residential address), the reasons of the failure will be identified via an official report to be jointly signed by the local authority at the village/district and the security officer. Finally, the report will be conveyed to the court of the competent jurisdiction by the security officer.

Public Prosecutor or the Court, carrying out the investigation or holding the trial, respectively, should decide for the announcement of the summons through publishing in a newspaper or hanging it at the door of the known residence of the suspect/defendant. These announcements should also state clearly that the measures set forth under the Article 248 of the Code of Criminal Procedure will be imposed if the suspect/defendant does not appear within fifteen days.

And finally, after the preparation of the report stating that all of these procedures have been duly performed, the suspect/defendant who fails to apply to the competent authorities for presenting his statement or making his defense within fifteen days is concluded to be a "fugitive"[17]. Only after this decision, the suspect or defendant who has taken the fugitive status with the court decision[18] is called as "*fugitive suspect*" or "*fugitive defendant*".

As the following decision reveals, the Supreme Court considers non-compliance with the abovementioned procedures as unlawful even if the conditions for a suspect/defendant to be considered as a fugitive emerged;

> "*(...)In the subject case, considering the character of the offense attributed to the suspect, the fugitive decision should have been given in full compliance with all relevant provisions stipulated under the Articles 247 and 248 of the Code of Criminal Procedure No. 5271;thus after issuing repetitive invitations to the suspect – although one invitation would be sufficient – the court needed to have recourse to subpoena as mentioned in the Article 199 of the Code of Criminal Procedure No. 5271. Therefore, it is against the law to insist on the original verdict in the absence of the suspect and without listening to what the suspect has got to say regarding the decision of reversal. (...)*"[19].

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[17] It is evident here that the law-maker does not want to permit judicial discretion to the judge on whether or not to give fugitiveness decision about the suspect once all conditions are realized. See ÖZBEK-DOĞAN-BACAKSIZ-TEPE, p. 9809.

[18] Nevzat TOROSLU-Metin FEYZİOĞLU, Ceza Muhakemesi Hukuku, Savaş, Ankara, 2011, p: 229.

[19] For the Supreme Council's Penal General Assembly's Decision No. 2008/9-1 Esas, 2008/26 Karar and dated 19.02.2008, see (online), http://www.kazanci.com/kho2/ibb/giris.htm, 05.10.2017.

Article 248/4 of the Code of Criminal Procedure has regulated that the confiscation decision about a suspect will be removed, once the suspect is caught or surrenders. However, the provision is silent about the possibility of what would happen if the suspect or defendant, who is the subject of "*fugitiveness decision*", is caught or surrenders subsequent to the subject decision. What will be the outcome of the "fugitiveness decision" awarded by the judge in such a case? We think that there is a legal loophole regarding the issue, yet it may be filled by using other stipulations of the Code of Criminal Procedure, since the principle of "no ban on analogy" applies in the criminal procedure law. To wit: under-arrest protection measure can be implemented only by the relevant decision of the judge. As per the Article 103 of the Code of Criminal Procedure, this decision may become void upon the release decision given ex officio by the prosecutor during the interrogation stage. Based on this decision, it can well be alleged that the "*fugitiveness decision*" about a suspect will become void, when he is released by the prosecutor after his statement is taken or when he is caught or surrenders after a fugitiveness decision is given against him. Although it seems arguable to reverse a judge's decision via a prosecutor's decision, it is enabled within the Code of Criminal Procedure in case of an arrest, which is a far heavier measure. Therefore, it can be applied *argumentum a fortiori* to the case of fugitiveness[20]. Furthermore, this interpretation can be legitimized considering that it leads to a more favorable position for the suspect[21].

On the other hand, "*fugitiveness decision*" may be removed only by the competent authority just as in the confiscation measure, and we believe that this will be possible ex officio or upon the request of the suspect who is caught or surrendered by his own for making his own counsel.

II. WHAT CAN DONE ABOUT THE FUGITIVE SUSPECT OR DEFENDANT

Following the latest amendments, investigation and prosecution procedures may be carried out on "*fugitive suspect or defendant*" under the current state of our regulations. These procedures and possible protective measures will be mentioned in this chapter, while "*expatriation*" which is a different type of administrative measure will be covered under a different heading.

A. Investigation and Prosecution Procedures

Prosecution may be carried out about a "*fugitive defendant*" as provided under Article 247/3 of the Code of Criminal Procedure. Following the amendment of this Article, it is evident that fugitiveness decision may also

[20] CENTEL-ZAFER, p. 209; ÖZBEK-DOĞAN-BACAKSIZ-TEPE, p. 286.
[21] ÖZBEK-DOĞAN-BACAKSIZ-TEPE, p. 286.

be given about a suspect. Although there is no clear-cut regulation on this subject, since it is possible to prosecute a defendant, it should also be probable to investigate him as the following decisions by the Supreme Council[22]- with which we also agree- emphasize; "*Investigation will be definitely conducted, i.e. an investigation which has already started might be completed even though the statement of the suspect cannot be taken in his absence*"[23]; "*Although the suspect's statement cannot be taken, a public case may be commenced by thus completing the investigation and the bill of indictment will not be returned as such.*"[24]

According to the article 247/3 of the Code of Criminal Procedure, even though a prosecution has been started about the defendant (prosecution is filed, prosecution started, a witness is listened to by the court, an expert report is received, and an estimation, etc. has been made), no jail sentence can be given about "*fugitive defendant*, if he has not been interrogated[25]. Turkish Code of Criminal Procedure strictly bans the conviction of a defendant who did not enjoy his right of defense efficiently [26].

Apart from conviction, it is certainly possible to award other decisions (dismissal, acquittal, etc.). We think it is appropriate to maintain this provision in the Code of Criminal Procedure even after the amendments made via the mentioned Law and the Governmental Decree, as it shows the importance given by the state on the right of defense even under the extreme conditions, in the state of emergency, and during the exceptional procedures.

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22 For the Supreme Court 12th Penal Department's Decision No. 215/3151 2015/6782 and dated 27.04.2015, see (Online), http://emsal.yargitay.gov.tr/BilgiBankasiIstemciWeb/GelismisDokumanAraServletYargıtay, 05.10.2017; For the Supreme Court 4th Penal Department's Decision No. 771/2513 and dated 19.03.2007; for the Supreme Court's 4th Penal Department's Decision No. 2007/4495 Esas, 2007/8944 and dated 06.11.2007, and for other decisions in this respect, see (Online), http://www.kazanci.com/kho2/ibb/giris.htm, 05.10.2017.

23 ÖZBEK-DOĞAN-BACAKSIZ-TEPE, p. 810; YENİDÜNYA-İÇER, p. 568.

24 For the Supreme Court 12th Penal Department's Decision No. 2015/3151 2015/6782 and dated 27.04.2015; and 1st Penal Department's Decision No. 2010/1899 Esas, 2010/2382 and dated 14.04.2010; see (Online), http://emsal.yargitay.gov.tr/BilgiBankasiIstemciWeb/GelismisDokumanAraServletYargıtay, 05.10.2017; For the 4th Penal Department's similar Decision No. 2007/6573 Esas, 2008/286 and dated 16.01.2008, see (Online), http://www.kazanci.com/kho2/ibb/giris.htm, 05.10.2017.

25 Cumhur ŞAHİN-Neslihan GÖKTÜRK, p. 194; YENİDÜNYA-İÇER, p. 210; YURTCAN, p. 629. for the Supreme Court's 4th Penal Department's similar Decision No. 2007/6573 Esas, 2008/286 and dated 06.01.2008, for the Supreme Court's 2nd Penal Department's Decision No. 2007/6622, 2007/6573 and dated 16.01.2008 and for other decisions in this respect, see (Online), http://www.kazanci.com/kho2/ibb/giris.htm, 05.10.2017.

26 ŞEN, (Çevrimiçi), http://www.haber7.com/yazarlar/prof-dr-ersan-sen/2348647-vatandasliktan-cikarma, 01.10.2017.

On the other hand, is it possible to convict a "*fugitive defendant*" who was interrogated by the judge during the investigation phase, but was later considered as a fugitive, since he went missing intentionally and willingly during the prosecution phase? Our answer to this question would be "*no, it is not possible*" when we consider entirely our Criminal Procedure system (particularly, the cruciality of the right of defense within the system). In this concrete example, although the suspect, about whom the fugitiveness decision has not been given yet, has been interrogated during the investigation, no interrogation in the real sense has been conducted by the competent court during the phase of prosecution. Hence, convicting a person, based on his interrogation taken by the judge of the court of peace during investigation phase, when he was not yet a fugitive will be in clear contradiction with the Article 247/3 of the Code of Criminal Procedure[27].

The Code of Criminal Procedure does not define if the judge of the court of peace or the competent court is entitled to make interrogation. However, we believe that the function of interrogation made by the judge of the court of peace may not be the same with the interrogation made by the judge of the competent court. The prosecutor can change the nature of the crime attributed to the suspect during the initial phase of the investigation at the end, as he prepares the indictment. Similarly, the crime attributed in the indictment may also be changed during the prosecution. For example, although the suspect has been interrogated by the judge of the court of peace upon the alleged crime of bribery, the prosecutor may subsequently decide to change the nature of the crime e.g. into malversation while preparing the indictment. It is also possible that the court may come to believe that the subject crime is indeed malversation not the bribery. Taking these examples into account, is it possible to convict a fugitive for malversation, if he was interrogated due to bribery allegation during the investigation phase? We think the answer to this question should be "no". Since the Code of Criminal Procedure has regulated that right to additional defense should be given even to the defendant who is present in the court, it would not be possible and fair to maintain that a fugitive may be convicted without the interrogation of the competent court for the reason that he has already been interrogated during investigation.

To comply with the above-defined trial procedures, the Article 247/4 of the Code of Criminal Procedure regulates that the court shall request from the Bar to appoint a counsel for the "*fugitive defendant*", if he is not represented by a counsel. As one might notice here, the law-maker has adopted compulsory advocacy principle. In such cases which might cause such a heavy consequence (to make a trial in absentia, to conduct trial procedures, to consult to the

[27] For contrary opinion see ÖZBEK-DOĞAN-BACAKSIZ-TEPE, p. 811.

following protective measures, etc.), it is absolutely essential to adopt the "compulsory advocacy principle". That's why this principle, which is crucial for the right of defense[28] is maintained by the latest amendment as underlined in the decision of the Supreme Court[29].

On the other hand, the measures that might be taken/imposed during the trial of the fugitive are quite heavy, and yet we believe it is a great deficiency that there is no regulation providing that the prosecutor may request from the Bar an attorney for the defense of the fugitive suspect, who is not represented with legal counsel, during the prosecution. In our opinion, an attorney appointed to the suspect who does not enjoy legal counsel's aid during the investigation, may enlighten the suspect, who is hiding inside the country or who is abroad, about the legal possibilities or the protection measures. At the end, the suspect may be more easily convinced to appear before the court to give his statement or to make his defense.

B. PROTECTIVE MEASURES THAT MAY APPLY TO THE FUGITIVE SUSPECT OR DEFENDANT

Various protective measures may be exercised on the "fugitive *suspect or defendant"* according to our laws and regulations. These protective measures will be shortly explained below:

1. Confiscation and Appointment of Administrator

The scope of the protective measures of "*confiscation and appointment of administrator*" which may be applied only in the case of the "*fugitive suspect*" as amended by the Law No. 6763 and the Governmental Decree No. 680 has been expanded further. At the moment, it has become possible to impose these measures on the "*fugitive suspect*". According to the Article 248/1 of the Code of Criminal Procedure; the belongings and the rights and receivables of the fugitive suspect existing within the boundaries of the Republic of Turkey may be confiscated exclusively in proportion with this purpose[30]. The text of the article indicates that "it may be confiscated"; therefore, it is not compulsory to confiscate as it is the case in other protective measures. The specific confiscation measure can be awarded by the judge of the court of peace upon the request of the Public Prosecutor during investigation and

[28] CENTEL-ZAFER, p. 943; ÖZBEK-DOĞAN-BACAKSIZ-TEPE, p. 812 ÖZTÜRK-KAZANCI-GÜLEÇ, Koruma Tedbirleri, p. 197.

[29] For the Supreme Court 2nd Penal Department's Decision No. 2009/48524 Esas, 2011/13291 and dated 16.06.2011; and 1st Penal Department's Decision No. 2010/1899, 2010/2382 and dated 14.04.2010; see (Online) http://emsal.yargitay.gov.tr/BilgiBankasiIstemciWeb/GelismisDokumanAraServletYargıtay, 05.10.2017.

[30] ÖZTÜRK-KAZANCI-GÜLEÇ, Koruma Tedbirleri, p. 197.

by the competent court at the stage of the prosecution. This measure may be applicable only for the crimes listed in the Article 248/2 of the Code of Criminal Procedure[31].

With the confiscation decision, an administrator may also be appointed for dealing with the concerning belongings, rights and receivables[32]; as referred by Law; "*may be appointed as required for the management thereof*". The confiscation and appointment of the administrator shall be informed to the legal counsel of the suspect. Although awarding the confiscation decision and appointing an administrator is not compulsory; it is mandatory to inform the legal counsel of the suspect or defendant once such decision is given and relevant action is taken[33]. In our opinion, the adoption of compulsory advocacy principle for the suspect who is not represented by a legal counsel at the stage of the investigation is of particular importance. It may ensure the appearance of the suspect to give his statement, supervision of whether the confiscation measure is proportional, the expression of objection – if any – regarding the appointed administrator. It should be noticed that the "*appropriateness/ proportionality*" is explicitly included within the provision and it is a condition for confiscation[34].

Here, we would like to assert that we do not agree with the decision of the European Court of Human Rights (ECHR) which concluded in an organized crime case that "confiscation of 16 real properties of the suspects was proportional due to the heaviness of the crime"[35]. In fact, the relevant provision allows "*confiscation in proportion with the purpose*", not in proportion with the heaviness of the crime. Confiscation based on the nature of the crime may lead to confiscation of all belongings of the fugitive. However, overall confiscation of the belongings of the fugitive is banned as per our laws and regulations[36].

In another decision which underlines the criteria to assess the amount of the bail, the European Court for Human Rights underlines that "*the prospect*

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31 ÖZBEK-DOĞAN-BACAKSIZ-TEPE, p. 814; ŞEN, (Online), http://www.haber7.com/yazarlar/prof-dr-ersan-sen/2348647-vatandasliktan-cikarma, 01.10.2017; ÜNVER-HAKERİ, p. 721; YURTCAN, p. 631.

32 For the opinion "*should be appointed*", see TURHAN, p. 264.

33 ÖZTÜRK-KAZANCI-GÜLEÇ, Protection measures, p. 198.

34 TURHAN, p. 264.

35 For the Raimondo v Italy decision No. 12954/87 and dated 22.02.1994 of the European Court for Human Rights; see Serkan CENGİZ-Fahrettin DEMİRAĞ, Teoman ERGÜL, Jeremy McBRIDE-Durmuş TEZCAN, *Avrupa İnsan Hakları Mahkemesi Kararları Işığında Ceza Yargılaması Kurum ve Kavramları*, Şen Matbaa, Ankara, 2008, p. 78, quoted by ÜNVER-HAKERİ, p. 403.

36 CENTEL-ZAFER, p. 945.

of loss in the assets of the concerned person, in the event of non-appearance at a trial will act as a sufficient deterrent to dispel any wish on his part to abscond"[37], and by referring to the report dated 11 December 1980 of the European Commission of Human Rights[38] continues as follows, "*As the fundamental right to liberty as guaranteed by Article 5 of the Convention is at stake, the authorities must take as much care in fixing appropriate bail as in deciding whether or not the accused's continued detention is indispensable"*. We agree with the decision of the court and think that the criteria imposed by these decisions can also be applied in the case of the confiscation measures on the fugitives. That is to say as the confiscation should be sufficient and proportional to reach its purpose (which is convincing the suspect to appear in order to continue with the investigation or conclude it). In our opinion, if the confiscation measure does not serve this purpose, it should be considered as unlawful[39].

Article 132 entitled "*retention or disposal of the confiscated goods*" will apply to the maintenance of the confiscated goods as per Article 248/3 of the Code of Criminal Procedure. In addition to these provisions, "Regulation of the Goods of Crime"[40] shall also be taken into consideration while applying the confiscation measure[41]. Besides, the judge of the court of peace or competent court may also decide to announce a copy of the decisions regarding the adopted measures in a newspaper. This will ensure that the injunction measure is learned by the authorities and officers who will implement the measure, as well as the third parties who will conduct their commercial activities accordingly. The fugitive may also be informed about the decision and may come out of his hiding to give his statement or to defend himself, which is an opportunity for him to remove the confiscation decision on his belongings. We believe that it will be much more effective and beneficial if the advertisement decision becomes compulsory rather than to discretionary.

According to the Article 248/4 of the Code of Criminal Procedure; the authority that has decided on the confiscation, may also decide to lift this decision in case the fugitive is caught inside the country or he is extradited to the country after being caught up abroad or he surrenders by his own will. The instrumentality and temporariness principles are applicable in all protection measures[42], and as the main purpose which is to ensure the return

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37 Iwanczuk v. Poland, T. 15.11.2001, Başvuru No. 25196/94, P. 66 – 70.

38 European Commission of Human Rights, T. 11 December 1980, No. 8339/78, Decisions and Reports 23, s. 137.

39 ÖZTÜRK-KAZANCI-GÜLEÇ, Koruma Tedbirleri, p. 197.

40 Official Gazette No. 25382 and dated 01.06.2005.

41 ÖZBEK-DOĞAN-BACAKSIZ-TEPE, p. 815.

42 CENTEL-ZAFER, p. 939; p. 349; ÜNVER-HAKERİ, p. 302-303.

of the fugitive[43] would be fulfilled, when the fugitive is caught or surrenders, expectedly the confiscation decision "will" be terminated rather than "may" be terminated[44].

Another factor relevant with the confiscation is that the "*fugitive suspect or defendant*" will be entitled to claim compensation in accordance with the Articles 132 and 141 of the Code of Criminal Procedure if and where "**a)** the confiscation decision is taken although the requirements as foreseen in the provision are not present, **b)** the measures required for the protection of the confiscated goods are not implemented, **c)** the confiscated goods are used outside of the scope of the confiscation, or **d)** the confiscated goods are not returned on time[45].

Finally, as per the Article 248/5 of the Code of Criminal Procedure, if the confiscation decision given by the judge of the court of peace during the investigation or by the authorized court during the prosecution causes legal dependents under fugitive's care fall in poverty, and if it is established by the court ex officio or upon the request, then the court shall permit the administrator to help legal dependents (his spouse, his children, parents, etc.). The administrator shall help those by using the confiscated property, proportional to their financial states and with the purpose of securing their minimum livelihood[46] (with that purpose only[47]).

We believe these rules are conveniently regulated, because as a subject of the criminal trial, the suspect -just like the defendant –shall have rights, even if he avoids the Public Prosecutor and the Court. To provide the livelihood of his family is one of these rights. Confiscation of the asset is a measure imposed for a reason (which is neither pushing the family of the fugitive to a financial crisis, nor causing them to become dependent on others, etc.), yet it is necessary for the state to help the family of the fugitive, to pay a salary in a way, to fulfill the principles of a state of law and individual criminal responsibility.

2. Arrest in Default

In the present criminal procedure system, it is not possible to award an arrest warrant in default, unlike in the previous system[48]. Despite this fact,

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43 ÖZTÜRK-KAZANCI-GÜLEÇ, *Koruma Tedbirleri*, p. 197.

44 ÖZBEK-DOĞAN-BACAKSIZ-TEPE, p. 817; ÖZTÜRK-KAZANCI-GÜLEÇ, *Koruma Tedbirleri*, p. 199.

45 ÖZTÜRK-KAZANCI-GÜLEÇ, *Koruma Tedbirleri*, p. 348-349.

46 CENTEL-ZAFER, p. 945; ÖZTÜRK-KAZANCI-GÜLEÇ, *Koruma Tedbirleri*, p. 198.

47 ÖZBEK-DOĞAN-BACAKSIZ-TEPE, p. 816.

48 ÖZTÜRK-ERDEM, p. 567; Feridun, YENİSEY-Ayşe NUHOĞLU, Ceza Muhakemesi Hukuku, 3. Baskı, Seçki, Ankara, 2015, p. 318.

unfortunately, the prosecutors include their request to investigate and to arrest the concerned person within subpoena order, which is regulated under the Article 274/1 of the Code of Criminal Procedure. Subsequently, if the subpoena is issued in line with these requests, it leads to an arrest in default[49].

Article 248/5 of the Code of Criminal Procedure provides an exception to the arrest warrant in default. Accordingly, arrest in default decision may be awarded by the judge of the court of peace or the competent Court in accordance with the Article 100 and the subsequent articles. Hence, a special provision shall be noted here: As stated by the Code of Criminal Procedure Enforcement Law Article 5/2, arrest in default decision can be given only about *fugitives in foreign countries*[50]. We believe that such an exception should have been regulated directly under the relevant provision within the Code of Criminal Procedure, rather than in another Code[51]. We certainly think that this judgment should have been included in the Code of Criminal Procedure which has been amended for several times since its first enactment.

However, in our opinion, it should be established that the fugitive is abroad (it should have been recognized that he crossed the border by legal or illegal means, that he was seen and recognized abroad, or that his existence abroad should have been reported by the officials of the relevant country, etc.) Since it is not always easy to establish whether a fugitive is abroad or inside the country, we believe that the clause may not be applicable on people except those who are well known/acknowledged.

3. Issuing an Assurance Document

Article 246/1 of the Code of Criminal Procedure provides that the court may issue, an assurance document in respect to the "*defaulter suspect*" stating that if he appears at the hearing, he shall be immune from arrest with a warrant, yet this assurance may impose some conditions[52]. Article 248/7 of the Code of Criminal Procedure regulates that Article 246 will be also enforced about the fugitives.

In this regard, it is possible to issue a warranty about the "*fugitive suspect or defendant*" by the Public Prosecutor during the interrogation stage and by the Competent Court during the prosecution stage[53]. In our opinion, this

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49 CENTEL-ZAFER, p. 365; YENİSEY-NUHOĞLU, p. 318.

50 TOROSLU-FEYZİOĞLU, p: 228. This is justified by; "*not living any problems during the return procedures of the fugitive*". See: ÖZTÜRK-ERDEM, p. 567; Cumhur ŞAHİN-Neslihan GÖKTÜRK, 194.

51 ÖZBEK-DOĞAN-BACAKSIZ-TEPE, p. 817; TOROSLU-FEYZİOĞLU, p. 229.

52 Article 109/3 of the Code of Criminal Procedure may be considered in terms of the conditions. For similar opinion, see BALCI, p. 112; ÖMEROĞLU, p. 210-211.

53 BALCI, p. 101-117.

regulation is not provided for "*fugitive suspect or defendant*", i.e. the subject of the trial, but is for the alleged crime[54]. Otherwise, an assurance would be extended to include all crimes, not only the alleged crime, which is not in compliance with the practical purpose of the concerned provision. Similarly, as per the Article No. 246/2 of the Code of Criminal Procedure and the reference made to this article, the assurance will become void and the fugitive will be arrested where; **a)** the competent court completes the trial and convicts the "*fugitive defendant*" who appeared in the court and made his defense, **b)** the fugitive does not comply with the requirements of the assurance.

Since the subject of the assurance is the "*arrest*", which is one of the protective measures, it will not be possible to "*apprehend or take into custody*" the fugitive who shows up in the court because apprehension or taking into custody are quasi-arrest measures. On the contrary, measures with distinctive characteristics (such as search, confiscation or supervision of the communication) may be applied[55].

Since the purpose of the issuance of the warranty is to bring out the fugitive suspect or defendant and to ensure the completion of the interrogation and the prosecution in particular; according to us it is appropriate to keep this provision even after the amendment, so that an assurance of no-arrest can be given for the fugitives. Although there is no clear-cut regulation on this subject, we believe that the "fugitive suspect" who does not act in accordance with the assurance conditions may be arrested by the judge of the court of peace following an arrest request. However, any procedure other than arrest cannot be imposed on the suspect. For example, accepting the preparation of an indictment as conviction by analogy and applying the abovementioned article on fugitive suspect would be unlawful[56], as it contradicts the principle "*ban on analogy in restrictive and exceptional provisions*"[57].

4. Issuing Apprehension Order

As known, under the Article 98/1 of the Code of Criminal Procedure, the judge of the court of peace may issue an apprehension order upon the request of the Public Prosecutor if the suspect does not abide by the summons or if it is not possible to serve a summons on him, during the investigation. This provision can also be applied on the "*fugitive suspect*". Similarly, as per the Article 98/2 of the Code of Criminal Procedure, apprehension order may be issued by the public prosecutors and the office of security forces about the "fugitive suspect or defendant" who escapes from the security forces after

54 ÖZBEK-DOĞAN-BACAKSIZ-TEPE, p. 819.
55 ÖZBEK-DOĞAN-BACAKSIZ-TEPE, p. 819.
56 BALCI, p. 113; ÖMEROĞLU, p. 214; ÜNVER-HAKERİ, p. 622.
57 CENTEL-ZAFER, p. 50; ÜNVER-HAKERİ, p. 33.

being captured. During the prosecution, apprehension order may be issued about the "*fugitive defendant*" by the court ex officio or upon the request of the Public Prosecutor[58].

5. Apprehension without a warrant by the Security Forces

Similarly, in cases stipulated under Article 90/2 of the Code of Criminal Procedure (where an arrest warrant issued by the judge or issuance of an apprehension order is required), if there would be peril in delay; and if it is not possible to immediately reach the public prosecutor or the superiors, the officers of the security forces shall be entitled to arrest the individual without a warrant. Once more, this provision is also applicable on the "*fugitive suspect or defendant"*.

III. OPPOSITION

Under the system adopted by the Code of Criminal Procedure, the decisions of the judges and -if it is explicitly regulated- the decisions of the courts can be opposed. Article 248/8 of the Code of Criminal Procedure, which regulates the trial of the fugitives, provides that "*these decisions may be subject to opposition*". However, does the possibility to oppose include only the decisions for protection measures listed under Article 248, or does it extent to the fugitiveness decision regulated under Article 247?

In our opinion, although the opposition is mentioned only in the Article 248/8, it should be regarded that Article 247/2 also refers to Article 248, by indicating that a fugitiveness decision can be given only because of crimes mentioned within Article 248/2. Therefore, Article 248/8 which permits the opposition shall apply not only to protective measures listed under 248 but also to the fugitiveness decision awarded by the judge of the court of peace or the competent court within the Article 247.

Opposition to the fugitiveness decision is indisputably probable where the fugitiveness decision is awarded by the judge of the court of peace. On the other hand, we believe that fugitiveness decision taken by the competent court can also be opposed. Even though the person is fugitive, his legal counsel may be able to file an objection about the fugitiveness decision given by the court (for example based on assumption that there was no catalog crime in the subject incident which is required for a fugitiveness decision). Although the article is not clear, we believe that it is possible to object to all decisions given by the court or judges about the "*fugitive suspect or defendant*"[59].

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[58] YENİSEY-NUHOĞLU, p. 317-319.

[59] BALCI, p. 116; CENTEL-ZAFER, p. 947; ÖZBEK-DOĞAN-BACAKSIZ-TEPE, p. 822; ÖZTÜRK-

IV. EXPATRIATION

Turkish Nationality Law numbered 5901 and dated 29.05.2009[60] provides the principles and the procedures regarding the conduct of affairs and processes relating to the acquisition and loss of Turkish citizenship, as well as and the implementation of citizenship services. According to the Article 29 of the Law, Turkish persons whose acts as ascertained by the official authorities, fall into scope of the Article, may be lose their citizenship by a decision of the Council of Ministers acting on a proposal from the Ministry.

A subparagraph has been inserted to the relevant article by Article 75 of the Governmental Decree No 680[61] which makes significant changes in fugitiveness and in the Article 29 of the Turkish Nationality Law, indicating that *" the citizens about whom an investigation or prosecution is conducted due to the crimes provided under Articles 302, 309, 310, 311, 312, 313, 314 and 315 of the Turkish Criminal Code No. 5237 and dated 26.09.2004 and who cannot be reached because they are abroad shall be reported to the Ministry for the revocation of their citizenship within one month after this is confirmed by the public prosecutor during the interrogation or by the court. If they fail to return to the country within three months despite the announcement for return, Turkish citizenship of these persons may be deprived by the proposal of the Ministry and decision of the Council of Ministers*".

As the provision includes "*the nationals about whom an investigation or prosecution is conducted due to crimes and who cannot be reached because they are abroad"*, and as it is regulated under the same governmental decree that amended the trial of fugitives within the Code of Criminal Procedure, we would like to mention very shortly that the nationals referred here shall be considered similar to "*fugitive suspect or defendant*". This similarity can also be inferred from the text of this provision (which indicates that the person should be abroad and cannot be reached). However, it is not compulsory to decide a person to be a fugitive in order to revoke his Turkish citizenship, which implies that the same conditions of the fugitiveness are not sought (e.g. smaller number of catalog crimes are enlisted compared to those required for the fugitiveness)[62].

ERDEM, p. 613; YENİDÜNYA-İÇER, p. 2010; YURTCAN, p. 631.

60 For the law provisions, see the Official Gazette No. 27256 and dated 12.06.2009.

61 For the provisions of the Governmental Decree No. 680 "*About making some Regulations in the content of the State of Emergency*", See the Official Gazette No. 29940 and dated 06.01.2017 (Repeating).

62 Vahit DOĞAN, Türk Vatandaşlık Hukuku, 14. Edition, Savaş, Ankara, 2017, p. 164-169. For conditions sought for the loss of Turkish citizenship under the Turkish Nationality Law, See DOĞAN, p: 165.

As one can notice, no court decision is required for revocation of Turkish nationality, instead the decision of the Council of Ministers[63]based on the proposal of the Interior Minister would be sufficient. Therefore, contrary to other measures regarding the fugitive, this decision is subject to the supervision of the State Council because it is of the character of an "*administrational incentive*".

For the implementation of this decision, an investigation or prosecution should have been commenced about a Turkish citizen due to crimes listed under Articles 302, 309, 310, 311, 312, 314 or 315 of the Turkish Criminal Code. These crimes are: "To disrupt the unity and territorial integrity of the State; violation of the Constitution; attempt of assassination and assault; offenses against the Turkish Grand National Assembly; offenses against the government; armed insurgency against the Republic of Turkey; establishing, managing, being a member of an armed organization; committing an offense for such organization one is not a member of; deliberate and voluntary help to such organization one is not a member of; propagating for such organization; and providing arms to such organization". Although it may be a temporary yet a heavy administrative measure (Article 14 of the Turkish Nationality Law allows re-acquisition of the Turkish nationality of the person, if he returns to the Republic of Turkey and resides in Turkey for a period of 3 years), we still believe that this provision is appropriately regulated since it covers fewer and heavier crimes compared to the large list of crimes under the Article 248/2 of the Code of Criminal Procedure. On the other hand, considering the presumption of innocence principle, even the measure at stake is an administrative one, it is not convenient to apply it only based on an allegation for a crime (either via investigation or prosecution) and without requiring a judge decision[64].

Similarly, where it is not possible to reach (hence make a notification to) a suspect because he is abroad which would lead to the disruption of the investigation or prosecution, it is compulsory for the competent public prosecutor or for the court to report to the Interior Ministry for the revocation of the nationality of the person, within one month after it has been learned that the suspect or defendant was abroad. In case the concerned person fails to return to the country within 3 months following the Interior Ministry's announcement in the Official Gazette, he may lose his nationality by the decision of the Council of Ministers, based on the proposal of the Ministry.

It is compulsory for a Public Prosecutor or the competent Court to report the situation (that the person who is abroad cannot be reached) to the

63 DOĞAN, p: 167.
64 DOĞAN, p: 167-168.

Ministry. As for the Ministry, it is an obligation to make an announcement in the Official Gazette regarding the necessity to return of the concerned person and to propose the revocation of his nationality to the Council in case the person does not return. However, the Council of Ministers does not have to accept the proposal of the Ministry; in other words, the Counsel has the discretion to accept or reject the proposal.

On the other hand, according to the Article 30 of the Turkish Nationality Law, expatriation decision will become effective from the date on which the decision of the Council of Ministers is published in the Official Gazette , and expatriation decision will be personal (it will not have an effect on the spouse and children). In our opinion, the individuality of this decision is in concordance with "*individual criminal responsibility principle*" even if it is an administrative decision. On the other hand, although some restrictions may be imposed on the individual rights and freedoms during the periods of state of emergency and martial law based on the Articles 15/2 and 13 of the Constitution[65], we think that introducing such an important regulation via a Governmental Decree does not concur with the state of law principle. Therefore, we believe that it would be more appropriate if an explicit regulation is introduced via an amendment of law instead of a governmental decree into the Articles 247 and 248 of the Code of Criminal Procedure regarding the fugitiveness decision about "fugitive defendant or suspect" for specified crimes. We think that this new regulation shall be differently formulated than the present Article 29 of the Turkish Nationality Code and insist that "expatriation shall be imposed if a person fled abroad, after being convicted following conclusion of a trial for the listed crimes, and did not return to the country even after the prescribed procedure has been duly followed"[66]. As such, the new term of "fugitive convict" will be introduced to our law system, apart from the terms "fugitive suspect and defendant"; furthermore, revocation of nationality measure will be applied to the "fugitive convict" who fails to return to the country in spite of the fugitive decision by the court and announcement made thereafter.

Since the expatriation decision is an administrational decision, it is of course legally possible to file a petition before the State Council by the relevant persons (the suspect, defendant, legal counsel, attorney, etc.) for revocation of the decision. We believe that it would be more appropriate to recompose the clause regarding "the reacquisition of nationality three years after residing in Turkey", in a similar way to the regulation on the removal of confiscation decision which can be lifted if a fugitive is apprehended, or surrenders by his own free will. In other words, we think it would better encourage a person to

[65] ŞEN, (Online), http://www.haber7.com/yazarlar/prof-dr-ersan-sen/2348647-vatandasliktan-cikarma, 01.10.2017.

[66] DOĞAN, p. 167.

return to the country if the regulation provides that a suspect or defendant would regain his nationality without any procedure, in case he returns to the country or is apprehended.

Eventually, it will be understood in years, if imposing such a heavy measure - of expatriating a person abroad without seeking any court decision – rather than applying fugitiveness decision and measurements, would be beneficial for convincing the suspect or defendant to return to the country and for revealing the material truth .

CONCLUSION

"*Trial of fugitives*" which is one of the special trial procedures regulated under the Articles 247-248 of the Code of Criminal Procedure has taken its present form after it was amendment via the relevant articles of the Law No. 6763 and the Governmental Decree No. 680. With this latest amendment, it is now possible to give fugitiveness decision about a suspect at the investigation stage. Probably, the intention is to bring the suspect – just like the defendant– who is hiding inside the country or who fled to another country and thus who cannot be reached, before a public prosecutor for investigation. "Confiscation in order to compel" is also applicable on the fugitive suspect during interrogation stage to pursue the same purpose.

The catalog crimes required for taking a fugitiveness decision have reasonably increased in recent years due to rise in the terrorist acts in our country. Adopting a compulsory advocacy system, while implementing a confiscation decision on a fugitive, underlined the importance of fair trial even during a state of emergency.

Turkish Nationality Law was also amended so that a suspect or a defendant in a foreign country charged with listed heavy crimes within Turkish Criminal Code may be expatriated from Turkish nationality by the decision of the Council of Ministers, following a series of procedures (especially after failing to abide by the return call). Although this is a revocable administrative measure against which the State Council can be appealed, we still believe that imposition of such a heavy measure in absentia and without a court ruling is not convenient.

In our opinion, insertion of such a heavy measure should be introduced via amendment by law rather than by a governmental decree, and just like the amendments made on the "trial of fugitives", changes on this measure should also be systemized under the Code of Criminal Procedure.

REFERENCES

BALCI Murat, "*Ceza Muhakemesi Hukukunda Gaip ve Kaçak Sanığa Güvence Belgesi Verilmesi (CMK m. 246, CMK m. 248/7)*", TBBD, sayı: 92, Ankara, 2011, p. 101-117.

CENTEL Nur-ZAFER Hamide: Ceza Muhakemesi Hukuku, 14. Baskı, Beta, İstanbul, 2017.

DOĞAN Vahit, Türk Vatandaşlık Hukuku, 14. Baskı, Savaş, Ankara, 2017.

ÜNVER Yener- HAKERİ Hakan, Ceza Muhakemesi Hukuku, 13. Baskı, Adalet, Ankara, 2017.

ÖMEROĞLU Ömer, "*Ceza Muhakemesinde Gaip ve Kaçak Sanığa Güvence Belgesi Verilmesi*", Gazi Üniversitesi Hukuk Fakültesi Dergisi, C. XVII, sayı. 3, Ankara, 2013, p. 195-225.

ÖZBEK Veli Özer-DOĞAN Koray-BACAKSIZ Pınar-TEPE İlker, Ceza Muhakemesi Hukuku, 10. Baskı, Seçkin, Ankara, 2017.

ÖZTÜRK Bahri, Suç Muhakemesi Hukukunda Gaiplik ve Gaiplerin Muhakemesi, Üçdal Neşriyat, İstanbul, 1984.

ÖZTÜRK Bahri- ERDEM M. Ruhan, Uygulamalı Ceza Muhakemesi Hukuku, 11. Baskı, Seçkin, Ankara, 2007.

ÖZTÜRK Bahri-KAZANCI Behiye Eker-GÜLEÇ Sesim Soyer, Uygulamalı Ceza Muhakemesi Hukukunda Koruma Tedbirleri, 2. Baskı, Seçkin, Ankara, 2017.

ŞAHİN Cumhur-GÖKTÜRK Neslihan, Ceza Muhakemesi Hukuku II, 4. Baskı, Seçkin, Ankara, 2016.

ŞEN Ersan, "*Vatandaşlıktan Çıkarma*", (Çevrimiçi), http://www.haber7.com/yazarlar/prof-dr-ersan-sen/2348647-vatandasliktan-cikarma, 01.10.2017.

TOROSLU Nevzat-FEYZİOĞLU Metin, Ceza Muhakemesi Hukuku, Savaş, Ankara, 2011.

TURHAN Faruk, Ceza Muhakemesi Hukuku, Asil Yayın Dağıtım, 2006.

YENİDÜNYA Caner-İÇER Zafer, Ceza Muhakemesi Hukuku, Adalet, Ankara, 2016.

YENİSEY Feridun-NUHOĞLU Ayşe, Ceza Muhakemesi Hukuku, 3. Baskı, Seçki, Ankara, 2015.

YILMAZ Ejder, Hukuk Sözlüğü, 5. Baskı, Yetkin, Ankara, 1996.

YURTCAN Erdener, Ceza Yargılaması Hukuku, 12. Baskı, Beta, İstanbul, 2007.

(Çevrimiçi), www.kazanci.com

(Çevrimiçi), www.yargitay.gov.tr

THOMAS MORE'S UTOPIA: A MANUAL FOR EXPANSIONIST FOREIGN POLICY?

Thomas More'un Ütopyası: Genişlemeci Bir Dış Politika İçin Kullanım Kılavuzu?

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ABSTRACT

Thomas More's Utopia, among others, touches upon the international relations of the ideal state called Utopia. The utopian foreign politics depend upon a hierarchical understanding of international relations, where Utopia occupies the uppermost position. This self-righteous and self-serving position enables Utopia to wage aggressive wars and to implement an imperialistic policy. Geographical expansion is an important component of this policy, which is justified by an unquestionable moral superiority of this state. Utopians feel free to declare wars, appoint rulers from their ranks for their allies and usurp other nations' resources at will. All this stems from the fact that Utopia has an unfalsifiable claim of always being the rightful party. This paper deals with this apparently imperialistic and inherently supremacist design of Utopian foreign affairs. Thomas More foresees an ordered state within domestic realm, whereas regarding foreign affairs he offers a cruel yet rational policymaking geared towards aggressive wars.

Key Words: Thomas More, Utopia, International Law, International Relations, War.

ÖZET

Thomas More'un eseri Ütopya diğer konuların yanı sıra Ütopya Devleti'nin uluslararası siyasetine ilişkin konuları da ihtiva etmektedir. Ütopya'nın dış siyaseti devletlerarasında mevcut olan ve zirvesinde Ütopya'nın var olduğu bir hiyerarşiye dayanmaktadır. Bu, kerameti kendinden menkul ve öz menfaat sağlamaya yönelik anlayış Ütopya Devleti'nin saldırı savaşları yürütmesinin ve emperyalist bir dış politika gütmesinin önünü açmaktadır. Bu politikanın en önemli unsurlarından biri de coğrafi genişlemedir. Coğrafi genişleme politikasının dayanağını da bu Devlet'in sahip olduğu düşünülen ahlaki bir üstünlük pozisyonudur. Ütopyalılar kendi keyiflerine göre savaş ilan edebilmekte, müttefiklerine bile yönetici atayabilmekte ve başka milletlerin topraklarını kullanabilmektedir. Tüm bunlar sürekli olarak haklı olduğunu düşünen Ütopyalıların bu iddiası ile meşrulaştırılmaktadır. Bu çalışma aşikâr bir şekilde emperyalist olan ve içkin olarak üstünlük iddiasına sahip olan Ütopya dış politikasına ilişkindir. Devlet-içi bir düzen öngören More dış politikada saldırı savaşlarına neden olacak acımasız bir politika-yapım modalitesi tasarlamaktadır.

Anahtar Kelimeler: Thomas More, Ütopya, Uluslararası Hukuk, Uluslararası İlişkiler, Savaş

Introduction

Thomas More's approach to or analysis of international relations has been a matter that has been only rarely elaborated. This may be a willful abstention on behalf of the academia, since a probe into the way More prescribes state behavior in the field of international politics, may be seen to be in complete contrast with the way the author has been accepted by the academia, namely a humanist.

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More is usually seen as the ultimate anti-machiavelli and anti-realism.[1] However, the *foreign* relations of Utopia carry some inherently dystopic tendencies; whereas the main aim of More in writing Utopia is actually to craft a way to *order* human activities in the best way possible *within* a political community.[2] Thus, the effort on behalf of More to devise a system that will yield *ordered* human behaviors will also result in the creation of a political space. As he foresees an order within a realm, he draws up a mapping up of politically relevant and irrelevant territories. That means, the inclusive, i.e. constitutive definitions and delineations that cause a certain state of Utopia to emerge, also serve to exclude others and different identities.[3] Those individuals and societies that these boundaries happen to exclude will be on the receiving end of the Utopian international politics. As will be mentioned later in this paper, Utopians have an unshakeable claim of superiority and see other peoples as their natural preys and political tools. The Zapoletes are the best example of this self-righteous assumption. Utopians believe this people are completely devoid of any humane qualities and see their extermination *en masse* as something to cherish.

Thomas More's starting point is the real political situation in Europe of his time.[4] He criticizes the politics of his country as well as Europe, for the politics were administered in an irrational way back then.[5] Against this backdrop, he comes up with a plan of a state and a society making use of a system of political and moral sanctions to escape the shortcomings of the-then England and Europe[6]. Therefore, the second book of Utopia is sliding away farther from the political reality, just as the teller of the Utopia Hythloday had to travel long distances away from Europe to have the opportunity to observe the Utopian society.[7]

The order of the Utopian society has its root in chaos and violence[8] dexterously used by Utopus, who went on to exclude his realm from neighboring localities by building a huge canal. Utopia bears the name of its founding father, a certain Utopus, who brilliantly jockeyed for political power and used to his advantage the political disputes among a very high number of

1 Nyers, p. 2.
2 De Luca, p. 521; Nyers, p. 2; Osgood, p. 180. De Luca also highlights the very fact that More'e piece is "a work of constitutional and political ideology, rather than simply imaginative literature", which conveys a written text an objective., De Luca, p. 522.
3 Nyers, p. 4.
4 Bal, s. 4.
5 Spreen.
6 Nyers, p. 6.
7 Nyers, p. 7.
8 Nyers, p. 8.

warring parties.[9] The original name of the Utopia was a certain Abraxa, which was not an island but a peninsula. Abraxan natives were a "rough and uncouth" people, who were not able make use of their land to its fullest potential leaving it waste and idle.[10] Utopus forcefully imposed an allegedly progressive modernist yoke over the natives, who were now allocated a lesser place in the rank of humanity, where Utopians represented a modernist progressive group directly claiming an ecological sovereignty on the originally Abraxan territory.[11] Simultaneously, the Natives were the pitiable embodiments of the primitive pre-moderns, who had no rightful claim over their own land solely due to the fact they failed to "rationally recognize the law of nature and proceed to instrumentalize the land on which they lived".[12] The moment they failed to do so, the Abraxan Natives were stripped of their natural being, for now they are relegated to a de-naturalized entities, which have been marked for murder.[13] Here a "logic of elimination" is at work, a vicious and self-righteous logic justifying its existence by making use of a modernist language. The method employed by the conquering and assimilating Utopians possesses a twofold *modus operandi,* as Ruth Levitas diagnoses. First of all, they strip of the subject of their conquests of their natural characteristics, which she dubs "a cognitive estrangement". This estrangement, in turn, enables the conquerers to go *critical* on their future prey.[14] Therefore, the imaginary reconstitution of a foreign society comprises an inherently self-supremacist approach, a *carte blanche* for the future assimilation and re-humanization, the latter meaning, needless to say, nothing else but a complete extermination of the old way of life and imposing a completely-Utopian one.

Utopus thus made use of violence and geographical exclusion to create and impose his order in the Utopian society. Thomas More has no problem with the violent and suppressive policies, as far as they are geared to creating an ordered society. Even Hythloday, who was at first very critical of the violent monarchical expansionism rampant on the European continent, praises Utopians' gentle-in-rhetoric expansionist foreign policy.[15] A strong vacillation between a "fanciful anti-maerialism and keen-eyed-pragmatism" is observable here.[16]

9 Yıldırım, p. 38.
10 Balasopoulos, p. 5; Hardy, p. 126.
11 Balasopoulos, p. 5; Hardy, p. 126.
12 Hardy, p. 126.
13 Hardy, p. 127. Hardy reminds us that Patrick Wolfe terms this attitude as the "logic of elimination".
14 Hardy, p. 128.
15 Balasopoulos, p. 5.
16 Balasopoulos, p. 6.

As Nyers succinctly points at, More does not aim to create or design a good or a just society.[17] He highlights the fact that Utopians do have a very well ordered society, of which they are very proud. This order is attained by a constant surveillance of the individuals. Utopia is a society where individuals are denied any personal space and life. Since every deed or omission of individuals are observable by others, shame proves to be the most important sanction of law and legal order.[18] Other penalties and sanctions are available yet the reel teeth of the system stem from the collective shame burdened by not only the evildoers themselves, but also their family.[19] Their parents are also added to this collective frenzy of shame, for they have been unsuccessful in the proper upbringing of their children. All in all, the legal system of Utopia depends heavily upon the notoriety one has to bear when one commits a crime. Even the slavery, which is deemed as a kind of penalty in Utopia, uses this notoriety principle, for the slaves will be seen by others' "universal gaze" doing their hard labor, which in turn means that these people are obviously wrongdoers and criminals.[20] More's Utopia is a place where an all-seeing eye is at work, making vicious use of every social and penal tool available, to instill fear and a sense of lawfulness in the citizenry.

Thomas More on the Essence of Mankind

According to Thomas More, human beings do not possess a quality of goodness from birth. The basic characteristics of human beings are greed and a rapacious attitude, especially when they do not own vital goods.[21] Thus, Thomas More has an essentialist take on human character and these antisocial tendencies and potentialities should be squared away by education.[22] This in turn entails a constant surveillance built upon the citizenry. This bleak outlook has its ramifications in the way Thomas More sets forth the utopian foreign affairs and its modus operandi. The Utopian individuals who have a falling out with the Utopian legal system are to be sentenced to slavery with a high probability. As a result, More defended the establishment of a socially Darwinian system, which declares some individuals unfit to remain as citizens and downgrades them to *untermensch* category, i.e. slaves. As may be expected, the way Utopians handle their international affairs is not distinct from their justice administration.

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17 Nyers, p. 10.

18 Nyers, p. 12.

19 Nendza offers a thorough analysis of the way family matters are regulated in Utopia, Nendza, pp. 438-440.

20 Nyers, p. 13.

21 Spreen.

22 Spreen.

Thomas More on International Relations

While talking about the way Utopians handle their foreign affairs, Thomas More, looks, at the very first sight, like a premature idealist, whose design displays great proximity to today's United Nations system, especially as regards the legitimate use of force. However, war has its own unique place in Utopian foreign affairs.[23] Thomas More stresses unmistakably that Utopians fight defensive wars. Reminiscent of today's U.N. System, Utopians fight solely for legitimate self-defense of themselves and of other nations. However, a closer look reveals that Utopians do have some ulterior motives and their fancy and peaceful illustrations by More may only be too thin to hide one of the most cynical political designs of all times.

Utopians exploit the rhetoric of *prima facie* defensive wars, for the subsequent assumption of power in other countries as well as expansionist and irredentist policy objectives.[24] They have a racist approach to other nations and places themselves in a higher position than the others, which Nyers calls an "assumed superiority".[25] They make use of mercenary armies and do not shy away from using bribes for political assassinations. All in all, Utopians deem as legitimate almost every political maneuver that exists in the realm of the politically and practically do-able, provided that these tactics yield the required results. At the same time they never cease donning that hollier-than-thou attitude, a self-consciousness inherently and strikingly Utopian-supremacist. Yet they are wise enough to utter the politically correct words that create a peace-loving image. Utopians see themselves as a nation predestined to lead others, a humble but successful fulfiller of that notorious *la mission civilisatrice*. They are the supreme nation whose mission is to save and lead other nations. All these taken into consideration, it is fair to say that all of the Utopian international relations depend upon hierarchical relations with other nations, where Utopians have the most superior position.

The most important aspect of Utopians Foreign Affairs is the predominant character of trade relationships.[26] The Utopians are capable of producing everything they are in need of. Yet, they are perfectly capable of trading their surplus materials and produces.[27] In this trade, they especially target valuable goods like gold, which will , when needed of course, enable them to recruit mercenaries, who will fight and logically die in their stead.

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23 De Luca, p. 528.
24 Avineri, p. 264.
25 Nyers, p. 15.
26 De Luca, p. 526; Spreen.
27 De Luca, p. 526; Spreen.

Thomas More on War and Conquest

The second pillar of the Utopian Foreign Affairs is the military stratagem used ruthlessly for the establishment of new colonies and for the placement of Utopian citizenry in the affluent positions of the so-called "allies" of Utopia. However shrewd and cynical that may sound, Utopians dislike the idea of waging war themselves. They do wage wars but they choose to employ mercenaries from other nations, most notably from the Zapoletes, but not limited to them.

> "Zapoletes are a rude, wild and fierce nation who delight in their own rugged woods and mountains among which they were born and bred up. They are hardened both against heat and cold and labour, and know nothing of the delicacies of life. They do not apply themselves to agriculture nor do they care either for their houses or their clothes: cattle is all that they look after; and for the greatest part, they live either by hunting or upon rapine; and are made, as it were, only for war. They watch all opportunities of engaging in it, and very readily embrace such as are offered them…They serve those that hire them with much courage and fidelity… There are a few wars in which they make not a considerable part of the armies of both sides".[28]

According to Utopians, Zapoletes are savages devoid of any qualities that would qualify them as humans. They are deemed by Utopians as *unmensch*[29], *i.e.* as beastly creatures and are just too suitable to draw to bloody military confrontations, since they are easily motivated by the promise of gold and similar valuable goods. That said, Utopians carry out an inhumane calculation here and the promise of gold and other riches are fulfilled properly, only after the safe return of those Zapoletes, who succeed in returning from bloody wars, which is rarely the case. Utopians are only too happy to see the high casualty rates of their Zapoletean mercenaries and indirectly believe to do humanity a great favor by causing massive casualties among the Zapoletes. Their happiness arises not only because the money to be paid will be less than planned in the light of the high casualty rates, but also for the fact that a big chunk of these beasts has been eliminated from the face of the earth.

> "The Utopians do not care in the least how many Zapoleteans they lose, thinking that they would be the greatest benefactors to the human race if they could relieve the world of all the dregs of this abominable and impious people".

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[28] More, p. 154-155.

[29] Not even as *untermensch* as is the case with those Utopians who have breached law, but just *unmensch*. I owe this differentiation to Shlomo Avineri.

Utopians allegedly believe in the "natural fellowship of man"[30] but are ruthless and at the same time very rational in their military planning, which is reminiscent of the rational functioning and planning of the Nazi war machine during World War II.

Zapoletes, as they are the beastly creatures from woods and mountains are just too loyal and worthless in the eyes of Utopians and they form just another column in the accountants' labor dealing with the war expenditures. Since they are stripped of any human qualities in the eyes and minds of the Utopian decision-makers, their slaughter does not cause any sense of a cumulative guilt. They are nothing but a shell of human beings reduced to "instruments for good or the ill" in the political plans of other nations and states.[31]

The Utopian modus operandi in the face of a potentially violent dispute does not foresee the use of mercenaries in the first place. They are keen on the idea of making use of corrupt personalities from the other camp. They induce these persons to kill their leaders before the dispute could fruit an all-out military confrontation. In order to secure this prophylactic result, Utopians make vast use of gold and similar valuable stones and create havoc on the other party to the conflict from among their very own ranks. It is clear that Utopians deem it ethical and logical to interfere with the domestic affairs of the other societies for their own political agenda. More backs up authorization with "pity and compassion" for those other nations suffering under tyranny.[32] In this pro-intervention rhetoric, More does nothing original but follow an ancient way of thought from Aristotle through Catholic Fathers of international law to himself.[33] However, this prototypical argumentation in favor of the nations under tyranny may and most probably will serve the national interest of Utopia, for Utopians appoint new leaders from among its own Utopian cadres for those societies assisted and liberated by them. Therefore, the elimination of tyranny in other societies will also end up consolidating Utopian political power in those areas. This is a thinly veiled scheme for Utopian expansionist ambitions fueled by Utopian sense of superiority, for in case of a tyranny imposed upon other societies Utopians are ready to wage aggressive wars.[34] Even Fritz Caspari, who looks sympathetic to the More's endorsement of an interventionist foreign policy on the ground that it is nothing outrageous given his contemporary political theory, displays the urge to remind the readers that his attitude is much more self-righteous

30 Engeman, p. 139.
31 Engeman, p. 139; Yıldırım, p. 43.
32 Caspari, p. 305.
33 Caspari, p. 306.
34 Spreen.

than that of his like-minded predecessors and contemporaries.[35] In this issue, Caspari makes a striking comparison between Thomas More and Hugo Grotius. The latter too advocates military intervention for humanitarian causes.[36] That said, Grotius feels the pressing need to highlight that evil men may abuse this right to start a just war.[37] According to him, *prima facie* humanitarian concerns have been abused, misused and manipulated to promote selfish and aggressive objectives. It is remarkable that Thomas More's analysis of international politics has gone usually unnoticed and overlooked, which displays a totally different trait than his otherwise humane and rational policy recommendations. This forms the first way of Utopian expansionism, which one may dub as *expansion by military victory*. This aggressive character of Utopian foreign affairs is so dominant that More's book is deemed to be the very " first Tudor attempt to elaborate a theory of colonization" by Jeffrey Knapp and Antonis Balasopoulos, which runs the very plausible risk of being used as "colonial propaganda".[38] Under the light of all these, it should not surprise anybody that the brother-in-law of More, a certain John Rastell actually took part in the colonization of America.[39]

The second modus of Utopian expansionism is related to the population on the island and the transfer of excess Utopian population to other localities. More's Utopia follows the example of Plato's expansionist state[40]. Just as Plato does, More sets a numerical limit to the population in the cities of Utopia. In case this limit is exceeded, then the Utopians should strive to look for another locality, where they can settle this excess amount of individuals. However, this new settlement cannot be established on the island of Utopia, therefore Utopians have to go abroad and establish new colonies.

Richard Saage sees this as a normal consequence of the fact that Utopian economy is based on agriculture and it is not possible to stretch the limits of agricultural production beyond some natural limits.[41] When the inevitable population growth is observed, then inhabitants from each city shall be designated so that these persons can go and colonize other peoples' towns and states on the mainland close to island.[42] The criterium to select the land to colonize is basically the way the natives of the to-be-colonized area make use of their natural resources. If this people fail to make good use of their

35 Caspari, p. 306.
36 For a good introduction of Groatian conception of Bellum Justum see Mutlu, pp. 75-85.
37 Caspari, p. 307.
38 Balasopoulos, p. 6; Knapp, p. 21.
39 Balasopoulos, p. 6.
40 Saage, p. 41.
41 Saage, p. 41.
42 De Luca, p. 530.

land to the fullest, they will have waste and unoccupied territory in the eyes of Utopians.[43] In such localities, Utopians establish new cities and prosper.[44] According to More, the new settlers will introduce their way of government and administration to the colony. The natives are not given any right to resist this new mode of living. Either they will be driven out by this new superior force, or they will accept this yoke and live their lives peacefully in accordance with the imposed Utopians codes and culture.[45]

As can be seen, Utopians are imperialists *par excellence*, whose greedy politics are justified by a shallow morality stemming from a false sense of superiority. The question of the rights of the aggrieved indigenous peoples would fall on deaf Utopian ears, since they are utterly unconcerned about the possibly legitimate claims of other peoples, whom they forcefully colonize and assimilate.[46] What makes the text more dangerous is the fact that More wishes to convince the Christian Europe to adopt his plans which in return will yield good policy and order.[47] Thomas More is willing to offer his oeuvre as a serous contribution to politics, not as a fictional work of a learned mind.[48] Logically, as conceived in the light of this, the text emerges as a precursor of the European imperialistic and colonialist practices.

Thomas More on International Treaties

Utopia enjoys diplomatic relations with other states. They receive envoys representing other states. In the world More creates, diplomacy is at work then.[49] According to Utopians the normal state of international affairs is peace.[50] This rampant peaceful situation makes the conclusion of international treaties *unnecessary*. This may be the fundamental reason for the Utopian dispensing with the international treaties. However, there is another reason for the total disregard for treaties on behalf of Utopia. According to them, treaties and alliances are not honored by the majority of the rulers of the world. This too makes the treaties redundant. That is the reason More suggests that international treaties are worthless and should not be written.[51] Theoretically speaking, Utopians seem to have no problems whatsoever with the idea of entering into treaty obligations. However, they are convinced that

43 Saage, p. 41.
44 Avineri, p. 264.
45 Avineri, p. 264; De Luca, p. 531; Saage, p. 41.
46 Engeman, p. 141; De Luca, p. 531.
47 Surtz, p. 156.
48 Surtz, p. 160.
49 De Luca, p. 526.
50 De Luca, p. 527.
51 Osgood, p. 181.

theoretical legal obligations inked onto written texts usually have no effect upon the way states behave, especially when it matters the most.[52] This is the typical Utopians mind-set. Utopians have a ubiquitous skepticism about their far neighbors and their intentions. This is a learned reflex actually, taught by the double standards- laden Utopian foreign affairs. In addition, that they do not need to enter into treaties with their allies and friends is another symptom of the Utopian politics. Utopians do have a different understanding of these terms from the normal sense of the words. Since they establish hierarchical relations with their allies and friends, international treaties are unnecessary for they are in a position to impose at will their own political designs and culture. This is only a natural prolongation of the Utopian self-image. This city is "intended to rival, perhaps to surpass" any other philosophical cities or its contemporary rivals.[53]

Richard Saage reminds his readers of his agreement with Gerhard Ritter about that the Utopians are no fascists preying upon a hierarchical juxtaposition of different races with themselves at the top. Allegedly, what they employ to differentiate among peoples are the degree of education and moral maturity.[54] They do not believe in an essentialist superiority or inferiority of societies and / or states. They just value an ordered society with high morals and sound societal structures.

This is an interpretation, which is not fully in accord with the written text. As mentioned above, Utopians have an unmistakable claim of superiority. This is especially remarkable in their attitude towards the natives living in the newly colonized areas. These indigenous peoples do not enjoy a right reminiscent of a self-determination. They only face a dichotomy of Utopian hegemony or Utopian sword. Here these groups are between rock and a hard place. This is not a real freedom of choice but rather an imposed conquest solidified, if and when necessary by brute force. More's Utopia, it is in my opinion justified to claim, is an important contributor to the naturalization of an aggressive settler expansionism.[55] This Utopians do, by using of unfalsifiable and extremely essentialist methods, which dehumanize the conquered party. This method gives the whole process a false flavor of a *prima facie* progressive modernist benefactor of humanity, which is in Chaudhury's word "simultaneously absolutist and radically progressive, inclusive in format yet elitist in dissemination".[56] Likewise, the way Utopians handle their relations vis-à-vis their so-called allies is suggestive of an imperialistic power that

[52] De Luca, p. 527.
[53] Surtz, p. 156.
[54] Saage, p. 43.
[55] Hardy, p. 133.
[56] Chaudhury, p. 43.

makes use of a friendly rhetoric to create the consent for the establishment of new Utopian-friendly administrations in those localities. That consent allows the Utopians to appoint the nobles and governors of their allies from its own Utopian cadres, after these allies are *freed* from the threats created by a third party.

In toto, even if one were to accept those rather benign interpretations about Utopian political system, this Utopian outlook is easily exploitable by an evil-minded ruler, as Grotius rightfully warns us. What is obvious for me is that Utopians are cold-blooded realists in the mold of those power-mongering Athenians in that notorious Melian dialogue. As the holders of the might, Athenians are of the opinion that whatever they may impose to further their cause is just and legitimate. Accordingly, the weak have to suffer everything thrown their way by the superior adversaries.

In this vein, Thomas More quits being the highly touted anti-Machiavelli and still remains a-Machiavellian. Machiavelli, surrounded by political strife, had to deal with intricacies, wars and other perilous plots. He had to recognize the major tenets of the political game, whether he liked it or not. He was in a way subjected to these evil ways. In order to cope with the vicious character of conflict he has to detach ethics and politics from each other. What Utopians do is far more cynical than Machiavelli's observations, since Utopians, making use of an unfalsifiable ethics, believe that every war they declare is a just war. Being the justified ruler and the self-serving *conquistadors* is their manifest destiny.

Conclusion

Thomas More has clear intentions while writing his book, Utopia. Utopians impersonate a progressive nation. More wants this regime to be the exact opposite of the then-ruling Europeans. Utopia is a regime of reason, progress and justice, which result in an ordered domestic sociopolitical realm. However, these benign attributes are nowhere to be observed, when one probes into the way Utopians handle their international affairs. Utopians are still the same Utopians *in rhetoric*, good intended and progressive. They *say*, *inter alia,* that they are staunchly against aggressive wars and that they are ready to help other nations facing an outside threat. A scrutiny reveals the fact that Utopians do act very differently from their rhetoric and employ brutal strategies to reach their objectives in international politics. They seem to mean well by their *prima facie* progressive politics, which turn out to be nothing more than a thinly veiled jockeying for more power and land. With all these taken into consideration, Utopia, as far as her foreign policy is concerned, is the prototypical expansionist European power, which was to emerge in history, years after the publication of More's book.

BIBLIOGRAPHY

Avineri, Shlomo. "War and Slavery in More's Utopia", *International Review of Social History*, VII, 1962, 260-290.

Bal, Metin. "Ütopyanın Siyaset Felsefesi Tarihinde Evrimi", *ETHOS: Felsefe ve Toplumsal Bilimlerde Diyaloglar*, Sayı 3 (1), Ocak 2010, 1-13.

Balasopoulos, Antonis. "Unworldly Worldliness: America and the Trajectories of Utopian Expansionism", *Utopian Studies*, Vol 15.2, 2004, 3-35.

Caspari, Fritz. "Sir Thomas More and Justum Bellum", *Ethics*, Vol. 56, No. 4, July 1946, 303-308.

Chaudhury, Sarbani. "Literature and Beyond: Contextualising More's Utopia", *Sosyoloji Dergisi*, 3. Dizi, 18. Sayı, 2009/1, 43-68.

De Luca, Kelly. "Utopian Relations: A Literary Perspective on International Law and Justice", *Canadian Journal of Law and Jurisprudence*, Vol. XXVII, No. 2, July 2014, 521-534.

Engeman, Thomas S. "Hytloday's Utopia and More's England: an Interpretation of Thomas More's Utopia", *The Journal of Politics*, Vol. 44, No.1, Feb., 1982, 131-149.

Knapp, Jeffrey. *An Empire Nowhere: England, America and Literature from Utopia to the Tempest*, The New Historicism Series No. 16, Berkeley, University of California Press, 1992.

Hardy, Karl. "Unsettling Hope: Settler-Colonialism and Utopianism", *Spaces of Utopia: An Electronic Journa*l, 2nd Series, No. 1, 2012, 123-136.

More, Thomas. *Utopia*, Pergamino Publishing, Istanbul.

Mutlu, Erdem İlker. *Savaşın ve Barışın Hukuku: Modern Dönemin Etik* İkilemleri, Turhan Kitabevi, Ankara, 2016.

Nendza, James. "Political Idealism in More's Utopia", *The Review of Politics*, Volume 46, No. 3, July 1984, 428-451.

Nyers, Peter. "The Politics of Enclosure in Thomas More's Utopia", *Problématique*, Vol. 6, 2000, 1-21.

Osgood, Russell K. "Law in Sir Thomas More's Utopia as Compared to His Lord Chancellorship", *Thomas More Studies*, Volume 1, 2006, 177-187.

Saage, Richard. "Morus' "Utopia" und die Macht. Zu Hermann Onckens und Gerhard Ritters Utopia-Interpretationen", *UTOPIE kreativ*, Heft 183, Januar 2006, 37-47.

Spreen, Nils. Thomas Morus: Utopia. <www.ruhr-uni-bochum.de/philosophy/didaktik_kultur/pdf/TexteUtopie/Utopia.pdf>, (15.02.2017).

Surtz, Edward L. "Interpretations of "Utopia"", *The Catholic Historical Review*, Volume 38, No. 2, July 1952, 156-174.

Yıldırım, Mehmet Akif. "Thomas More'un Yaşamı ve Utopia Üzerine", *Genç Hukukçular Hukuk Okumaları*, 33-43.

FRAMEWORK AGREEMENTS UNDER TURKISH LAW

Türk Hukukunda Çerçeve Sözleşmeler

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ABSTRACT

Classical contract law prioritizes certainty over flexibility. In commercial transactions, however, flexibility is as important as certainty. Contractual transactions are also usually expensive in terms of the time, effort and money they require to negotiate, draft and follow up the enforcement of the agreement. To increase flexibility and mitigate the aforementioned problems, non-binding framework agreements that eases the formation of many future binding contracts are becoming more attractive in certain areas of contractual transactions. This article examines the concept of framework agreement under the Turkish law. It focuses on legislations and case laws related with framework agreements in the Turkish Law of Obligation, the Turkish Public Procurement law and Turkish Labour law.

Keywords: Framework Agreements, Umbrella Contracts, Cover Contracts, Future Contracts, Freedom of Contract.

ÖZET

Klasik sözleşme hukuku, esneklikten ziyade belirliliği ön planda tutar. Bununla birlikte, iş hayatındaki hukuki işlemlerde esneklik, belirlilik kadar önemlidir. Diğer taraftan, klasik sözleşmeler, müzakere, taslak hazırlanması ve anlaşmanın uygulanması için gereken zaman, emek ve para açısından değerlendirildiğinde daha masraflı görülmektedir. Klasik sözleşmelerin sözü edilen olumsuz yönlerini hafifletmek ve karmaşık çok taraflı değişim ile uğraşmamak için, şemsiye sözleşmeler gibi bağlayıcı olmayan daha esnek sözleşme ilişkileri, hukuki işlemlerin pek çok alanında tercih edilir hâle gelmiştir. Gerçekten, çerçeve sözleşme taraflardan birinin varsayılan (sabit) taraf olmasını zorunlu kılan, ileride yapılacak başkaca sözleşmelere alt yapı oluşturan, taraflar arasında kısmen bağlayıcı olan bir sözleşmedir. Bu makale, Türk Hukukunda ana hatlarıyla çerçeve sözleşme kavramını ele almaktadır. Çalışma, Borçlar Kanunu, Kamu İhale Kanunu ve İş Kanunu açısından şemsiye sözleşme ile ilgili içtihatlar ve yasal düzenlemelere odaklanmıştır.

Anahtar Kelimeler: Şemsiye Sözleşme, Çerçeve Sözleşme, Kılıf sözleşme, Müstakbel Sözleşme, Sözleşme Özgürlüğü.

I. INTRODUCTION

Classical contract law theories describe contract as a sharp transaction between two or more stranger parties and focus on "*the single instance of formation than the dynamic processes like negotiation*"[1]. The predominant view had been "*either there is a contract or no contract*" (i.e. there is full

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[1] **Eisenberg** Melvin A. (1999). Why There Is No Law of Relational Contracts. *Northwestern University Law Review, 94.* 3, 805-821, p. 807.

liability or no liability at all)[2]. Later theories like relational theory of contract rejected this idea and have argued that contract law "*should take in to account the dynamic aspect of the contract process…and contract laws have the past, a present and a future*"[3]. Therefore, contracts are not discrete transactions among strangers and, from the negotiation stage to the post performance stage, there are arrays of interactions among/ between the parties and reciprocal obligations may arise even before the formation of the contract[4].

Modern contracts involve a number of communications and complex negotiations among the parties before and after their formation. The long duration it takes for the conclusion and performance of some business contract as well as the complexity that is intrinsic to contracts involving big amounts "*displaced the discreetness of contracts*"[5].

In all the stages of a contractual transaction, the consent of the parties involved, the need to protect the reliance and expectation of the other party, efficiency of the transaction, fairness and bargain are the major concerns of contract laws[6]. Party autonomy and contractual freedom, in particular, constitutes the core of a contract and contract laws. Even if the extent of the role played by the will of the parties can be debatable across various theories, the role of the will of the parties for the creation of contractual relation is not debatable in any theory or understanding of contract. *"Behind every contract, there is the basic idea of assent"*[7]*.* The principle of autonomy and contractual

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2 **Ben-Shahar** Omri. (2004). Foreword Freedom from Contract. *Wisconsin Law Review,* 261-270, p. 262.

3 **Eisenberg**, 1999, p. 808.

4 **Eisenberg**, 1999, p. 808. Also, see **Eren** Fikret. (2015). *Borçlar Hukuku Genel Hükümler*. 18th Edition, İstanbul: Yetkin, p. 1128; İnan Ali Naim. (1984). *Borçlar Hukuku Genel Hükümler.* 3rd Ed. Ankara: Ankara Hukuk Fakültesi Yayınları. p. 482; **Cansel** Erol & Özel, Çağlar. (2014). *Borçlar Hukuku Genel Hükümler.* Vol. I, Ankara: Seçkin, p. 307; **Oğuzman** M. Kemal & Öz Turgut. (2015). *Borçlar Hukuku Genel Hükümler.* Vol. I, İstanbul: Vedat, p. 37; **Kocayusufpaşa** Necip, **Hatemi** Hüseyin, **Serozan** Rona & **Arpacı** Abdulkadir. (2014) *Borçlar Hukuku Genel Hükümler.* 6th Ed. İstanbul: Filiz, p. 169; **Antalya** Gökhan. (2013). *Borçlar Hukuku Genel Hükümler.* Vol. I. 2nd Ed. İstanbul: Beta, p. 134 ff.; **Tercier** Pierre, **Pichonnaz** Pascal & **Develioğlu** Murat. (2016). *Borçlar Hukuku Genel Hükümler,* İstanbul: On İki Levha, p. 200; **Resioğlu** Safa. (2014). *Türk Borçlar Hukuku Genel Hükümler.* 25th Ed. İstanbul: Beta, p. 345. **Kılıçoğlu** Ahmet. (2014). *Borçlar Hukuku Genel Hükümler.* 18th Ed. Ankara: Turhan, p. 83.

5 **Williamson** Oliver E. (1979). Transaction-Cost Economics: The Governance of Contractual Relations, *Journal of Law and Economics, 22*, 2, 233-261, p. 262.

6 **Barnett** Randy E. (1986). A Consent Theory of Contract. *Columbia Law Review 86*, 269-321, p. 271.

7 **Sage** Nicholas William. (2014). *Sheer Force of Will, A Will Theory of Contract*. Thesis submitted in conformity with the requirements for the degree of Doctor of Juridical Science, Faculty of Law, University of Toronto. Available at https://tspace.library.utoronto.ca/bitstream/1807/71840/5/Sage_ Nicholas_W_201403_SJD_thesis.pdf, p. 58.

freedom enables parties to reach any agreement no matter how its object, binding nature, manner, etc. be so long as the agreement is not illegal[8].

Traditional contractual relations impose binding obligations on the parties in the contract. They give priority to certainty in contractual transactions than flexibility. In the real business world, however, flexibility is as important as certainty in relation to transactions. Contracts are also being seen as expensive in terms of the time, effort and money they require to negotiate, draft and follow up the enforcement of the agreement[9]. To mitigate the aforementioned problems and not to deal with "complex multilateral exchanges", non-binding contractual relations like framework agreements are becoming more attractive in certain areas of contractual transactions[10].

II. FRAMEWORK AGREEMENTS IN GENERAL

Framework agreements, also called umbrella agreements, are agreements in which *"there are agreements and understandings but not fully completed contracts*"[11]. They are like "gentlemen agreements" that the parties enter without the intention to be bound by the terms inside the agreement[12]. Framework agreements are agreements about a future contractual relation called underlying contract, also called call offs, individual contracts/ agreements, orders, coat contracts, to be formed between the parties in the future[13]. They are binding between the parties who have agreed a framework agreement and sometimes, they may be unilateral acts like order by one party to the other[14]. Framework agreements define the frameworks under

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8 For details about freedom of contracts, see **Epstein** Richard A. (2000). *Contracts-Freedom and Restraint*, New York & London: Garland; **Trebilcock** Micheal J. (1993). *The Limits of Freedom of Contract*, Massachusetts: Harvard University Press; **K**üçü**kyalçı**n Arzu. (2004). Karşılaştırmalı Hukukta Sözleşme Özgürlüğünün Sınırlandırılması, *Ankara Üniversitesi Hukuk Fakültesi Dergisi*, *53*. 4, 101-123; **Tercier**, **Pichonnaz** & **Develioğlu**, 2016, p. 163 ff.; **Eren**, 2015, p. 297, **Kılıçoğlu,** 2014, p.77; **O**ğ**uzman** & Öz, 2015, p. 23. **Resioğlu,** 2014, p. 133.

9 **Mouzas** Stefanos & **Furmston** Michael. (2008). From Contract to Umbrella Agreement. *The Cambridge Law Journal, 67*,1, 37-50. doi:10.1017/S0008197308000081. p. 37.

10 **Mouzas**, Stefanos (2006). Negotiating Umbrella Agreements. *Negotiation Journal.* 279-301. Doi: 10.1111/j.1571-9979.2006.00102.x p. 285

11 **Mouzas** & **Furmston**, 2008, p. 38. **Barlas** Nami. (1999). *Çerçeve Sözleşme Kavramı ve Çerçeve Sözleşmelerin Özellikleri. Prof. Dr. Erdoğan Moroğlu'na 65. Yaş Günü Armağanı*. İstanbul: Beta. 807-828, p. 808-812.

12 **Önsal** Naci. (2012). *Yeni Bir Kavram/ Kurum: Çerçeve Sözleşme*, retrieved from http://webservice.turkmetal.org.tr/AsyaWebXmlService/file.do?id=21489, p. 2.

13 **Mouzas** & **Furmston**, 2008; **Barlas**, 1999, p. 809; European Commission Directorate General Internal Market and Services, 2005. Also, see Turkish Procurement Code, Additional Article 2.

14 **Eren**, 2015, p. 213 and 214.

which the future underlying contracts are to be negotiated and agreed upon. The main purpose of framework agreement is, therefore, to put some terms and conditions, that shall be important elements in the formation of more than one individual contracts in a specific period, without the intention to be bound[15].

Framework agreements are not contracts in the traditional understanding of the term. Nevertheless, they are negotiated arrangements and/ or guidelines about the ways a possible future binding contract or contracts may be concluded. They are usually referred as "constitutions of contracts"[16]. They are not "executory" in their nature and do not determine "*the future selection process rather it set up framework for future selection process"* and the framework agreement is a "*supply clauses that can be used in defined set of transactions"*[17]. Framework agreements can be taken as basic "principles that guide future contracts" and usually made in expectation of future contracts[18]. They do not oblige parties to enter in to a binding contract. However, they provide the framework for future contractual decisions in case the parties decide to enter to a contract[19].

As mentioned above, framework agreements are usually meant to regulate a future contract between the parties. The future contract (underlying/ call off individual contract/ order) is a specific and binding contract to be concluded in line with the framework agreement. The terms in the framework agreement come in to life after an underlying contract is formed[20]. If there is a conflict between the provisions in the framework agreement and the underlying/ call off contracts, the underlying contract shall prevail[21].

Framework agreements are usually used to create a continues debt relation among the parties in the contract. They are not meant for a single contract. Rather, they are made to many contracts of similar type, all to be made in the future[22]. Many underlying contracts of similar content may be signed under a framework of a single framework agreement.

Framework agreements are different from classical contracts for two main reasons. The first reason is that they are not meant to bind parties. Rather,

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15 **Barlas** 1999, p. 808.

16 **Mouzas** & **Furmston**, 2008, p. 38.

17 **Mouzas** & **Furmston**, 2008, p. 5 and 39.

18 **Mouzas** & **Furmston**, 2008, p. 39.

19 **Mouzas** Stefanos and **Furmston** Michael. (2013). A Proposed Taxonomy of Contracts. *Journal of Contract Law, 130,* 04, 1-11, p. 5

20 **Barlas**, 1999, p. 808.

21 **Glover** Jeremy. (2008). *Framework Agreements:Practice and Pitfalls*, Retrieved from http://www.fenwickelliott.com/files/Practice%20and%20Pitfalls.pdf. p. 7.

22 **Barlas**, 1999, p. 818.

they are made to fix some terms and conditions of future contracts[23]. The parties are bound neither to form the future contract nor by the terms of the framework agreement before the formation of the future individual contract. The other main difference is the requirement for the definiteness of terms and conditions in the classical contract. In framework agreement, the terms and conditions may or may not be specified. Specifying the terms and conditions of the contract may be left to the future underlying contracts[24].

Framework agreements are preferable in the business world for a number of reasons. First of all, framework agreements balance the need to certainty and flexibility in contractual relations. Framework agreements reflect the serious interest of the parties for future contractual undertakings and provide platforms for contractual negotiation. On the other hand, they afford the much-needed flexibility in business transaction for they are not binding commitments. *"By negotiating framework agreements, parties try to balance the need for certainty and calculability of give and take process with the need to remain sufficiently flexible to embrace new emerging business opportunities"*[25].

Framework agreements also help to reduce cost of transactions. They are made concerning potentially continuous contractual relations in which there will be a number of recurrent obligations[26]. Once framework agreements are signed between the parties, there shall not be the need to negotiate every time the parties want to enter in to binding contracts, which in turn reduces the cost of negotiation. In addition, they enable the parties to ripe the benefits of economy of scale by negotiating recurrent purchase orders under a single framework agreement. As framework agreements[27] are usually meant to create a long-run cooperation among the parties rather than a simple and short-term transaction, they enable parties to understand "each other's values, concerns, strategic selections and future priorities" which in turn shall boost trust without deteriorating flexibility, thereby facilitating contractual transaction[28].

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23 **Barlas**, 1999, p. 815.

24 **Barlas**, 1999, p. 815.

25 **Mouzas**, 2006, p. 279.

26 Sağlık Bakanlığı Strateji Geliştirme Başkanlığı. (2009*). Çerçeve Anlaşma İhaleleri ve Münferit Sözleşmeler, Genelge (Tenders of Framework Agreements and Several Contracts, Notice),* p. 1.

27 The phrases umbrella agreements or framework agreements are usually used in the business world. While the term framework agreements or framework contracts are used in international legal relationships, umbrella agreement/contract is used in business relationships. For more information, see Mouzas Stefanos. (2006). Negotiating Umbrella Agreements. *Negotiation Journal,* 22, 279-301, p. 279-278

28 **Mouzas** & **Furmstone**, 2006, p.38; **Glover**, 2008, p. 14.

III. FRAMEWORK AGREEMENTS AND SOME OTHER SPECIAL CONTRACTS

Framework agreements, as a non-binding agreement for facilitating continues contractual relation between parties who wish to form future contracts, need to be distinguished from some similar contractual agreements. They are, among others, different from pre-contractual agreements, general terms, installment contracts, conditional contracts, etc.

Framework agreements, even if they are pre-contractual undertakings, are different from pre-contractual agreements. Pre-contractual agreements may be made to organize negotiations, may be promises to negotiate/ or negotiate in good faith, exclusivity clauses/ promises to abandon negotiating with a third party/ to exert best effort for reaching a final agreement, etc.[29]. Accordingly, they either encourage or oblige parties to reach at a final full-fledged contract[30]. When the contract is formed, the pre-contractual agreements cease to be valid while the binding nature of framework agreements begins after the formation of the future contract[31]. Pre-contractual agreements may also become binding. The binding nature of pre-contractual agreements depends on various factors. Obligation to negotiate in good faith, reasonable reliance and expectation, disclosure requirements and the likes are used to enforce pre-contractual agreements in different legal systems[32]. In the US and French legal systems, for example, expectation damages and reliance damages are granted for break of pre-contractual agreements[33]. However, the definiteness of the terms of the agreement and specificity are usually valued for the enforcement of pre-contractual agreements[34].

Framework agreements are different from general terms and conditions of contracts[35]. While framework agreements are the result of a mutual

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29 **Pierrot** Claudia. (2000). *A Comparative Study of Preliminary Agreements under French and American Law*: A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the requirements for the degree of Master of Laws (LLM.), Institute of Comparative Law McGill University, National Library of Canada, p. 11-13.

30 **Pierrot**, 2000, p. 6.

31 **Barlas**, 1999, p. 808 and 822.

32 **Pierrot**, 2000, p. 13-62.

33 **Pierrot**, 2000, p. 86-108. Also, see **Philippe** Julie M. (2005). French and American Approaches to Contract Formation and Enforceability: A *Comparative Perspective, Tulsa Journal of Comparative and International Law. 12*. 2, 357-399.

34 **Pierrot**, 2000, p. 86-108.

35 For details about general terms and conditions of contracts see, **Atamer** Yeşim M. (2001). *Sözleşme Özgürlüğünün Sınırlandırılması Sorunu Çerçevesinde Genel İşlem Şartlarının Denetlenmesi*, 2nd Ed. İstanbul: Beta; **Yelmen** Adem. (2014). *Genel İşlem Koşulları.* Ankara: Yetkin; **Aydoğdu** Murat. (2014). *Türk Borçlar Kanunu'nda Genel İşlem Koşullarının ve Tüketici Hukukunda Haksız Şartların Denetimi.* İstanbul: Seçkin; **Altop** Atilla. (2007). Türk

negotiation between/ among parties, general terms and conditions are unilateral acts[36]. One party always makes them and the other party is required to adhere[37]. In addition, while framework agreements are meant for many underlying contracts that may be concluded in the future, it may or may not be the case for general terms and conditions.

Framework agreements are also different from installment contracts. Installment contracts are contracts in which the performance of the contracts is agreed to be through installments rather than a one-time performance[38]. Unlike framework agreements, installment contracts are classic contracts except the fact that their performance is agreed to be in installments. They are binding contracts whose terms are specified in the contract. Framework agreements, on the other hand, are a non-binding agreement under which many contracts of similar type shall be signed in the future.

Framework agreements are different from conditional contracts. Conditional contracts are contracts whose existence or termination depends on the occurrence of an uncertain future event. The validity or termination of a conditional contract depends on the occurrence of a future uncertain event that is beyond the reach of the parties[39]. While the parties under framework agreement have the choice whether to enter to a future contract or not.

Borçlar Kanunu Tasarısı'ndaki Genel İşlem Koşulları Düzenlemesi, *Prof. Dr. Ergon A. Çetingil ve Prof. Dr. Reyegan Kender'e 50. Birlikte Çalışma Yılı Armağanı,* İstanbul: Vedat. 254-260.

36 **Barlas**, 1999, p. 810.

37 Under the Turkish Code of Obligation (Article 20), standard terms and obligations are defined "contractual stipulations which have been drafted solely by a party and submitted to the other party in advance of a contract is concluded so as to be used in many similar contracts subsequent. When classifying these terms, no regard should be made upon their scope, font type or shape or whether they are located in the text or annex of the contract. It does not preclude the provisions of a contract be deemed as standard even the text of the contracts which are concluded for the similar purposes are not equivalent with each other. Where a contract with standard terms involves in its text or in another contract, provisions that each of the term or condition has been accepted upon negotiation do not solely exclude them of being standard. The provisions regulating the standard terms apply also to the contracts, notwithstanding their nature, submitted by legal or natural persons who provide services upon a statutory or official permission."

38 **Manfred** Pieck. (1996). A Study of the Significant Aspects of German Contract Law. *Annual Survey of International & Comparative Law, 3*.1, 111-176, p. 141. Also, see **Eren,** 2015, p. 214.

39 More information about conditional contracts see **Eren,** 2015, p. 1161 ff; **İnan,** 1984, 415; **Reisoğlu**, 2014, p. 451; **Kılıçoğlu,** 2014, p. 762; **Oğuzman** M. Kemal & Öz Turgut. (2016). *Borçlar Hukuku Genel Hükümler.* Vol. II, 12nd Ed. İstanbul: Vedat, p. 491 ff.

IV. AREAS IN WHICH FRAMEWORK AGREEMENTS ARE FAMILIAR

Framework agreements are common in both public and private law arenas. They are familiar in international relation of states, between states and international organization, between multilateral corporation and trade unions at various level, between/ among corporations, producers and consumers, between state entities and suppliers, etc.[40].

Framework agreements among/ between states are common mechanisms in negotiating various agreements and establishing different bilateral and/ or multilateral relationships. They provide guidelines for further engagements. The trade and investment framework agreement between the United States of America and the Oriental Republic of Uruguay in its preamble, for example, provides that "*intending to use this agreement to pursue initiatives on specific trade and investment matters, with a view to concluding agreements or other arrangements that offer enhanced opportunities for bilateral trade and investment*"[41]. Accordingly, the framework agreement by itself is not a binding agreement but an expression of positive attitude for future cooperation between the contracting states. The framework agreement for the establishment of free trade area between MERCOSUR[42] and the Republic of Turkey is also made in the same setting[43].

In the area of employment relations, framework agreements between multi-national corporations and sector specific employer's associations at various stages (global unions, national and local) are now a common phenomenon[44]. The proliferation of international framework agreements is usually associated with "*the neo liberal globalization process which led to trans-nationalization of finance, product and labour market"*[45]*.* Originating in the

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40 **Mouzas**, 2006, p. 298.

41 See,https://ustr.gov/sites/default/files/uploads/agreements/tifa/asset_upload_file566_15163.pdf. For Another Similar Agreement between the Government of The United States of America and the Government of The Swiss Confederation Establishing a Trade and Investment Cooperation Forum, see https://ustr.gov/sites/default/files/US-Switzerland%20TIFA.pdf.

42 Members of MERCOSUR includes the *Argentina Republic, The Federal Republic of Brazil, The Republic of Paraguay, and Oriental Republic of Uruguay*.

43 See http://www.mre.gov.py/v1/Adjuntos/mercosur/Acuerdos/2008/turco/111-msur-turquiaturco.pdf.

44 **Papadakis** Konstantinos. (2009). *Signing International Framework Agreements: Case Studies from South Africa, Russia and Japan.* ILO Industrial and Employment Relations Department, Working *Paper No.4*, p. 2.

45 **Müller** Torsten, **Platzer** Hans-Wolfgang, **Rüb** Stefan. (2008). International Framework Agreements-Opportunities and Limitations of a New Tool of Global Trade Union Policy. *International Trade Union Cooperation Briefing Paper 8/ 2008.* Retrieved from http://library.fes.de/pdf-files/iez/05814.pdf.

1980's, with the signing of first international framework agreement between the French food manufacturer *Danone* and International Union Federation, they proliferated after the beginning of the 21st century[46]. International framework agreements usually cover the social responsibility of corporations, environmental issues, corporate re-structuring and professional development of employees, adherence to international employment standards like the ILO core principles, etc.[47]. Framework agreements between trade unions and employer associations are also becoming familiar in different domestic jurisdictions.

Framework agreements are also common in public procurement, carriage contracts, banking contracts, among companies, between manufacturers and consumers, service suppliers and consumers, etc. However, it should be noted that framework contracts might not be recommendable for all types of contractual relation. Rather, they may be additional costs if they are employed in a simple agreement like buying a single consumable good. Framework agreements are, generally more advantageous in a "regular, stable and established contractual relationships"[48].

V. FRAMEWORK AGREEMENTS IN TURKISH LAW

Framework agreements are defined nowhere in the Turkish Code of Obligation nor are they familiar concepts in the legal literature. Recently, however, the concept of framework agreements is becoming an agenda in the academia and some codes are incorporating legal rules regarding them. Framework contracts, the other name used to describe framework agreements, are expressly provided in employment codes and public procurement codes of the republic. In this section, framework contracts are discussed in line with the general Code of Obligations, the Employment Codes and Public Procurement Codes.

A. FRAMEWORK AGREEMENTS IN TURKISH CODE OF OBLIGATIONS

The term of framework agreement is incorporated nowhere under the Turkish Code of Obligations. However, there is no legal prohibition for the formation of framework agreements under Turkish Law. The Turkish Code

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46 International Confederation of Free Trade Unions. (2004*). A Trade Union Guide to Globalization,* (2nd Ed.) Belgium, Retrieved from https://www.ituc-csi.org/IMG/pdf/report.complete.pdf; **Hammer** Nikolaus. (2005). International Framework Agreements: Global Industrial Relations between Rights and Bargaining. Doi: 10.1177/102425890501100404. Retrieved from http://journals.sagepub.com/doi/10.1177/ 102425890501100404.

47 **Müller** et al., 2004, p. 5.

48 **Mouzas** & **Furmston**, 2013, p. 5.

of Obligations[49] under Article 26 provided that "*The terms of a contract may be freely determined by the parties within the limits of the law*". Accordingly, there is no legal prohibition under the Turkish law if parties sign a framework agreement among/ between themselves. Based on the principles of freedom of contract and party autonomy, there is no limit to form a contract of whatever kind, including framework agreements, so long as the terms of the contract are not against the law[50]. Therefore, an framework agreement may be taken as untitled contract with in the Turkish Code of Obligations and subject to the general provisions of the Code of Obligations. They should be subject, specially, to the mandatory provisions of the law of obligation like validity requirements[51]. Thus, the terms under framework agreements should not be impossible, unlawful or immoral or in contrary to public order or fundamental human rights[52].

Based on the above assertion, the terms in relation to the immediate obligations the framework agreement may impose (whether the framework agreement is full or partly binding or not), the relationship between the framework agreement and the underline contracts, the duration of the agreement, etc. shall be decided in accordance with the contents of the framework agreement itself or the underlying contracts. Basically, we have no alternative than enforcing the agreement of the parties so long as it is not against the law for the consent of the parties is always "the moral component that distinguishes valid from invalid agreements"[53]. The challenge is if the framework agreement or the underlying contract do not provide for such issues.

The raison d'être *(rationale, Gerekçe in Turkish)* of Article 878 of the Turkish Commercial Code, while discussing about the responsibility and defenses available to a carrier in a contract of carriage, came across the concept of framework contracts. According to the preamble of the article, the term contract under the specific article is meant to encompass both the specific underlying contract of carriage and the framework contract under which the

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[49] Turkish Official Gazetta, 4 February 2011, No. 27836.

[50] **Eren**, 2015, p. 297; **Oğuzman** & Öz, 2015, p. 23; **Kocayusufpaşaoğlu**, **Hatemi**, **Serozan** & **Arpacı**, 2014, p. 501; **Antalya,** 2013, p. 261; **Resioğlu,** 2014, p. 133; **Kılıçoğlu,** 2014, p. 78.

[51] **Eren**, 2015, p. 297, 299; **Oğuzman** & Öz, 2015, p. 23-24; **Kocayusufpaşaoğlu**, **Hatemi**, **Serozan** & **Arpacı**, 2014, p. 502; **Antalya,** 2013, p. 93-94.

[52] A contract is null and void if its terms are impossible, unlawful or immoral or in contrary to public order or fundamental human rights. Where the defect pertains only to certain terms of a contract, the nullity shall not affect the rest. However, the contract is deemed as completely null and void if there is reason to assume that it would not have been concluded without the said terms considered void (Turkish Code of Obligations Article 27).

[53] **Barnett**, 1986, p. 270.

specific agreement is made[54]. Based on this, it can be concluded that the legislator wishes to consider framework agreements as parts of the contract once the underlying contract is made; at least for carriage contracts.

Exclusive distributorship contracts and bank open credit contracts are also considered as framework agreements under the Turkish doctrine. Exclusive distributorship agreements are agreements in which "the supplier continuously undertakes to provide its goods or products, wholly or partially, to the distributor for reselling and in return, the distributor undertakes to engage in transactions, that would in-crease the demand of the supplier's goods or products by selling them on its own behalf and account"[55]. The obligations are continuing obligations that shall be effected by subsequent individual underlying contracts[56]. When the underlying individual contracts are signed, the exclusive distributorship agreement shall also enter into force. The underlying individual contracts are sale contracts governed by the law of sales contract[57]. The details of the specific obligations including the quantity of the thing to be delivered need not be fixed in the exclusive distributorship agreement. The agreements provide a general framework for agreements to be made in the future[58]. But, the supplier has the obligation to deliver the product whether it is provided in the exclusive distributorship agreement or not.

Like the exclusive distributorship agreements, bank open credit contracts also are framework agreements in which a bank puts a certain fixed sum to the exposal of a client who may withdraw with in a fixed duration of time. The client may withdraw the amount in installments under separate individual agreements with in the fixed period[59]. The contracts recognize the right of the client to take the credit and obliges the bank to grant the credit[60]. So, are exclusive distributorship contracts and bank open credit contracts really framework agreements?

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54 For preamble of Article 878 see, Seçkin. (2011). *Türk Ticaret Kanunu Gerekçesi: Karşılaştırmalı Eski_Yeni Kanun Metni, Karşlaştırma Tablosu, Bilgi Notları ve Mevzuat İşlemleri, Kavram Dizini, Madde Değişim Göstergesi*, p.776.

55 **Küçükayhan** Aşçıoğlu, Meltem. (2011). *Rekabet Hukuku ve Dağıtım Sözleşmeleri*, Ankara: Adalet.

56 **Altinok-Ormanci**, Pınar. (2009). Tek Satıcılık Sözleşmesinde Müşteri Tazminatı, İsviçre Federal Mahkemesinin 22 Mayıs 2008 Tarihli Kararı (ATF 134 III 497) Üzerine Düşünceler. *Ankara Üniversitesi Hukuk Fakültesi* Dergisi, *58*, 3, 451-479, p. 468.

57 **Yeşiltepe**, Salih Önder. (2007). Tek Satıcılık Sözleşmesinin Öğretide Benzer Olarak Belirtilen Sözleşmelerden Ayırt Edilmesi. *MÜHF-HAD, 13*, 1-2, 169-191, p. 172.

58 **Bosnalı**, Özge, **Okutan**, Naz Çağıl & **Yurttaş**, Başak. (2016). Exclusive Distribution Agreement under Turkish Law and its Evaluation in Terms of Competition Law. *GSI Articletter Summer,* 89-101, p. 91.

59 **Karınca**, Eray. (2001). Bank Kredi Sözleşmeleri. *Ankara Barosu Dergisi, 3*, 46-58, p. 48.

60 **Karınca**, p. 49.

The defining characteristics of a framework agreement includes its non-binding nature, the fact that it is made for continues obligations and it enters into force when the individual underlying obligations are agreed. Both the exclusive distributorship agreements and open credit agreements are made for continuous obligations and enters into force when underlying individual obligations are agreed. But, are they also non-binding? Open credit agreements are binding agreements that impose an obligation to extend the credit on the bank. In the Turkish doctrine, exclusive distributorship agreements are also binding agreements that obliged the parties to sign the individual future contracts. They share the characteristics of framework agreements except the fact that they are binding contracts.

The concept of framework contracts in the general Turkish Code of Obligations are also rarely discussed in Turkish courts. Even if there is no case law, to the extent of the knowledge of the writer, that fully addresses the general nature and concept of framework contracts and their position in line with the Turkish law of obligation, Turkish courts came across with framework agreements in a number of cases. The tendency of the courts seems in line with the international legal literature about framework agreements[61].

In a case[62] before the Turkish Supreme Court, a bank and a client of the bank signed a framework contract for loan contracts in which a third party, who has been a shareholder in a company that the client owns, signed as a guarantor for the debt. Under the framework contract, the third party signed to guaranty the loan to a certain amount if the loan is given within a specified period. At the meantime, the guarantor sold his share in the company and left the company after paying all the bank debts of the client. But, after the guarantor left the company, the bank granted another loan for the client under the same framework agreement and notified the third party his obligation as a guarantor. The guarantor argued that he should not be responsible because he has not signed the loan contact and he have paid former debts, which he has signed. The court ruled that, the third party shall be responsible as a guarantor to the extent he bounds himself and in the duration, he agreed in the framework agreement. Even if he has not signed the last loan agreement, he has signed the framework agreement.

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[61] There is no case law to the extent of the knowledge of the writer that has the formation, termination, relation with the underlying contract, the binding nature, …of a framework contracts as its main issue. However, there are cases here and there in which framework agreements are accidentally mentioned either by the parties or by the court. In some cases, the parties tried to argue the non-binding nature of framework agreements.

[62] Yargıtay 19. HD. 29.4.2010, E. 2009/6402 K. 2010/5283 http://www.kazanci.com/ kho2/ibb/files/dsp.php?fn=19hd-2009-6402.htm&kw=29.4.2010+`2010/5283`#fm.

From the case, it is easy to see that framework agreements are taken to be binding once the underlying contracts are made[63]. In addition, framework agreements are also seen as complementary to the underlying contract in which they fill the gabs in the underlying contract (Even if the guarantor has not signed in the underlying contract, he is held liable due to his agreement in the framework agreement). What if the underlying contract is not signed after the framework agreement is signed? Is there any liability against the parties? Framework contracts are meant to be non-binding. Nevertheless, they can be taken parts of the negotiation process in the formation of contracts for they are presumed to be a base for the formation of binding future contract. If so, does a party owe any obligation to the other party?

According to modern contract theories, every contract has negotiation, formation, performance and enforcement stages. Framework contracts are within the negotiating stage of a contract. If so, should we rely on general principles of contract that can be applicable even before the contract is formed? In the pre-formation stage of contracts, there are three known obligations identified by contract scholars; general good faith obligations, tort and unlawful enrichment law obligations and obligations that emanate from pre-contractual agreements[64]. It has been clarified that framework agreements are different from all types of pre-contractual agreements for framework contracts do not obliged parties to form underlying contracts. Thus, can the general obligation of good faith and tort law be used in case the parties misbehave with regard to the framework contract?

Under international contracts, "even if the contract does not provide for, the behavior of the parties throughout the life span of the contract including the negotiation process must conform to good faith and fair dealing"[65]. These obligations cannot also be avoided by the agreement of the parties for they are generally accepted principles of contract law[66]. If so, parties in framework agreements should be liable for bad faith. The application of good faith principles in pre-contractual stage has been accepted in many jurisdiction including Turkey[67]. Therefore, it can be argued that reliance payment may be

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63 Also, see Yargıtay 8. HD. 7.3.2016, E.2014/ 12467, K. 2016/ 3997 (http://www.kazanci.com/kho2 /ibb /5941/ mlinklist-m.htm).

64 **Arunachalam** Aarti. (2002). *An Analysis of the Duty to Negotiate in Good Faith: Pre-contractual Liability and Preliminary Agreement. LLM Theses and Essays*. Retrieved from http://digitalcommons. law.uga.edu/stu_llm/22, p. 20.

65 UNIDROIT principles, Article 1.7. See http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf.

66 UNIDROIT principles, Article. 1.8.F

67 **Schäfer** Hans-Bernd, **Aksoy** Hüseyin Can. (n.d) *Alive and Well, the Good Faith Principle in Turkish Contract Law*. Retrieved from http://yoksis.bilkent.edu.tr/pdf/files/11864.pdf, p.15.

granted against a person who breaches the principle of good faith in relation to framework agreements even if underlying contracts are not concluded. Under the German legal system, for example, there are scholarly arguments about the legal effects of violating the framework agreement before the conclusion of underline contracts. It is argued that breach of framework agreements should be considered as a positive violation of contractual duties[68].

B. FRAMEWORK AGREEMENTS IN TURKISH LABOUR CODES

The concept of framework agreement is also recently introduced in the new Turkish Labour Codes for the first time[69]. The Trade Unions and Collective Labour Agreements Code[70] Article 2(b) defined framework agreement as "*a contract signed at the business level between workers' and employers' unions participating in trade union's confederations represented in the Economic and Social Council*"[71]. The Act also provides, under Article 33 (3), the application of the framework agreement upon the members of the trade unions and employers association who signed the agreement and a framework agreement may be signed in relation *to "vocational training, occupational health and safety, social responsibility and employment policies*". Further, according to articles 33 (4) and (5) of the Trade Unions and Collective Labour Agreements Code, framework agreement is to be signed only based on the will of the parties; to have 1-3 years' durations and, in no means, can be contrary to the constitution and other obligatory legal rules.

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[68] Positive violation of contractual duties covers all performance not conforming to the terms of the contract, which do not constitute delay, impossibility, nonexistence or disappearance of the basis of the contract, defects in title, or breaches of a warranty. For more information, see **Pieck** (1996), p. 9.

[69] Çalışma ve Sosyal Güvenlik Bakanlığı. (2014). *Sendikalar ve Toplu* İş *Sözleşmesi Kanunu* İlgili *Yönetmelikler.* Ankara: Özel Matbaası, p. 60.

[70] Turkish Official Gazette, 7 November 2012, No. 28460.

[71] The Economic and Social Council was establishing in the aftermaths of EU-Turkey talks around 1995, and started its activities in 1997. The council is composed of sixteen representatives of the Turkish state, twelve representatives of workers' organizations, six representatives of employers' organizations, six representatives of chambers. The duties and responsibilities of the Council includes to advise the Turkish government on various economic and social matters that are related to the economic and social life; to ensure the participation of the various social partners in the governmental economic and social policies; to promote consensus and cooperation both between the government and these groups and among these groups themselves; to submit opinions, views and reports to the Government, the Parliament, the President and the public, on its own referral; to establish, continual and provisional labor boards; to determine, members of Joint Consultative Committee. See, https://industrialrelationsinturkey.com/social-dialogue-institutions/the-economic-and-social-council/.

The above provisions of the Trade Unions and Collective Labour Agreements Code, together with some other provisions, were challenged before the Turkish Constitutional Court for alleged contradiction with the Turkish constitution by some members of the Turkish parliament. The claim of the parliamentarians alleged that:

The constitution allows trade unions to bargain with employers irrespective of their membership to any confederation. But, the proclamation restricts the right to sign framework agreements for only those members of confederations who are participating in the social and economic council;

The framework agreement has been conditional on the willingness of the employer and, if the employer refuses to accept the offer of the trade unions to sign a frame work agreement, no framework agreement shall be signed;

These arrangements are used for restriction of the right to strike, freedom of membership to trade unions;

The rule is an obstacle to regulate Working conditions, job security, wages, social and financial issues in the framework agreement.

Generally, the claim alleged that the provision of The Trade Unions and Collective Labour Agreements Code on framework agreements infringe the constitutional right of workers to organize and collective bargaining.

The court ruled that the very concept of framework agreements and the power to make such agreements is different from the concept of collective agreements. Framework agreements are new bargaining concepts for workers in addition to collective agreements. The court asserted that collective agreements are defined independently and the right to be or not to be a member of a union, the right to collective bargaining, the power to make collective agreements, the right to benefit from collective agreements, etc. are very different from that of framework agreements. Therefore, there is no bar in the constitution if the legislator attributes the right to make framework agreements to "workers' and employers' unions participating in trade union's confederations represented in the Economic and Social Council"; makes its formation dependent on the consent of both the workers' unions and that of the employers; and tries to indicate the possible issues to be covered in a framework agreement. The court, finally, denied the claim[72].

There are a number of questions that can be raised in relation to the provisions of The Trade Unions and Collective Labour Agreements Code and the decision of the Turkish Constitutional Court. May trade unions and

[72] Constitutional Court of the Republic of Turkey 22.10.2014, E. 2013/1, K. 2014/161, retrieved from http://www.resmigazete.gov.tr/eskiler/2015/11/20151111-10.pdf, p. 36-38.

employer's associations out of "workers' and employers' unions participating in trade union's confederations represented in the Economic and Social Council" sign a framework agreement? Can a framework agreement have terms other than those noted in the code? What shall be the effect of the framework agreement once it is signed? Shall it be binding?

Basically, labour relation is a special type of contractual relation in which there is more state protection to the weaker party: the employee. Therefore, parties in employment contract and/ employees or their unions as well as employers and/ or their unions have freedom of contracting so long as they do not contradict mandatory legal rules. Therefore, there is no limit if any trade union and employer unions signs a framework agreement. If so, why the code selectively mentioned, *"workers and employers' unions participating in trade union's confederations represented in the Economic and Social Council?*" is that obliging such unions to sign a framework agreement? It does not seem for the code itself expressly provided that the agreement depends on the will of the parties. The raison d'être of the act also uses the "*possible to be made"* like expression showing the fact that making framework agreement is not mandatory. Parties may also freely decide the terms of the framework agreement subject to mandatory legal provisions.

C. FRAMEWORK AGREEMENTS IN TURKISH PROCUREMENT CODES

Framework agreements are also provided in the Turkish Public Procurement Code as one means of public procurement. The Turkish Public Procurement Code number 4734[73] Art. 4 defined framework agreement as "*an agreement between one or more contracting authorities and one or more tenderers, which establishes the terms governing contracts to be awarded during a given period, in particular with regard to price and where appropriate, the quantity envisaged*".

Similarly, directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement defined framework agreement under article 33(1) as: "*A framework agreement means an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged."* [74]

[73] Turkish Official Gazette, 22 October 2002, No. 24648.

[74] http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0024&from=EN, p. 50.

Under the Turkish law, framework agreement is an agreement between one or more parties. According to the Public Procurement Code, one of the parties is a government authority. The authority need not be one in number but they can be many organs of the government acting jointly or in their individual capacity. In line with the nature of public procurements, the agreement can be signed with one or more than one suppliers. The private parties in the agreement need to be one, three or more (Public Procurement Code Art. 68, Additional Art. 2). In some jurisdiction, a government authority who was not a party in the negotiation of the framework agreement may use the agreement to conclude the individual contract with suppliers as suppliers who were not a party during negotiation may also adhere to the framework agreement. The UNCITRAL model law, for example, provides a possibility for non-parties to become a party subsequent to the adaption of the framework agreement. This is provided to be possible in the case of open framework agreements[75].

Under the Turkish Public Procurement Code, the main purpose of the framework agreement is establishing "*the terms governing contracts to be awarded during a given period in particular with regard to price and, where appropriate, the quantity envisaged*". The framework agreement shall establish terms governing prices and, if possible, the quantity of the thing or service to be purchased. Does that mean the unit price of the thing/ service to be purchased shall be fixed or the manner they are to be determined in the specific contract shall be described? The Turkish procurement proclamation further provides that *"estimated amounts planned to be procured under the scope of framework agreement shall be stated in the notice"*[76]*.* In addition, it provided that, in framework agreements in which there is only one tenderer, all the conditions should be determined in advance[77].

The UNCITRAL model law on public procurement, likewise, provides that a closed framework agreement should include: "*The description of the subject matter of the procurement and all other terms and conditions of the procurement established when the framework agreement is concluded;" and "to the extent that they are known, estimates of the terms and conditions of the procurement that cannot be established with sufficient precision when the framework agreement is concluded"*[78]*.*

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[75] UNCITRAL Model Law on Public Procurement 2014, Article 2, see http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/2011-Model-Law-on-Public-Procurement-e.pdf.

[76] Turkish Procurement Code Article 68, Additional Article 2.

[77] Turkish Procurement Code Article 68, Additional Article 2.

[78] UNCITRAL Model Law on Public Procurement, Article 59 (1b, c).

The logical question that follows is that if a framework agreement establishes terms, especially in relation to price and quantity, should it be binding? Should a certain framework agreement be taken as framework agreement for the mere reason it says so? The framework agreement may sometimes amount to a fully-fledge contract worth of enforcement[79]. If the agreed terms in the framework agreement are sufficiently definite and, from the circumstances, the parties' intention to be bound can be ascertained, it can be taken as a contract for "sufficient definiteness and intention to be bound are the two main principles" that distinguish contracts from other types of communications[80]. Under the classic European Union Procurement Directive, for example, framework agreements are divided in to two; framework contracts and framework agreements. Framework contracts are agreements that "established all the terms" of the agreement and "are made in a binding manner"[81] The other type of framework agreement is "framework agreement stricto sensu" in which the terms of the agreement are not established fully and definitely[82]. In the former case, the parties in the framework agreement may not need a new underlying contract while they actually need under the second case[83] .

Coming back to the Turkish Procurement Law, according to the Public Procurement Code Article 2, "*Framework agreements may also be concluded with only one tenderer provided that all the conditions are determined in advance".* Here it is important to recall that price and the thing to be delivered are usually considered as the essential terms of sale contract. In addition, the Turkish Code of Obligations provides that if the agreement includes the basic terms of the contract, the lack of second order terms shall not invalidate the contract[84]. Accordingly, if the party signing framework agreement is a single party, all the conditions of the contract should be determined. If so, should this framework agreement be binding on parties?

The procurement law also provides a framework agreement shall not bound the authority to purchase and it is free to cancel it any time without

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79 International Confederation of Free Trade Unions, 2004, p. 3.

80 UNIDROIT principles, Article 2.1.2.

81 European Commission Directorate General Internal Market and Services. (2005). Explanatory note-framework agreements-classic directive. Retrieved from http://ec.europa.eu/geninfo/query/resultaction. jsp?QueryText=Explanatory+ Note% 3A+Framework+Agreements+%E2%80%93+Classic+Directive&sbtSearch=Search&swlang=en, p. 3.

82 Explanatory Note-Framework Agreements-Classic Directive, p. 6.

83 Explanatory Note-Framework Agreements-Classic Directive, p. 6.

84 **Eren**, 2015, p. 233; **Oğuzman** & Öz, 2015, p. 72; **Cansel** & Özler, 2014, p. 101; **Kocayusufpaşaoğlu**, **Hatemi**, **Serozan** & **Arpacı**, 2014, p. 173; **Antalya,** 2015, p. 164; **Resioğlu,** 2014, p. 63; **Kılıçoğlu,** 2014, p. 56.

any liability (Tenders of Framework Agreements and Several Contracts, Notice Article 5d and Article 39). Therefore, it may be argued that as the special law overrides the general law in the interpretation of laws, the Public Procurement Code should prevail. However, should a certain contract be considered as framework agreement for the mere reason it is titled a framework agreement?

The Procurement Code sanctions a party in a framework agreement who refuses to sign the framework agreement after participating in the bid or who failed to adhere to the call off the authority after it signed the framework agreement, unless it is prohibited by force majeure. Accordingly, a defaulting bidder shall be prohibited from participating in any subsequent public tenders for 6-12 months (Public Procurement Code Article 68, 58; Implementing Regulation of Tenders of Framework Agreement Article 41, 43 (10)[85]. The authority has the right, even, to cancel all of its offers including under the individual contract with no fear of legal liability. If the authority fails to comply with its undertakings under the framework agreement, on the other hand, the bidder may relief itself from its obligation up on notice of ten days to the authority (Implementing Regulation of Tenders of Framework Agreement Article 43 (11)).

Thus, should we consider framework contracts as a sub-contractual agreement that have legal effects but not legal enforcement as ordinary contracts? It seems so. The approach of the procurement law tends towards characterizing framework contracts as a sub-contractual legal relation that shall have their special effects.

The relationship between the framework agreement and individual purchase contract/ call off is another issue. The procurement law specifically provides that "*the specific agreement offers shall be given under the principles laid down in the framework agreement*" (Implementing Regulation of Tenders of Framework Agreement Article 43). From this, it is easy to conclude that once the specific agreement is signed, the framework agreement shall be considered part of the terms of the agreement, which is in line with the concept of framework agreements in the legal literatures.

[85] See,http://mevzuat.basbakanlik.gov.tr/Metin.Aspx?MevzuatKod=7.5.12919&MevzuatIliski=0&sourceXmlSearch=%C3%A7er%C3%A7eve.

VI. CONCLUSION

Framework agreement is a non-binding agreement between parties who intend to have continued contractual relationship through recurrent contracts with similar terms to regulate future contracts. it is like a "constitution" governing many specific future contracts between/ among the parties. In the Turkish law, framework agreements are familiar in the law of obligation, the labour law and public procurement law.

Even if framework agreements are defined nowhere in the Turkish Code of Obligations, there is no prohibition if parties sign a framework agreement based on the contractual freedom and party autonomy principles that are enshrined in the Turkish law. In addition, exclusive distributorship and bank open credit contracts are also considered as framework agreements under the Turkish doctrine and case laws despite the fact that they are binding contracts. The decisions of Turkish courts and the raison d'être of the Turkish Commercial Code Article 878 leans towards making the framework agreement part of the contract after the conclusion of the underlying contracts. The application of good faith principles in the pre-contractual stage may also pave the way for liabilities in negotiation of the framework agreement and/ or failing to conclude the underlying contract after the formation of the framework agreement if bad faith can be proved.

Framework agreements are introduced in Turkish Labour Law in 2012. Accordingly, framework agreements may be signed at the business level between workers' and employers' unions participating in trade union's confederations represented in the Economic and Social Council. Framework agreements, different from collective agreements, are provided as additional means for collective bargaining. The discussions in the general law of obligations may also apply for labour relations analogically.

Finally, framework agreements are recognized as one means of public procurement under the Turkish Public Procurement Law. They are considered as sub-contractual agreements that have legal effects other than enforcements.

REFERENCES

Altinok-Ormanci, Pınar. (2009). Tek Satıcılık Sözleşmesinde Müşteri Tazminatı, İsviçre Federal Mahkemesinin 22 Mayıs 2008 Tarihli Kararı (ATF 134 III 497) Üzerine Düşünceler. *Ankara Üniversitesi Hukuk Fakültesi* Dergisi, *58*. 3, 451-479.

Altop Atilla. (2007). Türk Borçlar Kanunu Tasarısı'ndaki Genel İşlem Koşulları Düzenlemesi, *Prof. Dr. Ergon A.* Çetingil *ve Prof. Dr. Reyegan Kender'e 50. Birlikte* Çalışma *Yılı Armağanı,* İstanbul: Vedat. 254-260.

Antalya Gökhan. (2013). *Borçlar Hukuku Genel Hükümler.* Vol. I. 2nd Ed. İstanbul: Beta.

Arunachalam Aarti. (2002). *An Analysis of the Duty to Negotiate in Good Faith: Pre-contractual Liability and Preliminary Agreement.* LLM Theses and Essays. http://digitalcommons.law.uga.edu/stu_llm/22.

Atamer Yeşim M. (2001). *Sözleşme* Özgürlüğünün *Sınırlandırılması Sorunu* Çerçevesinde *Genel* İşlem Şartlarının *Denetlenmesi*, 2nd Ed. İstanbul: Beta.

Aydoğdu Murat. (2014). *Türk Borçlar Kanununda Genel* İşlem *Koşullarının ve Tüketici Hukukunda Haksız* Şartların *Denetimi.* İstanbul: Seçkin.

Barlas Nami. (1999). *Çerçeve Sözleşme Kavramı ve Çerçeve Sözleşmelerin Özellikleri. Prof. Dr. Erdoğan Moroğlu'na 65. Yaş Günü Armağanı*. İstanbul: Beta. 807-828.

Barnett Randy E. (1986). A Consent Theory of Contract. *Columbia Law Rev*iew *86*, 269-321. http://library.fes.de/pdf-files/iez/05814.pdf.

Ben-Shahar Omri. (2004). Foreword Freedom from Contract. *Winconsin Law Review.* 2, 261-270, http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1781&context=articles.

Bosnalı, Özge, **Okutan**, Naz Çağıl & **Yurttaş**, Başak. (2016). Exclusive Distribution Agreement under Turkish Law and its Evaluation in Terms of Competition Law. *GSI Articletter Summer,* 89-101.

Çalışma ve Sosyal Güvenlik Bakanlığı. (2014). Sendikalar ve Toplu İş Sözleşmesi Kanunu İlgili Yönetmelikler. Ankara: Özel Matbaası.

Cansel Erol & Özel, Çağlar. (2014). *Borçlar Hukuku Genel Hükümler.* Vol. I, Ankara: Seçkin.

Directive 2014/24/ Eu of the European parliament and of the council of 26 February 2014 on public procurement and repealing directive 2004/18/ec. *Official Journal of the European Union.* L 94/66, 28.3.2014. Retrieved from http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0024&from=EN.

Eisenberg Melvin A. (1999). Why there is no Law of Relational Contracts. *Northwestern University Law Review, 94,* 3, 805-822.

Epstein Richard A. (2000). *Contracts-Freedom and Restraint,* New York & London: Garland.

Eren Fikret. (2015). *Borçlar Hukuku Genel Hükümler*. 18th Ed. İstanbul: Yetkin.

European Commission Directorate General Internal Market and Services. (2005). Explanatory *Note–Framework Agreements–Classic Directive.* Retrieved from http://ec.europa.eu/ internal_market/publicprocurement/docs/explan-notes/classic-dir framework_en.pd.

Glover Jeremy. (2008). *Framework Agreements: Practice and Pitfalls.* Retrieved from http://www.fenwickelliott.com/files/Practice%20and%20Pitfalls.pdf.

Hammer Nikolaus. (2005). International *Framework Agreements: global industrial relations between rights and bargaining*. Doi: 10.1177/102425890501100404 of Canada, Canada.

İnan Ali Naim. (1984). *Borçlar Hukuku Genel Hükümler.* 3rd Ed. Ankara: Ankara Hukuk Fakültesi Yayınları.

International Confederation of Free Trade Unions. (2004*). A trade union guide to globalization,* (2nd edition) Belgium, Retrieved from https://www.ituc-csi.org/IMG/pdf/report.complete.pdf.

Karınca, Eray. (2001). Bank Kredi Sözleşmeleri. *Ankara Barosu Dergisi, 3*, 46-58.

Kılıçoğlu Ahmet. (2014). *Borçlar Hukuku Genel Hükümler.* 18th Ed. Ankara: Turhan.

Kocayusufpaşa Necip, **Hatemi** Hüseyin, **Serozan** Rona & **Arpacı** Abdulkadir. (2014) *Borçlar Hukuku Genel Hükümler.* 6th Ed. İstanbul: Filiz.

Küçükayhan Aşçıoğlu, Meltem. (2011). *Rekabet Hukuku ve Dağıtım Sözleşmeleri*, Ankara: Adalet.

Küçükyalçın Arzu. (2004). Karşılaştırmalı Hukukta Sözleşme Özgürlüğünün Sınırlandırılması, *Ankara* Üniversitesi *Hukuk Fakültesi Dergisi, 53,* 4, 101-123.

Mouzas Stefanos & **Furmston** Michael. (2013). A Proposed Taxonomy of Contracts. *Journal of Contract Law, 130,* 4, 1-11.

Mouzas Stefanos & **Furmston** Michael. (2008). From Contract to Umbrella Agreement. *The Cambridge Law Journal, 67*, 1, pp. 37-50. Doi:10.1017/S0008197308000081.

Mouzas Stefanos. (2006). Negotiating Umbrella Agreements. *Negotiation Journal.* 22, 279-301 Doi: 10.1111/j.1571-9979.2006.00102.x.

Müller Torsten, **Platzer** Hans-Wolfgang & **Rüb** Stefan. (2008). International Framework Agreements-Opportunities and Limitations of a New Tool of Global Trade Union Policy*. International Trade Union Cooperation Briefing Paper 8/ 2*008.

Oğuzman M. Kemal & Öz Turgut. (2015). *Borçlar Hukuku Genel Hükümler.* Vol. I, 13rd Ed. İstanbul: Vedat.

Oğuzman M. Kemal & Öz Turgut. (2016). *Borçlar Hukuku Genel Hükümler.* Vol. II, 12nd Ed. İstanbul: Vedat.

Önsal Naci. (2012). *Yeni Bir Kavram/ Kurum: Çerçeve Sözleşme*. Retrieved from http://webservice.turkmetal.org.tr/AsyaWebXmlService/file.do?id=21489.

Papadakis Konstantinos. (2009). Signing International Framework Agreements: Case studies from South Africa, Russia and Japan. *ILO Industrial and Employment Relations Department Working Paper* No. 4, p. 2.

Philippe Julie M. (2005). French and American Approaches to Contract Formation and Enforceability: A Comparative Perspective, *Tulsa Journal of Comparative and International Law*, *12*. 2, 357-399.

Pieck Manfred. (1996). A Study of the Significant Aspects of German Contract Law. *Annual Survey of International & Comparative Law, 3*. 1, 111-176.

Pierrot Claudia. (2000). A *Comparative Study of Preliminary Agreements under French and American law.* A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the requirements for the degree of Master of Laws (LLM), Institute of Comparative Law McGill University National library.

Resioğlu Safa. (2014). *Türk Borçlar Hukuku Genel Hükümler.* 25th Ed. İstanbul: Beta.

Sage Nicholas William. (2014). Sheer *force of will, a will theory of contract*. Thesis submitted in conformity with the requirements for the degree of Doctor of Juridical Science, Faculty of Law, University of Toronto. Retrieved from https://tspace. library.utoronto.ca/bitstream/1807/71840/5/Sage_ Nicholas_W_201403_SJD_thesis.pdf.

Schäfer Hans-Bernd & **Aksoy** Hüseyin Can. (n.d) *Alive and Well, the Good Faith Principle in Turkish Contract Law*. Retrieved from http://yoksis.bilkent.edu.tr/pdf/files/11864.pdf.

T.C. Sağlık Bakanlığı Strateji Geliştirme Başkanlığı. (2009). Çerçeve Anlaşma İhaleleri ve Münferit Sözleşmeler, Genelge. Retrieved from https://sgb.saglik.gov.tr/index.php? lang=tr&page=55&newsCat=3&newsID=81&newsPage=80.

Tercier Pierre, **Pichonnaz** Pascal & **Develioğlu** Murat. (2016). *Borçlar Hukuku Genel Hükümler,* İstanbul: On İki Levha.

Trebilcock Micheal J. (1993). *The Limits of Freedom of Contract,* Massachusetts: Harvard University Press.

UNCITRAL Model Law on Public Procurement (2014).

UNIDROIT Principles (2010).

Williamson Oliver E. (O 1979). Transaction-Cost Economics: The Governance of Contractual Relations. *Journal of Law and Economics, 22*. 2, 233-261.

Yelmen Adem. (2014). *Genel* İşlem *Koşulları.* Ankara: Yetkin.

Yeşiltepe, Salih Önder. (2007). Tek Satıcılık Sözleşmesinin Öğretide Benzer Olarak Belirtilen Sözleşmelerden Ayırt Edilmesi. *MÜHF-HAD, 13*. 1-2, 169-191.

CUSTOMS CRIMES IN TURKEY AND UNITED STATES

Türkiye ve Amerika Birleşik Devletleri'nde Gümrük Suçları

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ABSTRACT

Custom duties based on goods entering to Turkey and the determination of customs value of goods and rate is important. Custom duties regulated out of Turkish Procedural Tax Law article 2 and customs penalties and crimes regulated in detail in Customs Code. Customs penalties in Turkey divided losses of tax and irregularities. However in the United States Custom Code regulated more penalties than Turkey and regulated systematic rules in context of administrative appeals.

Keywords: Customs, Customs Duty, Customs Penalties

ÖZET

Gümrük Vergisi sadece Türkiye'ye giren ürünler/ ithalat üzerinden alınan bir vergidir ve bu kapsamda malın değerinin belirlenmesi uygulanacak oran açısından önemlidir. Gümrük Vergisi Vergi Usul Kanunu 2.maddesine göre kapsam dışı tutulmuştur ve gümrük cezaları detaylı biçimde Gümrük Kanunu'nda düzenlenmiştir. Gümrük suçları Türkiye'de vergi kaybı ve usulsüzlük olmak üzere ikiye ayrılmaktadır. Bununla birlikte ABD gümrük vergisi ise Türkiye'ye göre daha geniş ve ayrıntılı biçimde gümrük suçları ve cezalarını belirlemiş ve idari çözüm yolları kapsamında sistematik bir düzenleme getirmiştir.

Anahtar Kelimeler: Gümrük, Gümrük Vergisi, Gümrük Suçları.

Introduction

The Customs Code (CC- Gümrük Kanunu)[1] of Turkey applies to on goods imported into Turkey and determines the goods' customs value and tax rate.

Customs duties are taxes levied on imports (and, sometimes exports) by the customs authorities of a country to raise state revenue or to protect domestic industries from more efficient or predatory competitors from abroad.

The tax is generally based on the value of goods or on the weight, dimensions, or some other criteria specific to the item (for example automobile engine size)[2].

According to CC Article 1; "The scope of this Code is to lay down the customs rules that shall apply to goods and means of transport entering into and exiting from the Customs Territory of the Republic of Turkey".

The CC is a comprehensive document that states the rules for goods and vehicles entering and exiting the Turkish customs region. CC regulations

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1 Official Gazette: 4.11.1999, 23866.

2 www.gtb.gov.tr.(12.07.2017)

lay out taxes, regimes, penalties, appeals, audits and other details through regulations and statutes[3].

Customs penalties and crimes are included in the CC. However tax penalties and crimes under Turkish Procedural Tax Law are not linked with the CC[4].

The first section describes customs penalties in Turkey and the Second section describes United States' Customs penalties and proposes a different provision system for the Turkish Custom Code.

1. Custom Penalties in Turkey

1.1. General Definition

Customs controversies are defined as a conflict between customs administration and taxpayer with on issues covered in the CC[5].

Because the crimes and fines in CC Article 2 are convenient for Misdemeanor Law (ML) (Kabahatler Kanunu)[6] Article 2, this code is applied except for enforcement and appeal rules[7]. In other words, in the context of ML Article 2, all crimes are misdemeanors since CC regulates all customs systems. Correspondingly, customs penalties are administrative and the purpose is to compensate for public loss.

This administrative penalties imposed by the customs authority are monetary that less custom tax and/ or irregularities which was identified return to give custom authority[8].The CC stipulates penalties and corresponding fines. Penalties are criminal penalties for finding mispleaded and/ or deficit tax detected audits and controls by authorities reason[9].

The Title of XI is Penalties and articles 231 and 232 give us general rule about penalty.

"Article 231: On condition that the act subject to an administrative sanction is related with an act requiring penalty and that criminal suits have been filed because of this act having a longer period of prescription, the decisions on administrative sanctions shall be applicable within the duration of lawsuits and period of prescription laid down by the Turkish Penal.

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3 Selen Ufuk, Gümrük İşlemleri ve Vergilendirilmesi, Ekin Yayınevi, 6.Baskı, 2014, p.13.
4 Şenyüz Doğan, **Vergi Ceza Hukuku,** Ekin Yayınevi, 8.Baskı, 2015, p.254.
5 Selen, p. 197.
6 Official Gazette: 31.03.2005, 25772.
7 Ercan Tayfun, **Gümrük Uyuşmazlıkları ve Çözüm Yolları**, Adalet Yayınevi, Ankara 2012, p. 114.
8 Selen, p.199.
9 Selen, p.199.

The period of prescription of the administrative fines arising from customs duty receivables shall be subjected to the period of prescription of the customs duties related with these administrative fines".

"Article 232: 1.The fines that should be charged together with the customs duties in accordance with the provisions of Chapter 2 of this Title, shall be decided, communicated and paid concurrently with such duties. 2. On condition that the relevant issue and declarant are the same and have a pecuniary or legal interdependence, a single accrual and penalty decision may be applied for the customs duties and fines relating to multiple procedures or declarations. 3. Administrative sanction decisions shall be taken by the heads or deputy heads of customs administrations hereunder".

Customs penalties are legislated in detail on loss of tax (CC Part 11, Section 2) and irregularities (CC Part 11, Section 3).

The main characteristics of custom penalties are the following:

- While fining, intention is not taken into account. Intention is not a provision of the penalty.
- People who act contrary to the law may face with penalties as in the CC.
- If an act is punishable by multiple penalties, the largest fine is applied[10].

1.2. Loss of Tax Penalties:

Loss of tax not done on time or on time but with deficient amount or incorrect withdraw[11].

If any act leads to loss of custom taxes, penalty regulated by articles 234, 236, 237 and 238 of the CC.

According to Article 234;

"As a result of any declaration, examination and control or post release control relating to goods subject to free circulation procedure or temporary importation with partial relief;

(a) Apart from the existing duties, a fine at a rate of threefold of the arising difference, shall be charged in the case that any discrepancy occurs in the elements forming the Customs Tariff referred or in such measurements of goods as number and weight which are subject to taxation; and provided that the difference between the import duties calculated pursuant to declaration, and import the duties to be charged in accordance with the examination results, exceeds 5%.

10 Ercan, p. 18.
11 Ercan, p. 127.

(b) Apart from the import duties regarding the deficit, a fine at a rate of threefold of the tax difference shall be charged in the case the declared value of the goods subject to import duties is deficient when compared with the value.

(c) In case of a difference in quantity less than 5% and in case of deficient value declarations incurred from a formal account error, the import duties regarding these differences as well as a fine at an amount of half of the tax difference, shall be charged.

In cases where the differences referred to in paragraph (1) are found as a result of any declaration, examination and post-control relating to goods subject to inward processing procedure, procedure for processing under customs control and procedure on temporary importation with total relief; a fine at a rate of half the fines prescribed in the same paragraph, shall be imposed.

Where the above-mentioned discrepancies have been communicated by the declarant before the customs authorities notice them, the fines in question shall be applied at a rate of 15 per cent.

The provisions relating to the above-mentioned fines shall not apply for the public administrations within the scope of general administration.

Where the customs authorities establish, as a result of control, that the import duties payable under the cover of a customs debt have either not been paid or been incompletely paid until the deadline; the payable import duties shall be collected together with the interest mentioned in the said paragraph, and a fine at an amount of one fourth of these duties shall be imposed on the debtor. Such fines shall not apply in case the unpaid or incompletely paid import duties referred herein, are communicated by the debtor to the customs authorities before they notice such duties". Article 235, 236,237 and 238 also regulated amount of penalties in detail".

Tax loss which is not defined in the CC mean is not assessment in time, less assessment in time, give back or cause tax return as a tortuous. The acceptance of customs penalty is not related to defect of taxpayer, tax liable, custom broker or other people defined in the CC. When an acts which lead to tax loss that is identified in the CC shall be considered actualized material element of penalty[12].

Articles 235, 236, 237 and 238 regulated amounts of penalties for each case.

[12] Ercan, p. 142.

1.3. Irregularities

Irregularities are violation of articles of the CC procedure.

Irregularities acts regulated articles 239 and 241 of the CC.

According to article 239 which regulate this penalty; "a fine at the rate of one tenth of CIF in the case that the goods are subject to importation, and a fine at the rate of one tenth of FOB in the case that goods are subject to exportation, shall be charged from; those who have without authorization imported or exported or attempted to import or export the goods subject to relief from export and import duties through other places other than the customs administrations specified in accordance with the provisions; and those who have brought into or out such goods or who have attempted to bring into or out such goods, without going customs formalities, from the customs territory of the country.

Those exporting from the Customs Territory of Turkey the goods exportable by the payment of custom duties, without placing under customs procedures or without the partial or whole payment of customs duties, shall be charged with the customs duties of these goods as well as a fine of two-fold of these duties".

Article 241: "1. Without prejudice to the circumstances for which a separate penalty has been assigned, an irregularity fine of TL 60 shall be charged on those who have violated the provisions laid down by secondary regulations issued on the basis of this Code and the authorities granted therein.

2. The amount referred to in paragraph 1, shall be increased annually on the revaluation rate. In such a calculation, the amount up to TL 1 shall not be taken into consideration.

3. When compared with the amount referred to in paragraph 1, the irregularity fine shall be doubled where:

(a) the false presentation by the concerned persons, of the documents and information which form a basis for the decisions taken by the customs administrations;

(b) Even though it leads to no tax loss, existence of a sales transaction between the persons interrelated; and no declaration of such relationship;

(c) Failure of the equipper or operator or his agent to inform the relevant customs administration within the duration to be laid down by the regulation for the arrival and departure of the vessels that arrive at Turkey from foreign ports or that depart from Turkey for foreign ports

(d) Failing to present, within the prescribed time, the summary declaration or the commercial or official document used as summary declaration

(e) Where the vehicles carrying transit goods by road within the Customs Territory of Turkey exceed, up to 24 hours

(f) Where a deficiency exists in the technical equipment of the customs warehouse)

(g) Failing of the warehouse keepers to record the goods subject to customs warehouse procedure on the date when these goods have been placed into the warehouses

(h) Conclusion, within one month following the expiry of the authorization duration, of the formalities; re-exportation or placing under a customs-approved treatment or use, of the goods brought into the Customs Territory of Turkey under the inward processing procedure and the procedure for processing under customs control;

(i) Having exceeded the prescribed period, returning of the goods temporarily brought out of the Customs Territory of Turkey

(j) Without prejudice to the provisions of the Anti-Smuggling Act, a difference over 10% is detected in the amount or kind of the exported goods in accordance with the declaration and the documents enclosed therewith

(k) Non-compliance of those working in or entering and leaving the free zones, with the rules laid down by this Code.

(l) re-exportation or placing under a customs-approved treatment or use, within one month following the expiry of the granted time limit, of the goods brought into the Customs Territory of Turkey under the temporary importation procedure.

(m) Demonstration with reasonable documents, that the goods imported under the temporary importation procedure have been released out of the Customs Territory of Turkey without informing the relevant customs authorities, but within the period prescribed.

And also the irregularity fine shall be quadrupled where:

(a) even though he is not authorized to represent; where a person proceeds a transaction in the name or on behalf another in the customs administrations;

(b) road vehicles, without being granted the authorization of the customs administration, carry on their journey by embarking and disembarking passengers or load;

(c) Unloading goods from vehicles false declaration of the description of the goods registered in the summary declaration or in the commercial and official documents used as summary declaration or non-conformance of the kind of package and the numbers and marks indicated thereon, with the registrations of the summary declarations;

(d) Vehicles carrying transit goods by road into the Customs Territory of Turkey exceed, up to 48 hours,

(e) goods, brought into general warehouses and free zones and which are flammable and explosive or which present a danger or are likely to spoil other goods or which require special facilities and equipment for their preservation, are stored in general premises;

(f) Placing of the goods in warehouses

(g) re-exportation or placing under a customs-approved treatment or use, within a duration not exceeding 2 months following the expiry of the granted time limit, of the goods brought into the Customs Territory of Turkey under the temporary importation procedure;

(h) Conclusion, within a duration of no more than 2 months following the expiry of the authorization duration, of the formalities; re-exportation or placing under a customs-approved treatment or use, of the goods brought into the Customs Territory of Turkey under of the inward processing procedure and the procedure for processing under customs control;

(i) failure of the relevant persons to submit documents and information though they have been requested to submit such documents and information in written form

5. The irregularity fine shall be charged as six fold of the amount if; where

a) vehicles carrying transit goods by road into the Customs Territory of Turkey exceed, up to 72 hours,

b) re-exportation or placing under a customs-approved treatment or use, within a duration not exceeding three months following the expiry of the granted time limit, of the vehicles brought into the Customs Territory of Turkey under the temporary importation procedure

The irregularity fines shall be charged as eightfold, where;

(a) vessels arriving from the ports out of the Customs Territory of Turkey change their route, wait in the course of the journey, contact with other vessels, do not make their way enough for customs supervision or draw near places where no customs office exists and it is not possible to prove

that the vessel was actually not loaded or its cargo was discharged at another port or was damaged or lost (general average);

(b) Vehicles travel on the roads other than those

(c) Vehicles carrying transit goods by road into the Customs Territory of Turkey exceed, up to 72 hours

(d) Failing to keep the documents for a duration of 5 years".

Irregularities are violating of form and method provisions of CC and act is not losing a public income but is cause to losing. Articles 239-241 also regulated amounts of penalties for each case.

1.4. Administrative Rules

When taxpayers or custom brokers want to make an administrative appeal of custom penalties, they can follow either article 242 (objection) or article 244 (reconciliation).

If there is any controversy between taxpayer or custom brokers and the custom authority, they should initiate an objection, reconciliation, or claim remission with the administrative committee. This must be done before any case goes to court. Tax courts will not accepted cases that have not done this step first.

According to Article 242 and 243; "Within 15 days from the notification, the debtors may appeal against the customs duties, fines and administrative decisions under a petition addressed to a superior authority or to the same authority if such a superior authority does not exist.

Appeals submitted to the administration shall be decided within 30 days and notified to the relevant person.

Where the appeal petitions are submitted to the wrong authorities within the period prescribed, the appeal shall be deemed to be submitted within the prescribed period and shall be conveyed by the administration to the relevant authorities.

Any person shall have the right to appeal before the administrative judiciary bodies located where the formalities relating to the decisions on the rejection of the appeal are carried out.

Within 15 days as from the notification, any person shall have the right to appeal in writing before the Regional Directorate for Customs and Customs Enforcement against the chemical analysis results taken as a basis in the calculation of the customs duties notified to the relevant persons in accordance with Article 197.

Upon an appeal, second analysis shall be made by two chemists other than the chemist who works in the laboratory where he made the first analysis. Upon request, the customs administrations shall authorize an observer chemist who is not a customs chemist, to be involved in the second analysis. Where an appeal has been lodged against the analysis made in the customs laboratories in which not more than three chemists work, the second analysis shall be made in the laboratory in which at least two chemists work and which is affiliated to the nearest customs administration".

Article 244 which regulated reconciliation rule is; "Where the declarant or the person to pay the fines may contend against the deficiencies or irregularities detected by the customs administration in the submitted declarations, by arguing that they have emanated from failing to adequately understand the legal provisions or from misinterpretation of the provisions or a difference of opinion exists as to the judicial decisions, the customs administration may reconcile with the declarants or the person to pay the fines within the framework of the provisions hereof. The request for reconciliation shall be submitted within fifteen days as from the date of notification, for the customs duties and fines for which no objection was yet filed. In the event of a request for reconciliation, the term of objection or litigation shall be suspended and the term shall be resumed in failure of reconciliation or ensuring reconciliation. However, the term shall be extended for three days where the deadline is less than three days. In failure of reconciliation or ensuring reconciliation, no new request shall be submitted for reconciliation.

Demands for reconciliation shall be assessed by the customs conciliation commissions. The procedures and principles governing the establishment and functioning of the customs conciliation commissions and submission of applications hereunder shall be laid down by a regulation.

The reconciliation reports issued by the customs conciliation commissions shall be of definitive nature and relevant procedures shall be conducted forthwith. The declarant or the person to pay the fine may not file lawsuits or complaints at any official authority against the reconciled issues incorporated into the report.

In the event of reconciliation, the reconciled customs duties and fines shall be paid within one month as from the notification of the reconciliation report. The late payment fee determined under the Act no. 6183 shall apply to the time interval between the due date of the reconciled duties and the date of signature of the reconciliation report. In failure of reconciliation or assurance of reconciliation, the general provisions shall apply.

If there is any controversy between the taxpayer or customs broker and the customs authority, they should initiate an objection, reconciliation or claim remission with the administrative committee. This must be done before any case goes to court. Tax courts will not accepted cases that have not done this step first. They must go to tax court within thirty days or the case will be considered tax recognized[13]. There is no specific Custom Court therefore they can appeal to Tax Court in the region where custom authorities imposed penalty.

According to CC Article 8; "Any person may request information concerning the application of customs legislation from the customs administrations. The information shall be supplied to the applicant free of charge. However, where special costs are incurred by the customs administrations, in particular as a result of chemical analyses or expert reports on goods, or the return of the goods to the applicant, he may be charged the relevant amount".

2. Custom Penalties in United States

2.1. General Definition

United States Constitution provides in Article I, Section 8 that: "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States"[14].

In USA Congress has to power to regulate commerce with foreign nations. Also, the founders preempted the states from engaging in trade regulation by stating that "No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports..". To implement these powers, the First Congress passed the Tariff Act of July 4, 1789 and more detailed law was enacted in 1799 to define the administrative mechanism for the collection of duties[15].

Any person or business bringing goods into the United States is subject to the laws and regulations of U.S. Customs and Border protection (CBP), a component of the Department of Homeland Security[16].

Depending on the nature of the goods, they may also be subject to certain laws and regulations of various other federal agencies that strive to protect U.S. consumers from injurious foreign products by ensuring product safety or

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13 Şenyüz Doğan, Yüce Mehmet, Gerçek Adnan, **Türk Vergi Sistemi,** Ekin Yayınevi, 13.Baskı, Bursa 2016, p.348-350.

14 https://www.law.cornell.edu/constitution/overview (13.07.2017)

15 Pike V.Damon, Friedman M.Lawrence, **Customs Law,** Carolina Academic Press, 2012, p.3.

16 www.cbp.gov (13.07.2017)

adherence to U.S. specifications[17].

CBP is charged with enforcing and importers have the burden to comply with the import and other laws contained in United States Code of Federal Regulations (USC) Title 19, namely Custom Duties[18].

USC Title 19, Chapter 4 (Tariff Act of 1030), Subtitle III (Administrative Provisions), Part V (Enforcement Provisions) regulated custom penalties and other rules[19] that apply to individuals, companies and institutions so one of them fraud which enacted very broadly and other civil penalty provisions are enforced by the Customs Service which are;

- Failure to declare (19 USC, 1497)
- Drawback penalties (19 USC, 1593)
- Customs broker penalties (19 USC, 1641)
- Recordkeeping penalties (19 USC, 1509)
- Falsity or lack of manifest (19 USC, 1584/a/1)
- Unlawful lading and unlading (19 USC 1453)
- Unlicensed unlading of passengers (19 UC 1454)[20].

Penalties from CBP are initially stated in accordance with the applicable statute or regulation that dictates what the amount of the penalty should be. This could be a specific dollar amount, a percentage of the entered value, a multiple of the underpaid duties or a multiple of the quantity of goods entered[21].

2.2. Fraud

USC 19, Chapter 4, Subtitle III, Part V, Provision 1592 is one of the primary provisions used by Customs to restrict unlawful import practices. The section is very broad, making it unlawful for any person to make, or to aid or abet another in making "any false and material statement or omission in connection with the importation of merchandise". Also a violation may occur regardless of whether there has been actual loss of duties resulting from the practice. Thus 1592 article penalizes both fraudulent and negligent import practices which have a potential impact on the importation of an article, without regard to any actual loss of revenue to the United States and this provision also emphasizes the "reasonable care" standard[22].

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17 Reneau Robert, **Global Trade Compliance,** Outskirts Inc., 2011, p.7.

18 www.law.cornell.edu (13.07.2017)

19 https://www.law.cornell.edu/uscode/text/19/chapter-4/subtitle-III/part-V

20 Serko David, **Import Practice, Customs and International Trade Law,** Practising Law Institute, 1985, p, 302-304.

21 Reneau, p. 62.

22 Glick A.Leslie, **Guide to United States Customs and Trade Laws After the Customs**

According to provision 1592; "Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty, tax, or fee thereby, no person, by fraud, gross negligence, or negligence

(A)may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of

(i) any document or electronically transmitted data or information, written or oral statement, or act which is material and false, or

(ii) any omission which is material, or

(B) may aid or abet any other person to violate subparagraph (A)".

1592 (d): "Notwithstanding section 1514 of this title, if the United States has been deprived of lawful duties, taxes, or fees as a result of a violation of subsection (a), the Customs Service shall require that such lawful duties, taxes, and fees be restored, whether or not a monetary penalty is assessed".

Under 1592 (c) (3), "A negligent violation of subsection (a) is punishable by a civil penalty in an amount not to exceed

(A)the lesser of

(i) the domestic value of the merchandise, or

(ii)two times the lawful duties, taxes, and fees of which the United States is or may be deprived, or

(B)if the violation did not affect the assessment of duties, 20 percent of the dutiable value of the merchandise".

When a violation of Customs laws or laws enforced by Customs is discovered, in addition to, or in lieu of, seizure and/or referral for criminal prosecution, Customs usually has the option of assessing a personal penalty against the alleged violators[23]. While the penalty process generally begins with the Fines, Penalties & Forfeiture Officer's issuance of the Penalty Notice to the alleged violator, some statutes require the issuance of a prepenalty notice and opportunity for response before Customs makes its penalty claim and the alleged violator has thirty days from the date of mailing of the prepenalty notice for response[24].

Modernization Act, Second Edition, Kluwer Law International, 1997, p. 88 **; Pike, Friedman, p. 519** " The law requires that importers make entry of merchandise to the United States 1 using reasonable care" which was introduced into customs law via the Customs Modernization Act of 1993 but the term is not defined in the statue, is defined in United States v.Hitachi America, 1997.

23 Pike, Friedman, p. 533.

24 Pike, Friedman, p. 534.

2.3. Failure to Declare

USC 19, Chapter 4, Subtitle III, Part III, provision 1497 regulated; "(1)Any article which

(A)is not included in the declaration and entry as made or transmitted; and

(B)is not mentioned before examination of the baggage begins

(i)in writing by such person, if written declaration and entry was required, or

(ii)orally, if written declaration and entry was not required;

shall be subject to forfeiture and such person shall be liable for a penalty determined under paragraph (2) with respect to such article.

(2)The amount of the penalty imposed under paragraph (1) with respect to any article is equal to

(A)if the article is a controlled substance, either $500 or an amount equal to 1,000 percent of the value of the article, whichever amount is greater; and

(B)if the article is not a controlled substance, the value of the article".

2.4. Drawback Penalties

USC 19, Chapter 4, Subtitle III, Part V, Provision 1593 regulated;

"No person, by fraud, or negligence—

(A)may seek, induce or affect, or attempt to seek, induce, or affect, the payment or credit to that person or others of any drawback claim by means of—

(i)any document, written or oral statement, or electronically transmitted data or information, or act which is material and false, or

(ii)any omission which is material; or

(B)may aid or abet any other person to violate subparagraph (A)".

Drawback, in pertinent part, is the refund or remission, in whole or in part, of a customs duty, fee or internal revenue tax imposed under federal law. A drawback claim represents the drawback entry and related documents required by regulation in order to request drawback payment[25].

Drawback, in pertinent part, is the refund or remission, in whole or in part, of a customs duty, fee or internal revenue tax (in connection with the

[25] Pike, Friedman, p. 537.

importation of merchandise) imposed under Federal law. A drawback claim represents the drawback entry and related documents required by regulation in order to request drawback payment[26].

2.5. Broker Penalties

USC 19, Chapter 4, Subtitle III, Part VI Provision 1641 is "customs brokers" and generally Customs will assess penalties against custom brokers up to maximum of $ 30.000 for the violations included in any one penalty notice.

Provision 1641/d: "The Secretary may impose a monetary penalty in all cases with the exception of the infractions described in clause (iii) of subparagraph (B) of this subsection, or revoke or suspend a license or permit of any customs broker, if it is shown that the broker

A. has made or caused to be made in any application for any license or permit under this section, or report filed with U.S. Customs and Border Protection, any statement which was, at the time and in light of the circumstances under which it was made, false or misleading with respect to any material fact, or has omitted to state in any such application or report any material fact which was required to be stated therein;

B. has been convicted at any time after the filing of an application for license under subsection (b) of any felony or misdemeanor which the Secretary finds

   i. involved the importation or exportation of merchandise;
   ii. arose out of the conduct of its customs business; or
   iii. involved larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds;

C. has violated any provision of any law enforced by U.S. Customs and Border Protection or the rules or regulations issued under any such provision;

D. has counseled, commanded, induced, procured, or knowingly aided or abetted the violations by any other person of any provision of any law enforced by U.S. Customs and Border Protection, or the rules or regulations issued under any such provision;

E. has knowingly employed, or continues to employ, any person who has been convicted of a felony, without written approval of such employment from the Secretary;

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[26] https://www.cbp.gov/sites/default/files/documents/icp052_3.pdf (14.07.2017)

F. has, in the course of its customs business, with intent to defraud, in any manner willfully and knowingly deceived, misled or threatened any client or prospective client; or

G. has been convicted of committing or conspiring to commit an act of terrorism described

In cases where the broker allegedly has violated any of the laws, rules or regulations enforced by Customs (i.e., 19 U.S.C. 1641(d)(1)(C)), in a fraudulent manner, it is appropriate for Customs to impose additional penalties under 19 U.S.C. 1592. It is Customs policy, in cases of negligence or gross negligence, to impose additional penalties under 19 U.S.C. 1592, only where the broker shared in the financial benefits to an extent over and above the prevailing brokerage fees[27].

Custom brokers may be subjected to primarily liability as well as liability for aiding and abetting the commission of an infraction. Section 1641 authorizes two type of sanctions for violations of the section: monetary penalties, or revocation or suspension of the broker's license or permit[28].

2.6. Recordkeeping Penalties

USC 19, Chapter 4, Subtitle III, Part III, Provision 1509: "(a)Authority in any investigation or inquiry conducted for the purpose of ascertaining the correctness of any entry, for determining the liability of any person for duty, fees and taxes due or duties, fees and taxes which may be due the United States, for determining liability for fines and penalties, or for insuring compliance with the laws of the United States administered by the United States Customs Service, the Secretary (but no delegate of the Secretary below the rank of district director or special agent in charge) may

1. examine, or cause to be examined, upon reasonable notice, any record (which for purposes of this section, includes, but is not limited to, any statement, declaration, document, or electronically generated or machine readable data) described in the notice with reasonable specificity, which may be relevant to such investigation or inquiry, except that—
    A. if such record is required by law or regulation for the entry of the merchandise (whether or not the Customs Service required its presentation at the time of entry) it shall be provided to the Customs Service within a reasonable time after demand for its

[27] https://www.cbp.gov/sites/default/files/documents/icp052_3.pdf (14.07.2017)
[28] Glicke, p. 97.

production is made, taking into consideration the number, type, and age of the item demanded; and

B. if a person of whom demand is made under subparagraph (A) fails to comply with the demand, the person may be subject to penalty under subsection (g)".

Certain persons who fail to produce, upon demand, an entry record enumerated in the Customs Regulations pursuant to 1509 (a)(1) (A) commonly known as the " (a)(1)(A) list" may be subject to penalties and this list refer to records required by law or regulation for the entry of merchandise[29].

2.7. Falsity or Lack of Manifest

USC 19, Chapter 4, Subtitle III, Part V, Provision 1584 (a) (1) regulated;

"Any master of any vessel and any person in charge of any vehicle bound to the United States who does not produce the manifest to the officer (whether of the Customs Service or the Coast Guard) demanding the same shall be liable to a penalty of $1,000, and if any merchandise, including sea stores, is found on board of or after having been unladen from such vessel or vehicle which is not included or described in said manifest or does not agree therewith, the master of such vessel or the person in charge of such vehicle or the owner of such vessel or vehicle or any person directly or indirectly responsible for any discrepancy between the merchandise and said manifest shall be liable to a penalty equal to the lesser of $10,000 or the domestic value of the merchandise so found or unladen, and any such merchandise belonging or consigned to the master or other officer or to any of the crew of such vessel, or to the owner or person in charge of such vehicle, shall be subject to forfeiture, and if any merchandise described in such manifest is not found on board the vessel or vehicle the master or other person in charge or the owner of such vessel or vehicle or any person directly or indirectly responsible for any discrepancy between the merchandise and said manifest shall be subject to a penalty of $1,000".

2.8. Lading and unlading of merchandise or baggage; penalties

USC 19, Chapter 4, Subtitle III, Part II, Provision 1453 regulated; **"**If any merchandise or baggage is laden on, or unladen from, any vessel or vehicle without a special license or permit therefore issued by the appropriate customs officer, the master of such vessel or the person in charge of such vehicle and every other person who knowingly is concerned, or who aids therein, or in removing or otherwise securing such merchandise or baggage, shall each be

[29] Pike, Friedman, p. 537.

liable to a penalty equal to the value of the merchandise or baggage so laden or unladen, and such merchandise or baggage shall be subject to forfeiture, and if the value thereof is $500 or more, the vessel or vehicle on or from which the same shall be laden or unladen shall be subject to forfeiture".

2.9. Unlading of Passengers

USC 19, Chapter 4, Subtitle III, Part II, Provision 1454 regulated; **"**If any passenger is unladen from any vessel or vehicle without a special license or permit therefor issued by the appropriate customs officer, the master of such vessel or the person in charge of such vehicle and every other person who knowingly is concerned, or who aids therein, shall each be liable to a penalty of $1,000 for the first passenger and $500 for each additional such passenger so unladen".

2.10. Administrative Rules

Before any disputes or any import acts Custom Advance Ruling may be requested under Part 177 of the CBP Regulations (19 C.F.R. Part 177) by any person who, as an importer or exporter of merchandise, or otherwise, has a direct and demonstrable interest in the question or questions presented in the ruling request, or by the authorized agent of such person. A "person" in this context includes an individual, corporation, partnership, association, or other entity or group[30].

The person named in the pre-penalty notice will have 30 days in which to respond to the notice. The response may be either oral or in writing. The importer's response should contain information identifying it as a response to the pre-penalty notice, answer the allegations set out in the notice and provide reasons why a penalty should not be issued for a lesser amount[31].

Written notice of any fine or penalty incurred, as well as any liability to forfeiture, must be given to each party known to have an interest or claim in the seized property. Each interested party must also be informed of the right to apply for relief under 19 USC Section 1618[32].

According to USC 19, Provision 1592/e; "Notwithstanding any other provision of law, in any proceeding commenced by the United States in the Court of International Trade for the recovery of any monetary penalty claimed under this section

30 https://www.cbp.gov/trade/rulings (14.07.2017)
31 Glick, p. 89.
32 Serko, p. 309.

1. all issues, including the amount of the penalty, shall be tried de novo;
2. if the monetary penalty is based on fraud, the United States shall have the burden of proof to establish the alleged violation by clear and convincing evidence;
3. if the monetary penalty is based on gross negligence, the United States shall have the burden of proof to establish all the elements of the alleged violation; and
4. if the monetary penalty is based on negligence, the United States shall have the burden of proof to establish the act or omission constituting the violation, and the alleged violator shall have the burden of proof that the act or omission did not occur as a result of negligence".

This grant of exclusive jurisdiction has been upheld by the courts and legal proceedings to enforce section 1592 will be brought by the U.S. Attorney in the Court of International Trade[33] within five years of the date of the violation[34].

Conclusion

The customs service' in the United States has authority over infractions of customs and related laws. They are generally exercised through the assessment of civil penalties and forfeiture of imported merchandise following the terms and conditions provided by the law. When we compare the CCs of and the United States, the US Custom Code has more detailed penalties and fines including forfeiture of imported merchandise. It has a published bulletin that describes all of the rules. Since customs provisions are very complicated US Customs and Border Protection (CBP) also issues binding advance rulings and other legal decisions related to importing merchandise into the United States. Advance rulings provide the international trade community with a transparent and efficient means of understanding how CBP will treat a prospective import or transaction.

Although the CC in Turkey is less complex, it needs to more clearly define provisions and explain the rules, following the example of US. It also recommended to create a customs court, following the example of the US Court of International Trade.

[33] *See more information, www.cit.uscourts.gov*
[34] Glick, p. 100.

REFERENCES

Ercan Tayfun, Gümrük Uyuşmazlıkları ve Çözüm Yolları, Adalet Yayınevi, Ankara 2012.

Glick A.Leslie, Guide to United States Customs and Trade Laws After the Customs Modernization Act, Second Edition, Kluwer Law International, 1997.

Pike V.Damon, Friedman M.Lawrence, Customs Law, Carolina Academic Press, 2012.

Reneau Robert, Global Trade Compliance, Outskirts Inc., 2011

Selen Ufuk, Gümrük İşlemleri ve Vergilendirilmesi, Ekin Yayınevi, 6.Baskı, 2014.

Serko David, Import Practice, Customs and International Trade Law, Practising Law Institute, 1985

Şenyüz Doğan, Yüce Mehmet, Gerçek Adnan, Türk Vergi Sistemi, Ekin Yayınevi, 13.Baskı, Bursa 2016.

Şenyüz Doğan, Vergi Ceza Hukuku, Ekin Yayınevi, 8.Baskı, 2015.

Online References

www.cbp.gov

www.cit.uscourts.gov

www. gtb.gov.tr

www.law.cornell.edu

OBJECTIVE FACTOR OF *FURTUM: CONTRECTATIO*[*]

Furtum'un Objektif Unsuru: Contrectatio

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ABSTRACT

The first element of furtum was contrectatio; the handling of an object against the will of the owner (invito domino) or the person who had a lawful interest in such object. Examples of contrectatio included the removal of a thing, embezzlement, receiving stolen goods, disposing of a pledged thing without being authorized to do so, accepting an object that the owner had handed over by mistake, and hiding an escaped slave. Furthermore, a pledgee or depositee who made use of the pledged or deposited object committed furtum as did the borrower who misused the thing lent and even the owner who fraudulently removed a thing from who had a real thing in it or from a hirer with a right of retention for expenses. It is difficult to apply the notion of handling (contrectatio) to land thought of as such, and it is never is in fact so applied in juristic texts, thought soil or stones, as opposed to praedium, could be "contrected" and stolen.

Keywords: contrectatio, furtum, handling, subripere, manus

ÖZET

Furtum'un ilk unsuru contrectatio; eşyanın, malikinin (invito domino) veya eşya üzerinde meşru menfaati olanın rızası hilafına ele alınmasıdır. Contrectatio örneklerine, eşyanın alınıp götürülmesi, zimmete geçirme, çalınmış malların alınması, rehinli malın yetkisiz şekilde elde çıkartılması, malikinin hataen teslim ettiği malı kabul etmek, ve kaçak köleyi saklamak dahildir. Bundan başka, rehinli alacaklı ya da vedia alan, ödünç alanın malı sözleşme hükümlerine aykırı kullanmasında olduğu gibi ve malik dahi üzerinde ayni hakkı olan bir kimseden veya masraflar için alıkoyma hakkı olan kiracıdan hileli şekilde malı aldığında furtum işleyebilirdi. Contrectatio kavramının, hukuki metinlerde de geçerli olmadığı gibi, alınıp götürülemediği için araziler bakımından mümkün olmadığı, toprak ve taşların ise, praedium'un (arsa) aksine, ele alınabileceği, çalınabileceği düşünülmekteydi.

Anahtar Kelimeler: contrectatio, hırsızlık, taşıma, elle dokunma, gizlice alıp götürme

Introduction

Contrectatio[1] is wider in meaning and can be used to signify "meddling"

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[1] *Contrectatio* is the noun of *contracto*, to touch, feel, fondle; this verb being in itself a combination of *con* and *tracto*, the latter being the frequentative of traho and meaning to touch, feel, treat, but also: to use. *Con* may mean 'with', but also 'together' in the sense of bringing two together. Hence, *contrectatio* may mean the act of touching, feeling as an act or as the result of this. Sirks, Adriaan Johan Boudewijn:'*Furtum and manus/potestas*', Tijdschrift voor Rechtsgeschiedenis, Vol. 81, 2013, p. 497.

whether or not there is actual touching or handling[2]. *Contrectatio* involves some sort of physical meddling with the thing, such as shows the beginning of the theft.

In Roman law, the distinction between the two levels remained, for while physical act required ground liability for *furtum* was a simple *contrectatio*; the mental state of wrongdoer could be specified as an *animus furandi*, an intention to steal, that clearly involved more than an intention to handle[3].

The *contrectatio* is spoken of as the *initium furti* in Digest[4]:

Dig. 47.2.6 (Paulus libro nono ad Sabinum):

'Quamvis enim saepe furtum contrectando fiat, tamen initio, id est faciendi furti tempore, constituere visum est, manifestus nec ne fur esset.'

'Although there may be theft where there are frequent interferences, nevertheless, it is to the begining, that is, the time of the first such interference, that we must look to decide whether the theft be manifest or not'.

On the other hand, *contrectatio* usually has a more restricted sense and means a handling or touching which is improper in some way, whether illicit, immoral, illegal or merely disgusting[5]:

Cicero, De Deorum Natura, (1.27):

'…*cur non gestiret taurus equae contrectatione,..*'

'… should not a bull take pleasure in union with a mare,..'

Donatus Terence, Eunuchus, (194):

'..*hoc totum nimis blande et cum contrectatione...*'

'… he's handled the affair smartly…'

Contrectatio also requires an objective genetive and this is provided in the present text by *rei*. The *res*, for example, must be *mobilis* and children, wives in *manu*, etc. who are not *res*, may be stolen[6]. The thing (*res*) which was stolen

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2 But those who adopt this point of view, produce no evidence for it and it would appear from texts that the word is not so used. Watson, Alan: '*The Definition of Furtum and The Trichotomy*', (Trichotomy), Tijdschrift voor Rechtsgeschiedenis, Vol. 28, 1960, p. 198.

3 Ibbetson, David: '*The danger of definition: contrectatio and appropriation*', in The Roman Law Tradition (ed. Lewis, Andrew/ Ibbetson, David), Cambridge 1994, p. 55-56.

4 This might well be accompanied by a certain looseness of conception of the meaning of the word, a looseness which would make 'meddling with" a beter translation than 'handling'. Buckland, William Warwick: '*Contrectatio*', The Law Quarterly Review, Vol. 57, p. 468.

5 Watson, Trichotomy, p. 198.

6 The popular opinion that there could not be *furtum* of land came to prevail in classical law: Dig. 47.2.25. pr. (Ulpianus libro 41 ad Sabinum): '*Verum est, quod plerique probant,*

should have been any *res mobiles* in *commercio* which someone had the right to it. In addition, theft was possible only on movables, which were considered as *res aliena*[7].

Furtum means the appropriation to another person's property or its possession or use fraudulently (*contrectatio*).

Gaius tells us that actual '*amovere*' (remove) is not necessary; *contrectatio* suffices[8].

Gai. I. (3.195):

'*Furtum aulem fit non solum, cum quis inlereipıendi causa rem altenam arntivit. sed generaliter cum quis rem aiienam invitu domino contrectat*'.

'Again, theft is committed not only when a person removes the property of another with the intention of appropriating it, but, generally speaking, when anyone handles the property of another without the consent of the owner'.

Gai. I. (3. 196):

'*Itaque si quis re, quae apud eum deposita sit, utatur, furtum committit; et si quis utendam rem acceperit eamque in alium usum transtulerit, furti obligatur, ueluti si quis argentum utendum acceperit, quasi amicos ad cenam inuitaturus, et id peregre secum tulerit, aut si quis equum gestandi gratia*

fundi furti agi non posse'. 'The rule adopted by most authorities, that the theft of a tract of land cannot be committed, is true'. Buckland, p. 469. Gai. I. (2.51): '*Fundi quoque alieni potest aliquis sine ui possessionem nancisci, quae uel ex neglegentia domini uacet, uel quia dominus sine successore decesserit uel longo tempore afuerit: quam si ad alium bona fide accipientem transtulerit, poterit usucapere possessor; et quamuis ipse, qui uacantem possessionem nactus est, intellegat alienum esse fundum, tamen nihil hoc bonae fidei possessori ad usucapionem nocet, cum inprobata sit eorum sententia, qui putauerint furtiuum fundum fieri posse*'**.** 'Anyone can obtain possession of land belonging to another without the exertion of violence, if it either becomes vacant through the neglect of the owner, or because he died without leaving any heir, or was absent for a long time; and if he should transfer the said land to another who received it in good faith, the possessor can acquire it by usucaption. And although the party who obtained the land when vacant may be aware that it belongs to another, still, this does not in any way prejudice the right of usucaption of the possessor in good faith, as the opinion of those who held that land could be the subject of theft is no longer accepted'. Gai. I. (3.199): '*Interdum autem etiam liberorum hominum furtum fit, uelut si quis liberorum nostrorum, qui in potestate nostra sint, siue etiam uxor, quae in manu nostra sit, siue etiam iudicatus uel auctoratus meus subreptus fuerit*'. 'Sometimes, however, a theft of persons who are free is committed, for example where anyone of my children who is under my control, or a wife in my hand, or a judgment debtor, or a gladiator whom I have hired is secretly taken away'.

7 Peschke, Seldağ Güneş: '*Furtum as a Delict under Ius Civile*', in Roma Hukuku ve Güncellik, (ed.Ünver,Yener), Ankara, 2017, p. 97.

8 Buckland, p. 467.

commodatum longius aliquo duxerit, quod ueteres scripserunt de eo, qui in aciem perduxisset'.

'Therefore, if anyone makes use of property deposited with him for safe keeping, he commits theft, and if having received an article for the purpose of using it, he employs it for some other purpose, he becomes liable for theft; for example, if anyone being about to invite friends to supper borrows silver plate and takes it away with him to a distance; or if anyone borrows a horse to carry him to a certain place, and takes it much further away, or, as the ancient lawyers stated by way of example, if he takes the horse into battle'.

Gaius relates that the *veteres*, considered the case of taking borrowed horse into battle to be *furtum*, evidently because the horse had not been lent out to that purpose. This is called *furtum usus*, but Gaius ranges it under *contrectatio*, like the use of a thing given in deposit[9].

In general, this is every handling of a thing against the will of the owner. In his examples the thing is already with the future *fur,* and the *contrectatio* is handling of the thing[10].

The well-known definition of *furtum* given in Digest of Paulus and referred to in Institutiones of Iustinianus that reflects the standpoint of the classical law is particularly superb. Paulus in the famous definition repeated with a difference in the Institutes (4.1.1) makes *contrectatio* a primary characteristic of *furtum*[11]:

Dig. 47.2.1.3 [Paulus, libro trigensimo nono ad edietum (Iust. Inst. 4, 1, 1)]:

'*Furtum esi contrectatio rei fraudulosa lucri faciendi gratia vel ipsius rei vel etiam usus eius possessionisve quod lege naturali prohibitum est admittere*'.

'Theft is a fraudulent interference [*contrectatio*] with a thing with a view of to gain, whether by the thing itself or by the use or possession of it. This

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9 Sirks, p. 496; Burdick, William L.: *The Principles of Roman Law and Their Relation to Modern Law*, New Jersey, 2012, p. 254.

10 *Contrectatio* fits perfectly the criterion of *furtum* as developed in *decemviral* times. It is always a handling against the will of the owner and such it challenges his control over the object. Sirks, p. 497. On the other hand, Birks argued that the *furtum manifestum* would have driven the moment of liability early; the need to name the stolen *res* would have prevented its being lost in mere intent; the act required would have been capable of only the loosest description as the beginning of an *amovere,* a description whose factual content would vary according to the evidential weight of the surrounding circumstances and, because different things began to be taken in different ways, according to the nature of the coveted *res.* Birks, Peter: '*A Note on the Development of furtum*', The Irish Jurist, Vol. 8, (1973), p. 351.

11 Buckland, p. 467.

natural law proscribes'[12].

In this definition of Paulus is included the intention of gain or interest '*lucri faciendi*' compared to that of Gaius[13].

We have another definition of *furtum* by Paulus and this is much closer to those of Sabinus and Gaius than to that ascribed to him in the Digest.

Paulus, Sententiae, (2.31.1) :

'*Fur est qui dolo malo rem alienam contrectat*'.

'A thief is one who handles the property of another with evil intent'.

There is internal evidence to show that his Commentaries ad edictum, from which the Digest definition is taken, are earlier than the *Sententiae* and after producing such a good definition, he revert to the traditional, inferior one[14]. If the *Sententiae* are a postclassical compilation from the works of him, it is difficult to understand why the author chose the inferior definition even if it was the earlier.

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12 According to Schulz and Watson, expression of '*vel ipsius rei vel etiam usus eius possessionisve*' are undoubtedly an interpolation. They must depend on either *contrectatio* or *lucri faciendi gratia*. If the former, they are logically absurd since one cannot handle the use or possession of anything. If the latter, they would be ungrammatical. In reference to Watson, the important point is deciding whether the compilers regarded them as depending on *contrectatio* or on *lucri faciendi gratia*. According to him, the evidence strongly points to the latter and lastly, expression of '*lucri faciendi faciendi gratia vel ipsius rei vel etiam usus eius possessionisve*' makes perfect sense both logically and legally. But words '*lucri faciendi gratia*' are not in the Institutes (4.1.1). On the other hand, Buckland relying on the Institutiones, but he omits the first *rei* which occurs between *contrectatio* and fraudulosa. Baldus' comment on Iustinianus Institutiones (4.1.1) is as follows: '*Furtum est contrectatio proprietatis vel usus resi alienae fraudulosa invito domino animo lucrandi*', 'Theft is a fraudulent dealing with property, either in itself, or in its use, or in its possession: an offence which is prohibited by natural law'. Baldus, links the *vel ipsius* etc. with *contrectatio*. Watson, Trichotomy, p. 204-205. According to Watson, the Digest definition should be translated as follows : 'Theft is the dishonest handling of a thing with intention of profiting either from the thing itself or from its use or possession. From such conduct natural law commands us to abstain'. Watson, Trichotomy, p. 202.

13 The classical Roman lawyers, adopted a definition of *furtum* as a *contrectatio rei fraudulosa*, adding an additional mental element that it must have been *lucri faciendi gratia*. Ibbetson, p. 57. On the other hand, Biondi (Biondi, Biondo: *Istituzioni di Diritto Romano*, Milan, 1946, p. 397) implies that the element *lucrum* should not depend on the intention to steal (*animus furandi*), the subjective element of theft because *furtum* may exist without *lucrum* by giving the example of a man who steals a female slave just to satisfy his sexual desires (*libidinis causa*). Rado, Türkan: '*Gaius'a göre Klasik Roma Hukukunda Furtum Suçu*', İstanbul Üniversitesi Hukuk Fakültesi Mecmuası, Vol. 1-2, 1952, p. 501.

14 Paulus intended the *Sententiae* for the education of his son, it is just possible that he would prefer to give the old definition because it is simpler. Watson, Trichotomy, p. 197.

These definitions underline two elements of *furtum*: one is objective and the other subjective. The objective element *contrectatio* refers to handling of a property fraudulently. This term also means, seizure or theft of a property with the intention of acquiring that property and refers to loosening up the limits of the right of use or acquiring the possession of another person's property unjustly. The subjective element, on the other hand, refers to do the same, intentionally without the consent of the owner[15].

Contrectatio covers not only appropriation of a movable property, but also the offenses of fraud and abuse of confidence mentioned in the contemporary criminal law. A person who takes money, not belonging to him, commits *furtum*:

Dig. 13.1.18 (Scaevola libro quarto quaestionum):

'*…furtum fit, cum quis indebitos nummos sciens acceperit*…'

'…it is theft knowingly to receive coins which are not owed…'

Using less weights or falsifying another person's handwriting, was also considered as *furtum* in Roman law. A man who paid up his debt by using the money he received on behalf of a false creditor or to pay the debt of a third person was also considered as an example of *furtum*[16]:

Dig. 47.2.43.pr. (Ulpianus libro 41 ad Sabinum):

'*Falsus creditor (hoc est is, qui se simulat creditorem) si quid acceperit, furtum facit nec nummi eius fient*'.

'A false creditor, that is, one who pretends to be a creditor, commits theft if he accepts payment; and the money does not become his'[17].

The acts of a person claiming a lost property and of the slave are both considered within the context of *contrectatio*[18]:

Dig. 47.2.43.4 (Ulpianus libro 41 ad Sabinum):

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15 The term *contrectatio* is connoted with the term *manipulation* (to handle, to touch) in French. Rado, p. 501.

16 Tahiroğlu, Bülent: *Roma Hukukunda Furtum*, İstanbul, 1975, p. 109.

17 The general effect of the the texts just cited is that there was no theft, whatever else there was, if ownership passed. It would seem that property would pass, but even if it did not, it could hardly pass any the more because the fraudulent originator was not on the spot. According to Buckland, that is the reason why there is no *furtum* here, if he is away must be the absence of *contrectatio*. Theft is committed not only when a person removes the property of another with the intention of appropriating it, but everyone handles the property of another without the consent of owner. This of itself can hardly amount to the necessary *contrectatio*. Buckland, p. 474; Peschke, p. 97, fn. 12.

18 Tahiroğlu, p. 110.

'*Qui alienum quid iacens lucri faciendi causa sustulit, furti obstringitur…*'.

'A man who, for personal gain, takes away a thing belonging to another is guilty of theft…'

Dig. 47.2.61 (60) (Africanus libro septimo quaestionum):

'*Ancilla fugitiva quemadmodum sui furtum facere intellegitur, …*'

'Just as a runaway slave-woman is regarded as stealing herself…'[19].

Therefore, the scope of the concept *contrectatio* is larger than theft. It also contains *furtum usus* and *furtum possessionis* other than the simple theft mentioned in the contemporary law.

I. The Early Law Period

In the Lex duodecim tabularum, *furtum* is primarily trickery and *subreptio* is distinct from *furtum*. The armed robber and the night prowler were treated as thieves (Lex duodecim tabularum, 8.12.13) though they had as yet taken nothing. And it is certain that the typical thief is the *subreptor*, the man who privily takes the thing, not the fraudulent person, the trickster, who commits the *furtum* improprium[20].

In the early law, *contrectatio* was not necessarily considered as an objective element of *furtum*. The main texts which are believed to show that touching was not needed in Dig. 47.2.67.2 and also in Dig. 47.2.37[21].

Dig. 47.2.67.2 (Paulus libro septimo ad Plautium):

'*Eum, qui mulionem dolo malo in ius vocasset, si interea mulae perissent, furti teneri veteres responderunt*'.

'The older jurists held that a man who, with wrongful intent, summoned a muleteer before the magistrate was guilty of theft, if the mules dissappeared'.

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19 In some texts, *contrectare* is used not because the thief has possession prior to the act of theft but because, there is another reason making inappropriate the use of words signifying removal. Africanus states it in Dig. 47.2.61. This is a case not where the ancilla takes her child away with her, but one in which she gives birth after she has fled. MacCormack, Gerard D.: '*Definitions: Furtum and Contrectatio*', Acta Juridica, Vol. 129, 1977, p. 138.

20 Buckland, p. 467.

21 Unfortunately, *contrectatio* never received a clear definition. Perhaps, the jurists felt it best to avoid precision. *Contrectatio* could equally well mean handling, meddling, or interfering; but did it require actual physical contact, touching the property? Although theft normally involved physical contact between the thief and the stolen property, there could be exceptional situations in which theft was committed despite the absence of physical contact, just as Dig.47.2.37. Du Plesis, Paul: *Borkowski's Textbook on Roman Law*, Oxford, 2010, p. 330.

In this Digest text, the man who summoned a muleteer to court of no reason had abused a specific right, because filing a suit *(actio iniuriarum)* to punish such abusers was not possible then. In this concrete case, the *Aquilia* law was not applicable as no direct damage had existed. If the mules had died or disappeared when the muleteer was going to court, the ancient legists (*veteres*) had granted *actio furti* despite the fact that the summoner was not mentioned as the co-partner of the thief [22]. He has not been enriched nor has he handled them in a way which would fall under *contrectatio*[23].

The term *furtum,* here, is a vast and ambiguous concept with no objective element (*contrectatio*)[24].

For example, in the case of the tame peacock; somebody chases a tame peacock away that gets lost. He is guilty of *furtum*, if somebody else catches it. The text says that, if somebody else starts to get hold of the animal, *furtum* is present and the former owner can sue the chaser[25].

Dig. 47.2.37 (Pomponius libro 19 ad Sabinum):

'*Si pavonem meum mansuetum, cum de domo mea effugisset, persecutus sis, quoad is perit, agere tecum furti ita potero, si aliquis eum habere coeperit*'[26].

'If, when my tame peacock escaped from my house, you chased it so that it dissappeared, I could have the action for theft against you, if someone else should take it'.

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22 Zimmermann, Reinhard: *The Law of Obligations*, Cape Town, 1990, p. 924-925.

23 Watson suggests that, the animals have been stolen and that he is liable on account of accomplicity and also he has argued that this would mean that the wrongdoer was liable without *animus furandi*, which he would regard as an untenable belief. Watson, Alan: '*Contrectatio as an essential of furtum*', (Essential), Law Quarterly Review, Vol. 77, 1961, p. 529. On the other hand; Ibbetson argued that, it did not seem too far-fetched to see this as indicating a broadening of the mental element and the causal connexion between the acts of the wrongdoer and the loss of the goods, analogous to the extension of the physical element visible in the move from subtraction to *contrectatio* and the only difference was that the latter had became established law while the former had not done. Ibbetson, p.59, fn.37.
There has been no handling, one is inclined to say there has been no 'meddling with'. But there has been a displacement due to intermeddling. The text decides that, if someone meddles with the thing wilfully so as to deprive you of an economic interest in the thing, that is *contrectatio fraudulosa*. Buckland, p. 470-471.

24 Tahiroğlu, p. 109. To assume that this criterion was introduced by them would require more assumptions. That is indeed done; expansion of furtum to cases of wrongful damage and destruction, which was halted when lex Aquilia offered a solution. Sirks, p. 496.

25 Sirks, p. 497. For some discussion between Thomas and Watson on this text see, Watson, Alan: '*Contrectatio Again*', (Again), Studies in Roman Private Law, London, 1991, p. 293.

26 This is *furtum* '*si aliquis eum habere coeperit*'. On the principle of the text just considered the proviso ought not to be necessary. Buckland, p. 471.

Sabinus's definition reported by Aulus Gellius shows that, in his time handling, not asportation was the requirement for theft.

Aulus Gellius, Noctes Atticae, (XI.18.14):

'*Atque id etiam, quod magis inopinabile est, Sabinus dicit furem esse hominis iudicatum, qui, cum fugitivus praeter oculos forte domini iret, obtentu togae tamquam se amiciens, ne videretur a domino, obstitisset*'.

'And Sabinus tells this also, which is stil more suprising, that one person was convicted of having stolen a man, who, when runaway slave chanced to pass within sight of his master, held out his gown as if he were putting it on, and so prevented the slave from being seen by his master"[27].

Likewise the case of the fugitive slave, who is shielded from his master's eyes by somebody holding up his toga, this was *furtum* according to Aulus Gellius. There is no touching at all. Aulus Gellius exemplifies the offense committed by a man, who stood in front of a slave and prevented him from seening as a case of *furtum* with no concrete *contrectatio* element[28].

There has been a discussion on the question, whether the criterion of *contrectatio* was old, or whether it had been developed (out of asportation, that cannot happen without touching the object) at the end of the Republic, in order to restrain a too wide application of the delict of *furtum*[29].

II. The Classical Law Period

By the begining of the first-century B.C., *furtum* was defined by *contrectatio* and this could even comprise of cases without actual touching, like in the cases of the peacock and the fugitive slave[30].

In the classical period, damage to the aggrieved did not suffice for an act to be considered within the scope of *furtum,* unless the elements of *furtum* were substantiated. There could be no *furtum,* unless there was an ***animus furandi,*** or wrongful intention of appropriating property[31]:

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27 Sirks, p. 499, fn. 118.

28 Tahiroğlu, p. 109. But there are alternative ways of looking at this. Sabinus may have been thinking of theft '*ope consilio*' (aiding and abetting) and Gellius, may not have appreciated the distinction. Or we may hold that this distinction was not known to the earlier lawyers and those who aided were assimilated to the actual thief. Buckland, p. 469.

29 Sirks, p. 496.

30 For Sabinus, it was sufficient that there had been an improper interference, adtrectatio, and the later jurists refer commonly to *contrectatio*, that seems to mean the same thing and the shift has probably begun to occur before the time of Sabinus. The moving away from the older conception had already begun by the middle of the first century BC. Ibbetson, p. 56.

31 Tahiroğlu, p. 109.

Dig. 47.2.1.2 (Paulus libro 39 ad edictum):

'*Sic is, qui depositum abnegat, non statim etiam furti tenetur, sed ita, si id intercipiendi causa occultaverit*'.

'Thus, one who denies the existence of a deposit with him does not at once become liable for theft but only if he conceal the thing with a view to appropriating it'.

The case of cupboard being opened and the objects in it being touched, but *furtum* only commited with those objects taken away shows that the *contrectatio* was originally sufficient ground, or else the question would not have risen and asportation would not have been applied to limit its application[32].

Dig. 47.2.21. pr. (Paulus libro 40 ad Sabinum):

'*Volgaris est quaestio, an is, qui ex Acervo frumenti modium sustulit, totius rei furtum faciat an vero eius tantum quod abstulit. Ofilius totius Acervi furem esse putat: nam et qui aurem alicuius tetigit, inquit Trebatius totum eum videri tetigisse: proinde et qui dolium aperuit et inde parvum vini abstulit, non tantum eius quod abstulit, verum totius videtur fur esse. Sed verum est in tantum eos furti actione teneri, quantum abstulerunt. Nam et si quis armarium, quod tollere non poterat, aperuerit et omnes res, quae in eo erant, contrectaverit atque ita discesserit, deinde reversus unam ex his abstulerit et antequam se reciperet, quo destinaverat, deprehensus fuerit, eiusdem rei et manifestus et nec manifestus fur erit. Sed et qui segetem luce secat et contrectat, eius quod secat*[33] *manifestus et nec manifestus fur est*'.

Dig. 47.2.21.pr. introduces the problem, drawing attention to the tension between the idea of *furtum* as *contrectatio* and *furtum* as *subreptio*. The man who takes a measure out of a whole heap of corn or small quantity of wine from a barrel is held to commit *furtum* of the whole, for he has committed a *contrectatio* of the whole. On the other hand, the damages should be assessed solely by reference to the amount that he took[34] . The case of cupboard being opened and the objects in it being touched, but *furtum* only committed with those objects taken away shows that, the *contrectatio* was originally sufficient ground, or else the question would not have risen and asportation would not have been applied to limit its application[35].

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[32] Sirks, p. 497. If mere meddling with the deliberate intention of depriving the owner of his property had been the standard again the theft would have been restricted to what the thief took or intended to take. For these Republican jurists *contrectatio* is the touchstone for theft. Watson, Again, p. 301.

[33] Mommsen suggested that '*eius quod secat*' should be replaced with '*eius quod sequente nocte asportans deprehenditur*', an emendation that has found general acceptance. MacCormack, p. 135.

[34] Ibbetson, p. 63.

[35] Sirks, p. 497.

Labeo (Dig. 47.2.1.3.) put forward as essential element of *furtum* the *lucrandi causa*, the intent to enrich oneself. Sabinus, on the other hand, emphasised the dolose aspect and extened by this application to even *furtum* of land[36]. But he also reintroduced the *contrectatio* to cover cases of conversion and where the object has dissappeared as a result of touching.

Just like Pomponius (Dig. 47.2.36.2) and Gaius (Gai. I.3.198), Ulpianus, the last of the classical legists, also admits that *furtum* cannot exist without *contrectatio*[37]:

Dig. 47.2.52.19 (Ulpianus libro 37 ad edictum):

'*Neque verbo neque scriptura quis furtum facit: hoc enim iure utimur, ut furtum sine contrectatione non fiat. …*'.

'No one commits theft by word or writing; our rule is that there can be no theft without wrongful physical interference;…'[38].

Was Ulpianus in Dig. 47.2.52.19 thinking of cases in which no coins passed from one person to another but some loss was incurred through a representation? For example, a creditor might be induced through a piece of verbal or written trickery to forgo a debt which was due to him. What one has is use by Ulpianus of the notion of *contrectatio* to exclude *furtum* in an undefined area of loss caused through verbal or written statements. He does not say that there is no theft because in this particular type of case there is no *contrectatio*, but more generally and strongly that there is no theft without *contrectatio*. He cannot consistently have held that theft normally or usually involved *contrectatio* but that such a requirement was not necessary in all cases. However, despite the uncompromising nature of his formulation he may have accepted the existence of exceptions to a rule requiring the presence of *contrectatio* in all cases of theft. There is a difference between accepting *contectatio* as a normal but not a necessary requirement of theft

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36 Aulus Gellius, Noctes Atticae, Lib.XI, XVIII, 13: 'In this book there is also written a thing that is not commonly known, that thefts are committed, not only of men and movable objects which can be purloined and carried off secretly, but also of an estate and of houses; also that a farmer was found guilty of theft, because he had sold the farm which he had rented and deprived the owner of its possession'.

37 Buckland, p. 467. Dig. 47.2.22.1 (Paulus, 9 ad Sabinum): 'if he handles the other things in the box with the intent to steal them, even if he does not carry them off, he commits *furtum* of them; if he handles them only to move them out of the way of the object of his theft, it is not *furtum*'. Ulpianus would presumably not disagree even with the first case (Dig. 47.2.52.19): the difference is that for Paulus (Dig. 47.2.21.7) there is a liability if the things were handled *furti faciendi causa*, while for Ulpianus the bundle was unstrapped simply ut contrectat the contents. Ibbetson, p.67, fn.84.

38 The most common word used to describe the act of stealing is subripere, with *contrectare* normally being used to designate the interference with goods that have been stolen already or simply to underline the minimal condition for liability. Ibbetson, p. 57.

and accepting it is a necessary requirement subject to the existence of a number of exceptions[39].

Dig. 47.2.52.22 (Ulpianus libro 37 ad edictum):

'*Maiora quis pondera tibi commodavit, cum emeres ad pondus: furti eum venditori teneri mela scribit: te quoque, si scisti: nam [] non [enim] ex voluntate venditoris accipis, cum erret in pondere*'.

'Someone lent you heavier weights when you were buying by weight; Mela writes that he will be liable to the vendor for theft as also will you if you are aware of the facts; for you do not acquire the goods with the owner's consent when he is in error over the weight'.

In this text (Dig. 47.2.52.22)[40], you are buying goods by weight; I lend you false weights so that you get more than is due. Ulpianus quotes Mela as saying that, I am quilty of theft and you also liable. I am the primary thief, for I am liable whether you are innocent or not. There has been a *contrectatio*, not indeed by the thief himself, but procured him[41].

According to Watson, in this text, first alternative the purchaser is innocent. Nevertheless, the lender of the false weights is guilty of *furtum*. He can be said to have handled fraudulently through the innocent agent. In this situation, the owner is deprived if his property and it can hardly have made difference whether or not the wrongdoer or his accomplice had fortuitously touched it[42]. This is not a wide extension of *contrectatio*.[43]

III. The Post Classical Law Period

In the post classical period, there were no significant changes in the definition of the delict of *furtum* so Iustinianus, in his codification, defines the *delict* of *furtum* as:

Iust. Inst. (4.1.1):

'*Furtum est contrectatio rei fraudulosa vel ipsius rei vel etiam usus eius possessionisve, quod lege naturali prohibitum est admittere*'.

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39 MacCormack, p. 144.

40 The real problem is that, Mela thought that even if the buyer did not know of the heavier weights, the provider was nonetheless guilty of furtum. This is suprising since he does not gain by it, nor touches any of the wares weighted out or takes anything with him. So, according to the criteria usually applied in the doctrine, there is no argument to hold him liable for furtum. Sirks, p. 499.

41 Buckland, p. 472.

42 Ibbetson, p. 61-62.

43 Watson, Alan: '*Contrectatio as an Essential of Furtum*', (Furtum), Studies in Roman Private Law, London, 1991, p. 289.

'Theft is the fraudulent handling of property, whether of the article itself or the use or possession of the same, and to commit it is prohibited by natural law'.

From the definition given in Institutiones of Iustinianus, it can be concluded that the delict of *furtum* contains certain subjective and objective elements. The objective elements include the unlawfulness of the act and the act of appropriating someone else's things, while the subjective ones include *animus*, that is, the offender's desire for material gain by appropriating things[44].The Roman law never had our highly technical rule of asportation: the thing need not have been moved. But it had an almost equally technical requirement, that of *contrectatio*: the thing must actually have been handled, *furandi animo*[45].

All of the aforementioned requirements have to be cumulatively met in order for the delict of *furtum* to exist. If the *contrectatio* has just the aim of endamaging, it would exist *damnum in iure datum*. If a slave is caught for being killed immediately, *furtum* would not be committed in this case. In the absence of the subjective element, that is, the intention to obtain material gain by seizing things, there will be the delict of *damnum iniuria datum*.This perception is a strange to the early times of Roman Law and it gradually admitted in Iustinianus Law[46].

In order to charge the perpetrator of the delict of *furtum* with this act, it must be done out of malice (*dolus*), and not by negligence (*culpa*). Also, a person who can not understand the significance of the committed act or a person who reasonably believes that he is entitled to appropriate certain thing, will not be responsible for the commission of this delict[47].

Although the definitions of the delict of *furtum*, legal protection, forms of expression and other basic characteristics in the Institutes of Gaius and Iustinianus are in many ways similar. The authors in their works give the explanations of this delict that testify to the level of development of the law and the conditions in different periods of development of the Roman State.

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44 Arsic, Aleksandar: '*Furtum in Roman and Contemporary Law*', Ius Romanum, Vol.2, 2016, p. 8.

45 Buckland, William Warwick / Mcnair, Arnold D. / Lawson, Frederick Henry: *Roman Law and Common Law*, Cambridge, 1974, p. 352.

46 Tahiroğlu, p. 114.

47 Arsic, p.8.

Conclusion

As a common view of the Romanist doctrine put forward that, there was a shift in the range and meaning of *furtum* between the Lex duodecim tabularum and the Late Republic, but regarding the nature of these changes pinions differ. Thomas[48] and Zimmermann[49] assume that, *furtum* was in the decemviral period limited to the asportation of moveable objects.

Watson took about the same position, that *contrectatio* was essential for theft. But unlike Buckland[50] and Thomas, he assumed that this was always physical touching, not also a meddling.

Buckland saw *contrectatio* as a rather limited criterion. He assumed that it was introduced as legal element of *furtum* in the Principate from the 2nd A.D., in order to extend the delict to attempted *furtum*. This might even have comprised cases of attempt without actual touching[51].

Mommsen[52] asserts that according to the view prevalent in the classical law but changed in the Iustinianus law, the jurists had rather used *contrectatio* (handling) than taking away the property as attempts of theft (preparatory act) were not punished in the Roman law. In other words, they assumed bringing the moment of actual crime (like the main offence) forward beneficial. Therefore, the *furtum* offense is deemed to have been committed even if the thief leaves the property instead of actually taking it away.

Birks[53], does not suggest what the central element of *furtum,* in his view, was but argues that the commitment to carrying off as the paradigm of theft did not entail the selection of asportation as the necessary and sufficient *actus reus* of the wrong and it was, in fact, almost wholly neutral.

Ibbetson[54] assumes too that by the middle of the 1st century B.C. the jurists started to discuss *contrectatio* as element, presumably to cover cases where there was no taking away as such present. On the other hand, according to MacCormack[55] one should not too easily assume that all jurists of these times considered *contrectatio* a necessary element. Besides, the word has an extraordinary wide range of meanings.

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48 For some remarks on *contrectatio* by Thomas, Joseph Anthony Charles: '*Contrectatio, complicity and furtum*', Iura, Vol. 13,1962, p. 69-88.

49 Zimmermann, p. 924-925.

50 Sirks, p. 503.

51 Buckland, p. 486.

52 Mommsen, Theodor: *Le Droit Pénal Romain*, C.III, Paris, 1907, p.36 ff.

53 Birks, p. 350.

54 Ibbetson, p. 55-56.

55 MacCormack, p. 144.

The question is, is *furtum* by mere touching possible? Some confirm this already Lex duodecim tabularum, others see this only in the Late Republic or Early Principate as possible, due to an extension on the meaning of *contrectatio*, that is: that it was separated from asportation and had become a criterion in itself[56].

As a conclusion; when we look at the development of Roman law through periods of Roman history, we can see the evolution of the legal institute of *furtum*. Thus, even Lex duodecim tabularum defines the delict of *furtum* in detail and the most common forms of its manifestation. Further study of this institute has been followed through the actions of the *praetor*, in the period of the Republic, together with the development of resources of procedural protection. Then Gaius, in the Institutes, gives his definition of this delict, whose fundamental elements remain largely the same as in Institutiones of Iustinianus. The importance of studying the delict of *furtum*, is not limited to the study of crimes against property. Because the delict of *furtum* in Roman law, included many forms of theft, which in contemporary criminal legislation are differentiated as separate crimes. After a comparative study of the development of the delict of *furtum* through periods of the Roman Empire, one can come to the conclusion that, its evolution is just one of the witnesses of a high level of development of Roman law.

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Bibliography

Arsic, Aleksandar, '*Furtum in Roman and Contemporary Law*', Ius Romanum, Vol.2, 2016, p.1-13.

Biondo Biondi, *Istituzioni di Diritto Romano*, Milan, 1946.

Birks, Peter, '*A Note on the Development of furtum*', The Irish Jurist, Vol. 8, 1973, p.349-355.

Buckland, William Warwick, '*Contrectatio*', The Law Quarterly Review 57, 1941, p. 467-474.

Buckland, William Warwick/ Mcnair, Arnold D. / Lawson, Frederick Henry, *Roman Law and Common Law*, Cambridge 1974.

Burdick, William L., *The Principles of Roman Law and Their Relation to Modern Law*, New Jersey 2012.

Du Plesis, Paul, *Borkowski's Textbook on Roman Law*, Oxford 2010.

[56] Sirks, p. 504.

Ibbetson, David, '*The danger of definition: contrectatio and appropriation'*, in The Roman Law Tradition (ed. Lewis, Andrew/ Ibbetson, David), Cambridge 1994, p. 54-72.

MacCormack, Gerard D., '*Definitions: Furtum and Contrectatio*', Acta Juridica 129, 1977, p. 129-147.

Mommsen, Theodor, *Le Droit Pénal Romain*, C.III, Paris, 1907.

Peschke, Seldağ Güneş, '*Furtum as a Delict under Ius Civile*', in Roma Hukuku ve Güncellik, (ed. Ünver,Yener), Ankara, 2017, p. 95-103.

Rado, Türkan,'*Gaius'a göre Klasik Roma Hukukunda Furtum Suçu*', İstanbul Üniversitesi Hukuk Fakültesi Mecmuası 1-2, 1952, p. 479-519.

Sirks, Adriaan Johan Boudewijn, '*Furtum and manus/potestas*', Tijdschrift voor Rechtsgeschiedenis 81, 2013, p. 465-506.

Tahiroğlu, Bülent, *Roma Hukukunda Furtum*, İstanbul 1975.

Thomas, Joseph Anthony Charles, '*Contrectatio, complicity and furtum*', Iura 13,1962, p. 69-88.

Watson, Alan, '*Contrectatio as an essential of furtum*', (Essential), Law Quarterly Review 77, 1961, p. 526-532.

Watson, Alan, '*Contrectatio Again*', (Again), Studies in Roman Private Law, London 1991, p. 291-301.

Watson, Alan, '*Contrectatio as an Essential of Furtum*', (Furtum), Studies in Roman Private Law, London 1991, p. 283-289.

Watson, Alan, '*The Definition of Furtum and The Trichotomy*', (Trichotomy), Tijdschrift voor Rechtsgeschiedenis 28, 1960, p. 197-210.

Zimmermann, Reinhard, *The Law of Obligations*, Cape Town 1990.

http://droitromain.upmf-grenoble.fr/ (18.11. 2017)

VITAL PROTECTION FOR WATERS: CITIZEN SUIT PROVISION OF THE UNITED STATES CLEAN WATER ACT

Sular İçin Hayati Koruma: Birleşik Devletler Temiz Su Yasası Vatandaş Davaları Hükmü

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ABSTRACT

The American experience of citizen participation authorizes Americans to bring a citizen suit against private polluters. Environmental citizen suits are indeed vital for the effective enforcement of environmental statutes; they have secured compliance with environmental laws and have aided greatly in better prevention of pollution. Such suits are especially valuable when the federal and state governments fail to enforce those laws; they provide supplemental enforcement by filling the gaps in governmental enforcement actions.

The citizen suit provision of the United States Clean Water Act (CWA) empowered citizens or citizen groups to enforce the standards of the Act. Plaintiff citizens would no longer bear the relatively difficult burden of proof to succeed in their lawsuit. They would only have to prove that the defendant was out of compliance with the Act.

This study emphasizes the importance of the American experience of the citizen suit provision of the CWA in the scheme of the modern federal water pollution enforcement mechanism under the Act in order to promote the adoption of the provision and practices presented in the Act by other countries. It argues that citizen suits are necessary for protection of the nation's waters since governmental enforcement tools have failed to provide adequate and efficient enforcement.

Keywords: Clean Water Act (CWA), citizen suit(s), water, environment, and enforcement.

ÖZET

Amerikan vatandaş katılım deneyimi, Amerikalılara, özel kirleticilere karşı vatandaş davası açma hakkı vermiştir. Çevre vatandaş davaları, çevre yasalarının etkili bir şekilde uygulanması için hayati öneme sahiptir; çevre yasalarına uygunluğu güvence altına alarak, kirliliğin daha iyi önlenmesine yardımcı olur. Bu davalar, özellikle federal ve eyalet hükümetleri bu yasaları uygulamakta başarısız olduğunda değerlidir; devlet idaresi eylemlerinde oluşan boşlukları doldurarak ek bir uygulama sağlarlar.

Birleşik Devletler Temiz Su Yasası vatandaş davaları hükmü, vatandaşlara veya gruplara Yasa'nın standartlarını uygulama yetkisi verir. Davacı vatandaşlar, dava açmada göreceli olarak zor olan kanıt yükünü taşımak yerine sadece davalının Yasa'ya aykırı hareket ettiğini kanıtlamakla yükümlüdürler.

Bu çalışma, Birleşik Devletler Temiz Su Yasası vatandaş davaları hükmü ve uygulamalarının diğer ülkeler tarafından benimsenmesini teşvik etmek için, bu hükmün Yasa kapsamındaki çağdaş federal su kirliliği uygulama mekanizması içindeki yeri ve önemini vurgulamaktadır. Bu çalışma, vatandaş davalarının, hükümet uygulama araçları yeterli ve verimli bir koruma sağlamadığı için, ulusların sularının korunması için gerekli olduğunu savunmaktadır.

Anahtar Kelimeler: Temiz Su Yasası (CWA), vatandaş davası, su, çevre ve uygulama.

I. INTRODUCTION

Many Americans take safe water for granted.[1] In contrast, after many incidents such as the water crisis that hit the city of Milwaukee in 1993, more Americans no longer take safe water for granted.[2] When evidence indicates that a nation's water is not as clean as citizens believe it to be, and the government fails to take action in response, what can citizens do to protect the quality of their water?

The United States (US) Congress placed citizen suit provisions in almost all of the major federal environmental statutes enacted during the 1970s and 1980s with the intent of promoting enforcement of environmental laws.[3] The citizen suit provision of the Clean Water Act (CWA) empowers citizens to bring an action against the violator or violators of the Act.[4] Congress perceived the adoption of Section 505 citizen suit provision of the CWA to be urgent and necessary due to the failure of the government to successfully enforce the federal water quality requirements and standards set up under the Act.[5]

According to Buzz Thompson, "the most pervasive, prominent, and continuing innovation in the modern environmental era has been the involvement of citizens in the enforcement of environmental laws."[6] Citizen suit provisions of environmental laws arose as a "Congressional response" to lack of enforcement by the federal and state governments.[7] Citizen suits are allowed when government authorities are unresponsive;[8] Congress conceived that "citizen suits would serve as adjuncts to, but not substitutes for, the enforcement activities of federal and state governments."[9] In other words, citizen suits provide supplemental enforcement by filling the gaps in

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1 Rideout, Christine L., (2011), Where are all the citizen suits?: the failure of safe drinking water enforcement in the United States, Health Matrix, Vol. 21, p. 657-58.

2 *Id.* at 658.

3 33 U.S.C. §1365; 15 U.S.C. §2619; 16 U.S.C. §1540(g); 42 U.S.C. §6972(a)(1)(B); 42 U.S.C. §7604.

4 McQueary Smith, Beverly, (1990), The Viability of Citizens' Suits Under the Clean Water Act After Gwaltney of Smithfield v. Chesapeake Bay Foundation, Case W. Res., Vol. 40, p. 8-9.

5 Shepherdson, Melanie, (2011), Citizen Suits, in The Clean Water Act Handbook, Mark A. Ryan eds., ABA Publishing, p. 257-258.

6 Seidenfeld, Mark & Satz Nugent, Janna, (2005), "The Friendship of the People": Citizen Participation in Environmental Enforcement, Geo. Wash. L. Rev., Vol.73, p. 298; Thompson, Jr., Barton H., (2000), The Continuing Innovation of Citizen Enforcement, U. Ill. L. Rev., Vol. 2000, p. 185.

7 Smith, *supra* note 4, at 41-42.

8 Potts, Elizabeth Rae, (1999), A Proposal for an Alternative to the Private Enforcement of Environmental Regulations and Statutes Through Citizen Suits: Transferable Property Rights in Common Resources, San Diego L. Rev., Vol. 36, p. 554.

9 Smith, *supra* note 4, at 41.

governmental enforcement actions.[10]

The ultimate goal of this study is to reveal the necessity of citizen enforcement in the scheme of the modern federal water pollution enforcement mechanism under the CWA, in order to promote the adoption of the citizen suit provision of the CWA and practices presented in the Act by other countries. The chapter following this introduction is dedicated to analyze the objective and utility of environmental citizen suits in general. The third chapter examines the CWA citizen suit provision specifically by providing descriptive information about the statutory and regulatory background of the provision. The fourth chapter analyzes the procedural and substantive requirements provided for the citizen enforcement of the Act. The fifth chapter examines some general aspects of the CWA citizen suit provision, which may help the reader to better understand the concept of citizen enforcement under the Act. The sixth chapter talks about the role and importance of citizen enforcement under the CWA. It argues that the US governmental enforcement mechanism is insufficient to assure adequate protection for the nation's waters, and that citizen suits are vital and necessary to assure compliance with the CWA and to provide a higher degree of protection for US waters. The seventh and the last chapter provides the conclusion of the study by presenting the main findings of the research.

II. ENVIRONMENTAL CITIZEN SUITS IN GENERAL

Joseph Sax initially raised the idea of environmental citizen suits over 45 years ago.[11] He claimed that the necessity for such suits arose from the financial problems and political pressures that have weakened the government's ability to effectively enforce environmental laws.[12] After that, the University of Michigan Law School added "a citizen's right to litigate to protect environmental and public trust resources" to the Michigan Environmental Protection Act of 1969,[13] and then this step was followed by the enactment of the citizen suit provision of the Clean Air Act (CAA)[14] in 1970.

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10 Longfellow, Emily, (2001), Friends of the Earth v. Laidlaw Environmental Services: A New Look At Environmental Standing, Environs Envtl. L. & Pol'y J., Vol. 24, p.12; Casdorph, Laveta, (1999), The Constitution and Reconstitution of the Standing Doctrine, St. Mary's L.J. , Vol. 30, p. 547.

11 Lehner, Peter H., (1996), The Efficiency of Citizen Suits, Alb. L. Envtl. Outlook, Vol.2, p. 4.

12 *Id.*

13 Coplan, Karl S., (2014), Citizen Litigants Citizen Regulators: Four Cases Where Citizen Suits Drove Development of Clean Water Law, Colo. Nat. Resources, Energy & Envtl. L. Rev., Vol. 25, p.65.

14 42 U.S.C. § 7604.

A citizen suit provision authorizes citizens or citizen groups to enforce the laws of the US by acting as "private attorneys general." [15] It grants a statutory right of action to individuals or organizations to enforce laws.[16] Most of the major environmental statutes have adopted this provision,[17] which authorizes private citizens to bring suits against alleged violators of environmental statutes. [18] According to Buzz Thompson, "the most pervasive, prominent, and continuing innovation in the modern environmental era has been the involvement of citizens in the enforcement of environmental laws."[19]

Citizen suits have allowed the public to be actively involved in the enforcement of environmental laws for the first time.[20] Such innovation[21] allowed private citizens to seek statutory rights for the benefit of all society, rather than personal benefit.[22]

In the late 1960s and 1970s, the US government recognized that there was a strong need for protecting the environment.[23] The interest in environmental conservation brought awareness of the deficiency of a comprehensive environmental enforcement mechanism, and the government's failure to successfully enforce the environmental statutes led to the enactment of citizen suits.[24] The CAA was the first federal environmental statute to include a citizen suit provision,[25] and today nearly all federal environmental statutes involve citizen suit provisions.[26] In essence, citizen suit provisions of different

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15 Krent, Harold J. & Shenkman, Ethan G., (1993), Of Citizen Suits and Citizen Sunstein, Mich. L. Rev., Vol. 93, p. 1793.

16 Casdorph, *supra* note 10, at 507.

17 33 U.S.C. §1365; 15 U.S.C. §2619; 16 U.S.C. §1540(g); 42 U.S.C. §6972(a) (1) (B); 42 U.S.C. §7604.

18 May, James R, (2004), Now More than Ever: Trends in Environmental Citizen Suits, Widener L. Rev., Vol. 10, p. 1-2.

19 Seidenfeld & Nugent, *supra* note 6; Thompson, *supra* note 6.

20 Thompson, *supra* note 6.

21 Miller, Jeffrey G., (1983), Private Enforcement of Federal Pollution Control Laws, Part I, Envtl. L. rep., Vol. 13, p.309 (Before environmental citizen suits were enacted, statutes in other fields of law such as the antitrust treble-damage provision had allowed the private enforcement of laws. The real innovation was that such suits empowered citizens or citizen groups to enforce the standards of environmental laws. Plaintiff citizens would no longer bear the relatively difficult burden of proof to succeed in their lawsuits. They would only have to show that the defendant was out of compliance with environmental laws.)

22 Miller, Jeffrey G. & Environmental Law Institute, (1987), Citizen Suits: Private Enforcement of Federal Pollution Control Law § 9-4, p.1.

23 Evans, Lynwood P., Bennett v. Spear: A New Interpretation of the Citizen-Suit Provision, Campbell L. Rev. Vol. 20, p. 173.

24 Elliot, Sharon, (1987), Citizen Suits Under the Clean Water Act: Waiting for Godot in the Fifth Circuit, TUL. L. Rev. Vol. 62, p. 176.

25 42 U.S.C. § 7604.

26 Evans, *supra* note 23, at 184.

federal environmental statutes have similar basis and elements.[27] Generally, environmental citizen suits allow "any person" to commence a civil action against either "any person" who violates a standard, limitation, or permit under the law or the Administrator of the EPA for failure to perform a non-discretionary duty under the law.[28]

Besides federal environmental laws, state environmental statutes also contain citizen suit provisions.[29] Some state environmental citizen suit provisions allow citizens to sue for the enforcement of environmental laws while others allow citizens to enforce specific attributes of environmental statutes. [30]

While enacting the CAA, Congress wished to supplement the government's enforcement capacity by partially granting enforcement authority to citizens.[31] Simultaneously, Congress was reluctant to allow citizens to interfere with governmental enforcement.[32] When the citizen suit provision of the CAA was first proposed it faced substantial resistance. Opponents of the provision were concerned that citizen suits would burden the courts and impede the power of governmental actions.[33] Additionally, some feared that citizen suits would cause incompatible and unsystematic application of environmental laws because they were not governed by a particular agency.[34]

Contrary to opponents' arguments, proponents of citizen suit provisions argued that citizen suits would prompt the governmental enforcement of environmental laws.[35] Furthermore, some argued that citizen suits would hinder the reliability of federal environmental agencies, which generally resulted from financial difficulties or political pressures to which agencies were exposed.[36]

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27 Smith, Kristi M., (2004), Who's Suing Whom?: A Comparison of Government and Citizen Suit Environmental Enforcement Actions Brought Under EPA-Administered Statutes, 1995-2000, Colum. J. Envtl. L., Vol. 29, p. 365.

28 42 U.S.C. § 7604(a).

29 May, James R., (2004), The Availability of State Environmental Citizen Suits, Nat. Resources & Env't., Vol. 18, p. 53.

30 *Id.*

31 Mann, David S., (1991), Polluter-financed environmentally beneficial expenditures: Effective use or improper abuse of citizen suits under the Clean Water Act?, Envtl. L., Vol. 21, p. 180.

32 Snook, Robert D., (1998), Environmental Citizen Suits and Judicial Interpretation: First Time Tragedy, Second Time Farce, W. New Eng. L. Rev. Vol. 20, p. 315.

33 *Id.* at 316.

34 *Id.*

35 Miller, Jeffrey G., (2003), Overlooked Issues in the "Diligent Prosecution" Citizen Suit Preclusion, Widener L. Rev. Vol. 10, p. 70.

36 Miller, *supra* note 21, at 10, 310.

Congress did not ignore the opponents' arguments while passing the CAA. In response to their fears, Congress added some limitations to the citizen suit provision of the Act. First, citizens must notify both the relevant agency and violator or violators of law prior to taking an action to give them a chance to take appropriate and necessary measures.[37] Second, citizens have been allowed to sue only for enforcement of law, not for damages.[38] Additionally, frivolous or harassing citizen suits have been discouraged by awarding attorney fees to prevailing defendants in those cases, while at the same time the statute itself has encouraged citizen suits by awarding attorney fees to prevailing citizens.[39] Lastly, citizens have not been allowed to take enforcement actions if the government has already started an action germane to the same violation or violations.[40]

The concept of environmental citizen suits arose from the need for greater public participation in the enforcement of laws due to the lack of efficient and sufficient governmental enforcement mechanisms of environmental laws,[41] and citizen participation in the enforcement of environmental laws has become a "central element" of environmental laws.[42] Statistics show that approximately 110 civil environmental cases were brought to federal courts between the years of 1993 and 2002, and almost seventy-five percent of those were citizen suits.[43] As it is seen, a greater part of the environmental enforcement actions arise from citizen suits.[44] In particular, the citizen suit provision of the CWA has been very successful; between the years of 1995 and 2000, 287 citizen suit enforcement actions were brought and 252 of those were filed under the CWA.[45]

III. CITIZEN SUIT PROVISION OF THE CLEAN WATER ACT

Over the last forty years, the citizen suit provision of the CWA has become an effective enforcement tool that allows individuals and organizations to bring an action against a violator or violators of the Act.[46] Citizen suits have

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37 *Id.*

38 Mann, *supra* note 31.

39 Miller, *supra* note 21, at 10, 310.

40 Miller, *supra* note 35, at 66.

41 Sunstein, Cass R., (1992), What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III, Mich. L. Rev., Vol. 91, p. 193.

42 Cleve, George Van, (1999), Congressional Power to Confer Broad Citizen Standing in Environmental Cases, Envtl. L. Rep., Vol. 29, p. 10038.

43 May, *supra* note 18, at 8.

44 *Id.*

45 Rideout, *supra* note 1, at 685.

46 Werner, Matthew M., (1995), Mootness and Citizen Suit Civil Penalty Claims Under the Clean Water Act: A Post-Lujan Reassessment, Envtl. L., Vol. 25, p. 801.

played a critical role in the enforcement of the CWA's standards; in 1985, the Senate Committee on Environment and Public Works declared that citizen suits are a significant portion of all enforcement actions brought in federal courts under the CWA.[47] The Senate Committee also defined citizen suits as a "proven enforcement tool," which "operates as Congress intended to both spur and supplement to government enforcement actions."[48]

The utter innovation of the citizen suit provision of the CWA was not that it gave private citizens a right to sue for pollution or degradation waters. Prior to the creation of this provision, citizens had applied tort actions to common law to terminate or mitigate water pollution; under actions for negligence, trespass, private and public nuisance, they could demand injunctive relief and damages.[49] The utter innovation was that the CWA's citizen suit provision authorized citizens or citizen groups to enforce the standards of the Act. Plaintiff citizens would no longer bear the relatively difficult burden of proof to succeed in their lawsuit. They would only have to prove that the defendant was out of compliance with the CWA.

A- Congressional Intent behind the Enactment of the Citizen Suit Provision of the Clean Water Act

Congress added a citizen suit provision, Section 505, to the Federal Water Pollution Control Act (FWPCA) in 1972.[50] By enacting this provision, Congress purposed federal and state governments to be primarily responsible for enforcing the Act.[51] Additionally, they intended to supplement governmental enforcement actions to ensure that the CWA is being appropriately enforced.[52] Such an enactment was urgent as both the federal and state governments had failed to effectively enforce the CWA's federal water quality standards.[53]

The public had different opinions regarding the adoption of the citizen suit provision under the CWA. Proponents of involving a citizen suit provision in the CWA asked Congress to authorize citizens with the similar enforcement

47 S. Rep. No. 50, 99th Cong., 1st Sess. 28 (1985).

48 *Id.*

49 Elliot, *supra* note 24.

50 Frye, Russell S., (1993), Citizens' Enforcement of the US Clean Water Act, in Water Pollution Law and Liability, Patricia Thomas ed., Graham & Trotman & International Bar Association, p.183 (FWPCA was named to the CWA in 1977 by the enactment of the FWPCA Amendments of 1977.).

51 Shepherdson, *supra* note 5, at 258.

52 Robinson, Gail J., (1987), Interpreting the Citizen Suit Provision of the Clean Water Act, Case W. Res., Vol. 37, p. 516.

53 *Id.*

privileges granted to citizens under the CAA.[54] They argued that such a provision was necessary for a larger participation of the public in the enforcement of the Act.[55] Additionally, some supporters claimed that citizen suits prevent possible environmental contamination that the government otherwise would not address.[56]

On the other hand, opponents were worried that citizen suits under the CWA would result in tedious litigation and Congress would lose power to monitor the EPA's execution of the federal law.[57] They critically questioned the reason behind granting private individuals and organizations such expansive power.[58]

Congress believed that the protection of environmental quality has national value that should be paid attention to by both the government and public interest groups; therefore, they supported citizens' participation in the enforcement of the CWA, which not only creates public confidence in the government's attempt to enhance water quality, but also guarantees the enforcement of the Act.[59]

The structure of the CWA indicates that Congress intended to create the citizen suit provision of the Act primarily as a means of prompting federal and state governmental enforcement.[60] Such an inference is based on the statute itself, which imposes three restrictions on the implication of citizen suits. First, citizens cannot commence suits if the Administrator or the state has commenced a suit and is "diligently prosecuting" an enforcement action.[61]Second, citizens can only bring suits for enumerated violations.[62] Third, citizens are obliged to give notice to the Administrator, the alleged polluter, and to the state in which the alleged violation occurs sixty days before commencing a suit.[63] These restrictions indicate that Congress did not only

54 Smith, *supra note* 4, at 9.

55 Attwood, Jason, (2000-2001), ARTICLE III - Standing - Article III Standing is Available To Citizen Group Seeking to Enforce Provisions Of The Clean Water Act Through Citizen Suit Provision - Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167 (2000), Seton Hall Const. L.J., Vol. 11, p. 796.

56 May Peters, Lori, (1999), Comment, Reloading the Arsenal in the Informational War on Pollution - Citizens As Soldiers in the Fight and How a Lack of "Actionable" Legs On Which to Stand Nearly Forced a Cease-Fire, Vill. Envtl. L.J., Vol. 10, p. 159.

57 Smith, *supra* note 4, at 9-10.

58 Attwood, *supra* note 55.

59 Robinson, *supra* note 52, at 519.

60 Goodman McKinney, Carie, (1986), Statute of Limitations for Citizen Suits under the Clean Water Act, Cornell L. Rev., Vol. 72, p. 201.

61 33 U.S.C. § 1365(b)(1)(B).

62 33 U.S.C. § 1365(f).

63 33 U.S.C. § 1365(b)(1)(A).

intend to envision citizen suits as supplemental to government enforcement, but also intended to avoid excessive amount of litigation and to reduce the burden on the judicial system.[64]

B- Reasons behind the Relative Popularity of the Citizen Suit Provision of the Clean Water Act

Citizens, who are highly active litigants under the CWA, have been filing many suits against illegal polluters of the nation's waters.[65] The CWA's citizen suit provision has clearly been the most often litigated provision in the midst of all environmental laws.[66] There are several explanation for this popularity. [67]

First, it is relatively easy to demonstrate violations of the National Pollutant Discharge Elimination System[68] (NPDES) permits,[69] which determine the amount of several pollutants that can be lawfully discharged from several point sources over several periods of time.[70]

NPDES holders are required to record test results and other data with the EPA,[71] and to work together with state agencies by keeping information updated on Discharge Monitoring Reports (DMRs).[72] The ease of demonstrating violations of NPDES permits results from the fact that monitoring reports are subject to disclosure under freedom of information; furthermore, EPA and state agency websites have been disclosing compliance information to the public.[73] A large number of courts have ruled that DMRs are acceptable as evidence of violations of the CWA.[74] Thus, any plaintiff may easily succeed in a citizen suit filed under the CWA only by demonstrating that the signified discharge amount goes over the allowed limit on the NPDES permit.[75]

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64 Robinson, *supra* note 52, at 520.

65 Shepherdson, *supra* note 5, at 257.

66 Lloyd, Edward, (2012), Citizen Suits and Defenses Against Them, in ALI-ABA Continuing Professional Education Environmental Litigation, p. 899.

67 *Id.* (A total of 298 citizen suit complaints were received under the CWA between the years of 1995 and 2001, while at the same time, only 38 citizen suit complaints were received under the CAA.).

68 33 U.S.C. § 1342 (NPDES program prohibits the discharge of any pollutant from any point source into the nation's waters except as authorized by a permit.).

69 Frye, *supra* note 50, at 184.

70 Werner, *supra* note 46, at 803.

71 Battle, Jackson B. & Lipeless, Maxine I., (1998), Water Pollution, 3rd ed., Anderson Publishing Co., p. 2 (The EPA is an independent agency of the US federal government and has the primary responsibility for water quality and water pollution issues.).

72 Berger, Emily A., (2000), Standing at the Edge of a New Millennium: Ending a Decade of Erosion of the Citizen Suit Provision of the Clean Water Act, Md. L. Rev., Vol. 59, p. 1373.

73 Coplan, *supra* note 13, at 70-71.

74 *Id.* at 71.

75 Rideout, *supra* note 1, at 685-86.

Another explanation for the popularity of the CWA's citizen suit provision is that it is relatively easy for citizens or citizen groups to take example of water discharges, and laboratory water analysis are available across the country and affordable.[76] Additionally, the CWA has obtained significant publicity since it was enacted.[77] Furthermore, the CWA is a well-known statute, the average American has heard more about the CWA than other environmental laws.[78]

Another reason that the CWA's citizen suit provision has crucially succeeded in enforcing the Act is the developing Waterkeeper movement.[79] Under this movement, Waterkeepers too often commence citizen suits themselves or stimulate others to do so.[80] Furthermore, public interest groups have significantly contributed to the citizen enforcement of the CWA; for instance, the Sierra Club, the Natural Resources Defense Council, the Chesapeake Bay Foundation, and Public Interest Research Group branches have brought many suits against violators of the Act since the early 1980s.[81]

C- Language of the Citizen Suit Provision of the Clean Water Act

The citizen suit provision of the CWA that is included in Section 505(a) of the Act provides:

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf—

1. against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
2. against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.[82]

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76 Coplan, *supra* note 13, at 70.

77 Rideout*, supra* note 1, at 686-87 (To give one example "the media bombardment of the public with images of the Cuyahoga River burning" led Americans to realize that many parts of the nation's water "were no longer swimmable or fishable.").

78 *Id*. at 687.

79 Gross, Joel M. & Stelcen, Kerri L., (2012), Clean Water Act, 2nd ed., ABA Publishing, p. 131 (The movement started "with the creation of the Hudson Riverkeeper in 1996.").

80 *Id.* at 132. (Waterkeepers are nonprofit organizations.).

81 Frye, *supra* note 50.

82 33 U.S.C. § 1365(a).

As it seen, the CWA makes available two kinds of citizen suits. First, according to Section 505(a)(1) "any citizen" may commence an action against "any person" alleged to be in violation of the Act's "effluent standard or limitation" or an order of the Administrator or the state that is issued with respect to an effluent standard or limitation.[83] The Act describes the term of "person" widely; accordingly, "person" includes individuals and a huge variety of entities.[84] Furthermore, the CWA's citizen suit provision itself states that the term of "person" includes "the United States, and any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution."[85] The term of "effluent standard or limitation" is also defined broadly, embracing almost all standards and limitations created by the EPA and the states under the CWA.[86]

Second, Section 505(a)(2) of the CWA authorizes any citizen to initiate a suit against the Administrator who fails to "perform any act or duty" under the CWA, "which is not discretionary with the Administrator."[87] The question to be addressed in this framework is whether a particular duty is nondiscretionary.[88] If the CWA requires the EPA to take action in a specific way by a specific date, it creates a nondiscretionary duty; on the other hand, decisions regarding whether or not to "approve a grant for the construction of an underground sewage retention basin," prosecute violations of the CWA, or refuse a permit issued under the Act are discretionary.[89]

IV. PROCEDURAL AND SUBSTANTIVE REQUIREMENTS OF THE CITIZEN SUIT PROVISION OF THE CLEAN WATER ACT

A- Procedural Requirements

1- Notice Requirement

Congress included a notice requirement in the CWA citizen suit provision with the purpose of ensuring "that citizen suits were supplementing, not supplanting agency enforcement."[90] Section 505(b)(1)(A) of the Act mandates that citizens give prior notice of their intent to file a citizen suit. According

83 33 U.S.C. § 1365(a)(1).

84 33 U.S.C. § 1362(5) (Corporations, partnerships, associations, municipalities, commissions, and interstate bodies are considered as entities.).

85 33 U.S.C. § 1365(a)(1).

86 Shepherdson, *supra* note 5, at 258.

87 33 U.S.C. § 1365(a)(2).

88 Shepherdson, *supra* note 5, at 259.

89 *Id.*

90 Lazerow, Shana, (2003), Once Adequate, Always Adequate: The Courts Are Getting the Clean Water Act Notice Requirements Right, Hastings W.-Nw J. Envt'l L. & Pol'y, Vol. 9, p. 151.

to this provision, no action may be commenced unless the EPA, the state in which the violation occurs, and the alleged violator have been given notice of the alleged violation at least sixty days prior to filing the suit.[91] Congress aimed to keep "citizen suits from trampling governmental enforcement efforts."[92] Notice requirement provides opportunity for the federal and state governments to primarily enforce the Act. The 1972 Senate Committee report explained this intention as follows:

The Committee has provided a period of time after notice before a citizen may file an action against an alleged violator. The time between notice and filing of the action should give the administrative enforcement office an opportunity to act on the alleged violation.[93]

The notice requirement has two main functions. In respect to the congressional intent mentioned above, the primary function is "to help stimulate a federal enforcement action."[94] Citizens, therefore, must wait sixty days for the federal or state agencies of claimed violations to decide whether to commence an action against the alleged violators of the Act; if not citizens can bring their own lawsuits.[95] It is quite obvious that this function is compatible with one of the stated goals of citizen suit provisions: "to goad government enforcement."[96] It is observed that a great number of state enforcement actions, which are provoked by the attempt of violators after receiving notice, result in the preclusion of the imminent citizen suits.[97] In brief, the notice requirement gives the governmental enforcement authorities the opportunity to take action and renders unnecessary the citizen suit.[98] The second function of the notice requirement is to allow the alleged violators to have an opportunity to redress the alleged violations before the citizen suit is commenced and therefore, render needless the lawsuit.[99]

A vital question to be answered is whether the CWA's sixty-day notice requirement is a ground for dismissal of a citizen suit. There has been controversy about whether the sixty-day notice provision is a mandatory

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91 33 U.S.C. § 1365(b)(1)(A).
92 Smith, *supra* note 4, at 17.
93 S. Rep. No. 414, 92d Cong., 1st Sess. 80 (1972).
94 Frye, *supra* note 50, at 185.
95 Smith, *supra* note 4, at 17.
96 Lloyd, *supra* note 66, at 912.
97 Hodas, David R., (1995), Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority is Shared by the United States, the States, and Their Citizens?, Md. L. Rev., Vol. 54, p. 1621-22.
98 McCall Jr., Eugene C. & Trail, Ryan W., (2012), Citizen Suits to Enforce Environmental Laws, S.C. Law., Vol. 23, p. 36.
99 Shepherdson, *supra* note 5, at 259.

requirement for citizen plaintiffs to file a suit or whether it might be disregarded by the courts at their discretion.[100] In Hallstrom v. Tillamock County, the Supreme Court addressed much of the controversy by holding that courts should dismiss a citizen suit if a citizen plaintiff has had failure to meet the sixty-day notice requirement under the Resource Conservation and Recovery Act (RCRA).[101] Citing Hallstrom, lower courts have held that citizen plaintiffs must comply strictly with the time limitation of the notice requirement of the CWA, and their failure to comply with this limitation requires the dismissal of the suit.[102] In certain emergency circumstances, however, a citizen suit may be filed promptly after notice is served. Such an exception is established by Section 505 (b) of the CWA; accordingly, citizen plaintiffs can file a lawsuit promptly after serving notice for violations of toxic effluent and pretreatment standards.[103]

2- Standing

Citizen plaintiffs must satisfy the procedural requirement of standing before filing a lawsuit. The standing requirement has a "gate-keeping function" that assures that "only those who have an interest in the outcome of litigation be allowed to participate in it."[104] It is widely accepted that the federal district courts should primarily address whether a citizen plaintiff has standing to sue before analyzing the merits of a case.[105] This is because the standing requirement guarantees that the appropriate parties are available before the litigation.[106]

The CWA authorizes "any citizen" to bring a suit,[107] defining citizen as "a person or persons having an interest which is or may be adversely affected."[108] In practical terms, a plaintiff bringing a citizen suit under the CWA must satisfy both constitutional and prudential requirements to have standing.[109] As a constitutional matter, citizen plaintiffs have to satisfy Article III, Section 2 of

100 Frye, *supra* note 50, at 186.
101 *Id.* at 186-87.
102 National Environmental Foundation v. ABC Rail Corp., 926 F.2d 1096, 1097-98 (11th Cir. 1991); Washington Trout v. McCain Foods, Inc., 45 F.3d 1351 (9th Cir. 1995).
103 33 U.S.C. §1365(b).
104 Lopez, Alberto B., (2001), Laidlaw and the Clean Water Act: Standing in the Bermuda Triangle of Injury in Fact, Environmental Harm, and "Mere" Permit Exceedances, U. Cin. L. Rev., Vol. 69, p. 159.
105 Salzman, James & Thompson, Jr., Barton H., (2010), Environmental Law and Policy, 3rd ed., Foundation Press, p. 79.
106 Berger, *supra* note 72, at 1372.
107 33 U.S.C. § 1365(a).
108 33 U.S.C. § 1365(g).
109 Salzman & Thompson, Jr, *supra* note 105.

the US Constitution, which authorizes federal courts to hear only "cases and controversies."[110] Plaintiffs' failure to establish constitutional standing leads courts to dismiss citizen suits on the grounds of noncompliance with the "case and controversy" requirement.[111]

The constitutional requirement means the plaintiff must establish the following: (1) an actual or threatened injury in fact,[112] (2) that the injury is caused by the defendant's act,[113] and (3) the possibility that the injury will be redressed by the court's judgment.[114] The burden of proof of demonstrating that these three components are met falls on the plaintiff.[115]

The formation of the "three-pronged test" helped minimize the confusion regarding the standing doctrine in the environmental model, which has created wide controversy for both courts and legal scholars since the 1960s.[116] The application of the three components, however, has not always been harmonious; their application is frequently "plagued with ambiguity."[117] Courts have labored hard to find precise standards for the constitutional standing under Article III;[118] they agree that the three components are necessary to have standing, however, they disagree over the description and application of those components.[119]

In addition to these three constitutional requirements, courts require that the injury that the plaintiff has suffered must be within the "zone of interest" that the underlying statute was enacted to protect.[120] The mission of the "zone

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110 Lujan v. Defenders of Wildlife, 504 U.S. 555, 559 (1992).

111 Masucci, Amanda J., (2001), Stand By Me: The Fourth Circuit Raises Standing Requirements in Friends of the Earth, Inc. v. Gaston Copper Recycling Corp. - Just as Long as You Stand, Stand by Me, Vill. Envtl. L.J., Vol. 12, p. 181.

112 504 U.S. 555, 560 (1992).

113 *Id.*

114 *Id.* at 561.

115 Chin, Courtney, (2015), Standing Still: The Implications of Clapper for Environmental Plaintiffs' Constitutional Standing, Colum. J. Envtl. L., Vol. 40, p. 333; Gilles, Myriam E., (2001), Representational Standing: U.S. ex rel. Stevens and the Future of Public Law Litigation, Cal. L. Rev., Vol 89, p. 323-25.

116 Attwood, *supra* note 55, at 798; Barnum, Cassandra, (2010), Injury in Fact, Then and Now (and Never Again): Summers v. Earth Island Institute and the Need for Change in Environmental Standing Law, Mo. Envtl. L. & Pol'y Rev., Vol. 17, p. 4 (Standing jurisprudence in the context of environmental cases has been the subject of extensive controversy among legal scholars, with conservative thinkers typically supporting a high bar for standing and more progressive thinkers favoring greater access to courts.).

117 Chin, *supra* note 115; Nichol, Jr., Gene R., (2002), Standing for Privilege: The Failure of Injury Analysis, B.U. L. Rev., Vol. 82, p. 304.

118 Attwood, *supra* note 55, at 798.

119 Masucci, *supra* note 111, at 189.

120 Salzman & Thompson, Jr, *supra* note 105, at 80.

of interest" requirement is "to exclude those plaintiffs whose suits are more likely to frustrate rather than to further statutory objectives."[121] Because the "zone of interest" requirement is prudential, Congress can rule out or adjust it.[122]

The standing requirement has been one of the most frequently litigated issues under the CWA's citizen suit provision.[123] Judicial trends indicate that it has been one of the most challenging constitutional defenses to citizen plaintiffs bringing suits under federal environmental laws.[124] Consequently, courts' interpretation of the standing requirement undoubtedly has significant importance for the success of citizen enforcement of the CWA.

3- Subject Matter Jurisdiction

Courts must have subject matter jurisdiction over a citizen suit to continue the suit.[125] This subsection will be divided into four parts and will examine, specifically, statutory provisions, ongoing violations, the diligent prosecution bar, and the statute of limitations.

a) Statutory Provisions

The CWA's citizen suit provision specifies which of its requirements citizen plaintiffs are empowered to enforce; according to the Act, a violation or violations of an effluent standard or limitation or an order with respect to such standard or limitation are enforceable by citizens.[126] The definition of effluent standard or limitation is important in this regard to determine whether courts have jurisdiction under the citizen suit provision of the CWA. Section 505(f) of the CWA defines the term of effluent standard or limitation very broadly, including almost all standards and limitations promulgated by the EPA and the states under the Act.[127] The first question to be addressed is whether Section 505(f) embraces Section 404 dredge and fill requirements. The plain language of the statute clearly ignores any reference to such requirements; however, it allows citizens to sue entities that violate Section 301 of the CWA (entitling "effluent limitations"), which refers to Section 404 of the Act.[128] Therefore, plaintiff citizens may bring suits against violators of the dredge and fill requirements of the CWA.[129]

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121 Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 397 (1987).
122 Salzman & Thompson, Jr, *supra* note 105, at 80.
123 Shepherdson, *supra* note 5, at 260.
124 May, *supra* note 18, at 33.
125 Frye, *supra* note 50, at 188.
126 33 U.S.C. § 1365(a).
127 Shepherdson, *supra* note 5, at 258; 33 U.S.C. § 1365(f).
128 Shepherdson, *supra* note 5, at 258-59.
129 *Id*. at 259.

The additional question in this framework is whether or not courts have jurisdiction over the non-point source standards required by the CWA. Earlier courts have ruled that courts do not have jurisdiction over such standards, reasoning that effluent standards or limitations exclude the non-point source standards.[130] Contrary to this, however, courts have more recently been inclined to allow citizens to bring an action against violators of such standards.[131] In brief, nearly all standards and limitations established under the CWA are enforceable by citizens, though, simultaneously courts have jurisdiction over them.

b) Ongoing Violations

To qualify for subject matter jurisdiction under the citizen suit provision of the CWA, citizen plaintiffs must bring a suit against people "alleged to be in violation" of the Act or a permit.[132] In Gwaltney of Smithfield Ltd. v. Chesapeake Bay Foundation Inc.,[133] the Supreme Court has interpreted such language to obstruct citizen suits over "wholly past" violations.[134] The Fourth Circuit Court of Appeals (on remand from the Supreme Court) has ruled that violations are "wholly past" if there is no rational possibility for recurrence, notwithstanding the frequency of violations.[135]

Additionally, the Supreme Court in Gwaltney has ruled that courts have subject matter jurisdiction over citizen suits brought under the CWA, which are based on good faith allegations of ongoing violations of the Act.[136] In short, good faith allegations of ongoing violations in the complaint are sufficient to satisfy the subject matter jurisdiction requirement.

The Supreme Court remanded the question of how citizen plaintiffs can satisfy their burden of proving ongoing violations of the CWA to the Fourth Circuit. Accordingly, a plaintiff bringing a citizen suit under the CWA can fulfill the burden of proof either: (1) by showing that the violations of the Act continued on or after the date of the complaint or (2) by presenting evidence to convince a trial court to find "the continuing likelihood of a recurrence in intermittent or sporadic violations."[137]

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130 Frye, *supra* note 50, at 188.

131 Baker, Bryce & Garratt, Justin & Lane, Mari, (2006), Best Brief for Intervenor: Eighteenth Annual Pace National Environmental Law Moot Court Competition, Pace Envtl. L. Rev., Vol. 23, p. 639-40.

132 33 U.S.C. § 1365(a)(1).

133 Gwaltney of Smithfield Ltd. v. Chesapeake Bay Foundation Inc., 484 U.S. 49 (1987) (Gwaltney I).

134 *Id.* at 66.

135 Gwaltney of Smithfield Ltd. v. Chesapeake Bay Foundation Inc., 844 F.2d 170, 172 (4th Cir. 1988) (Gwaltney II).

136 484 U.S 49, 67 (1987).

137 844 F.2d 170,171-72 (4th Cir. 1988).

The great majority of courts addressing the issue of ongoing violations in CWA cases followed the Gwaltney decision. To give one example, in 2003, in American Canoe Association v. Murphy Farms Inc., the US Court of Appeals for the Fourth Circuit admitted both the Gwaltney ruling that a citizen plaintiff must "show the defendant's violations of the CWA are ongoing" at the time the suit was filed and its two-part test that established the basis for the demonstration of ongoing violations of the CWA.[138] The court found that American Canoe Association did not meet the Gwaltney requirements because it failed to demonstrate that the Farm's violations were ongoing.[139] To give another example, more recently, in 2011, the Fourth Circuit Court of Appeals decided in Friends of the Earth v. Gaston Copper Recycling Corp. and held that courts have subject-matter jurisdiction over claims in citizen suits brought under the CWA, which are based on good faith allegations of the defendant's ongoing violations of the Act.[140]

The question of proving that ongoing violations still exist may arise if a defendant voluntarily comes into compliance with the CWA or a permit. The existence of ongoing violations needs to be analyzed at the time the complaint is brought,[141] therefore subject matter jurisdiction over CWA citizen suits does not disappear with such compliance. These suits, however, may become moot under such situations. The doctrine of mootness will be mentioned later in this chapter.

c) Diligent Prosecution Bar

Citizen suits filed under the CWA may be dismissed on the ground of lack of subject matter jurisdiction when either the federal or state government "has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State" regarding the same violations, against the alleged violators of the Act or a permit.[142] In 1987, the CWA extended this bar by adding Section 1319(g)(6), which prohibits citizen suits if the EPA diligently prosecutes particular types of administrative remedies or if a state diligently prosecutes administrative actions under a comparable state law to the CWA.[143] Section 1319(g)(6)(B), however, has provided an exception to this bar; consequently, administrative proceedings cannot prevent citizen suits if

138 Jackson, Jr., Ronal P., (2004), Recent Development: American Canoe Association v. Murphy Farms, Inc.: The Fourth Circuit Reaffirms That an Environmental Organization with Article III Standing to Sue under the Citizen-Suit Provision of the Clean Water Act Must Satisfy the Requirements of the Gwaltney Test, U. Balt. J. Envtl. L. Vol. 11, p. 91.

139 *Id.*

140 Friends of the Earth v. Gaston Copper Recycling Corp., 629 F.3d (4th Cir. 2011).

141 Frye, *supra* note 50, at 189.

142 33 U.S.C. §1365(b)(1)(B).

143 33 U.S.C. § 1319(g)(6)(A).

a citizen suit has been brought prior to commencement of such proceedings or if the EPA or state agencies commence administrative proceedings after citizen plaintiffs have given notice of their intent to sue (provided the citizen suit is filed within 120 days after such notice is given).[144]

Both section 1365(b)(1)(B) and section 1319(g)(6)(A) limitations allow citizen suits to function the way Congress intended: "as a supplement to primary enforcement by the states or the federal government but not as a primary tool of enforcement."[145] They are intended to prohibit duplicate litigation.[146] The lack of clarity in these sections, however, has led courts to interpret and apply them differently and has caused many problems for courts.

Three common problems that courts have encountered in interpretation of these sections will be analyzed. First, the CWA does not define the criteria for analysis of whether a government action was diligently prosecuted so as to preclude a citizen suit.[147] In spite of the lack of statutory definition, however, courts have commonly held that a state or EPA enforcement action enjoys a presumption of diligence.[148] For example, in 1986, one court held that "[t]he court must presume the diligence of the state's prosecution of a defendant absent persuasive evidence that the state has engaged in a pattern of conduct ... that could be considered dilatory, collusive or otherwise in bad faith."[149] More recently, in 2007, the Tenth Circuit in Karr v. Hefner reached a similar conclusion, holding that "Section 1365(b)(1)(B) does not require government prosecution to be far-reaching or zealous. It requires only diligence."[150]

Second, courts have labored to address the issue of whether administrative enforcement actions constitute an action in a court under the diligent prosecution bar of the CWA's citizen suit provision, however, they failed to provide uniform and precise standards for deciding what kind of actions are adequate to preclude a citizen suit.[151] They have not reached a consensus on the interpretation of the language "in a court," rather they have been split into two groups.[152]

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144 33 U.S.C. § 1319(g)(6)(B).

145 Appel, Peter A., (2004), The Diligent Prosecution Bar to Citizen Suits: The Search for Adequate Representation, Widener L. Rev. Vol. 10, p. 101.

146 Frye, *supra* note 50, at 189.

147 Leonard, Arne R., (1995), When Should an Administrative Enforcement Action Preclude a Citizen Suit Under the Clean Water Act?, Nat. Resources J. Vol. 35, p. 605.

148 *Id.* at 605-06.

149 Townsend, Leonard 0., (2000), Note: Hey You, Get Off [of] My Cloud: An Analysis of Citizen Suit Preclusion under the Clean Water Act, Fordham Envtl. L.J., Vol. 11, p. 91.

150 Karr v. Hefner, 475 F.3d 1192, 1197 (10th Cir. 2007).

151 Robinson, *supra* note 52.

152 Hodas, *supra* note 97, at 1627.

Many courts addressing this issue have followed the "functional equivalent" doctrine and have held that "any prior diligently prosecuted action in a forum that is the functional equivalent of a court would bar a citizen suit."[153] According to the functional equivalent rule, an administrative tribunal must be the functional equivalent of a court to preclude a citizen suit.[154] Other courts, on the other hand, have followed the "court means a court" rule, which gives the word "court" its broadly understood traditional legal definition.[155] The Second Circuit in Friends of the Earth v. Consolidated Rail Corp., applying this rule, found that an administrative proceeding was not the equivalent of an action in a court and thus would not preclude a citizen suit.[156] The Ninth Circuit reached a similar conclusion in Sierra Club v. Chevron U.S.A., Inc., holding that nonjudicial enforcement action by a state agency does not preclude a citizen suit.[157]

In order to eliminate the confusion arising from the different interpretations of the language "in a court," Congress, in its 1987 amendments to the CWA, allowed the EPA to assess administrative penalties.[158] Congress, in this regard, distinguished administrative penalty assessments from administrative compliance orders for the purposes of deciding whether a citizen suit is precluded by an administrative enforcement action.[159] Consequently, the Act states that only administrative penalty assessments by an "agency tribunal that is the functional equivalent of a court" may preclude a citizen suit under section 309(g).[160] Administrative compliance orders, on the other hand, are required to be enforced in a court, in other words they require judicial intervention, and thus, do not preclude a citizen suit.[161]

Third, courts have not reached a consensus on what kind of pre-enforcement actions should be considered as the commencement of an assessment of an administrative penalty in order to preclude a citizen suit under the CWA.[162] This is mostly because the Act does not precisely define the meaning of the

153 *Id.* at 1627-28.
154 *Id.* at 1628-29.
155 *Id*. at 1629; Friends of the Earth v. Consolidated Rail Corp., 768 F.2d 57, 63 (2d Cir. 1985).
156 Hodas, *supra* note 97, at 1629; 768 F.2d 57, 63 (2d Cir. 1985) (The Second Circuit came to its decision based on the clear language of the citizen suit provision of the CWA and congressional intent. It stated that Congress "has frequently demonstrated its ability to explicitly provide that either an administrative proceeding or a court action will preclude citizen suits.").
157 Hodas, *supra* note 97, at 1630; 834 F.2d 1517, 1525 (9th Cir. 1987).
158 33 U.S.C. § 1319(g).
159 Leonard, *supra* note 147, at 584-85.
160 *Id.* at 585; Hodas, *supra* note 97, at 1630.
161 Hodas, *supra* note 97, at 1630.
162 Leonard, *supra* note 147, at 601.

language "commence an assessment of an administrative penalty." [163] EPA's rules of practice, however, have efficiently filled this major gap in the law, providing a comparatively explicit definition of when an assessment of an administrative penalty has initiated.[164]

Under these rules, an action of an administrative penalty assessment "is initiated by filing an administrative complaint with a regional hearing clerk, serving the complaint on a respondent, and providing public notice of its service." Accordingly, pre-enforcement actions such as "meetings with the violator" or "threatening letters" have not been considered as the commencement of an administrative penalty assessment, and thus do not preclude a citizen suit under the CWA.[165]

Courts, following the EPA's rules of practice, have generally interpreted the meaning of the word "commence" strictly. To give an example, in the case of Pub. Interest Research Group, Inc. v. Elf Atochem case, the state environmental agency sent a letter to the defendants including instructions that tell them to take appropriate actions to correct their violations of the conditions of their permit.[166] The district court, addressing the issue of preclusion of the citizen suit, found that this letter could not be treated as the commencement of an enforcement action since it did not mention sanctions, formal charges, or a hearing; rather, the letter only notified and warned the defendants that an enforcement proceeding may be initiated later.[167]

d) Statute of Limitations

Citizen plaintiffs' failure to meet the statute of limitations may be claimed as a defense[168] and may cause the dismissal of a lawsuit on the ground of lack of subject matter jurisdiction. It is commonly accepted that there are three rationales behind the statutes of limitations: (1) assuring fairness to defendants, (2) promoting the efficiency of courts, and (3) favoring social stability.[169]

The citizen suit provision of the CWA does not include a specified statute of limitations. If a federal law does not contain a statute of limitations, courts have usually applied "a limitation period from an analogous state law."[170]

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163 *Id.* at 602.

164 *Id.*

165 *Id.* at 603.

166 Townsend, *supra* note 149, at 87.

167 *Id.*

168 Fadil, Adeeb, (1985), Citizen Suits Against Polluters: Picking Up the Pace, Harv. Envtl. L. Rev., Vol. 9, p. 50-51.

169 Goodman McKinney, *supra* note 60, at 202.

170 *Id.* at 203.

However, many federal district courts dealing with the CWA's citizen suits have stated that such an approach is not appropriate for cases under the Act because doing so defeats the congressional intent of "nationally uniform enforcement."[171] As a result, courts have rejected the application of state statutes of limitations and have ordinarily applied the general five-year statute of limitations, which is applicable to actions under federal law.[172]

In contrast to this general principle, some courts have ruled that no statute of limitations applies to citizen suits filed under the CWA.[173] Critics of such ruling, however, claimed that if courts follow a no-statute-of limitations approach, "the fairness, stability, and efficiency that statutes of limitations provide" will be damaged; thus courts should abandon this approach and apply a time limitation period for citizen suits brought under the CWA.[174]

Once it was decided that the statute of limitations applies to citizen suits, the next step was to determine when the clock starts ticking. The five-year statute of limitations to file a suit under the CWA does not commence on the date of violation; instead it begins from the date of discovery of the alleged violation or violations.[175] Thus, the statute of limitations is commonly commenced when citizen plaintiffs provide a sixty-day notice of intent to file a suit.[176] However, while the government has supported this "discovery rule," some courts have rejected it.[177]

B- Substantive Requirements

1- Mootness

The constitutional doctrine of mootness is frequently invoked as a defense[178] and keeps a great number of citizen suits out of the courts.[179] As previously mentioned, courts must have jurisdiction to hear claims, and courts only have jurisdiction over "cases and controversies."[180] To proceed with their claims, plaintiffs must have personal interest ("personal stake") in the litigation under

171 *Id.* at 196.

172 Frye, *supra* note 50, at 192; Sierra Club v. Chevron U.S.A., Inc., 834 F.2d 1517, 1521 (9th Cir. 1987).

173 Frye, *supra* note 50, at 192.

174 Goodman McKinney, *supra* note 60, at 212.

175 Pub. Interest Research Grp. of N.J., Inc. v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 75 (3d Cir. 1990).

176 *Id.*

177 Gross & Stelcen, *supra* note 79, at 135.

178 McIntosh, Ben, (2005), Standing Alone: The Fight to Get Citizen Suits Under the Clean Water Act Into the Courts, Mo. Envtl. L. & Pol'y Rev., Vol. 12, p. 175.

179 May, *supra* note 18, at 33.

180 Campbell, Jonathan S., (2000), Has the Citizen Suit Provision of the Clean Water Act Exceeded its Supplemental Birth?, Wm. & Mary Envtl. L. & Pol'y Rev., Vol. 24, p. 318.

the standing and mootness doctrines.[181] Mootness and standing are perceived as relevant doctrines.[182] The Supreme Court has indicated such relevancy by describing mootness as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness)."[183]

The principles of mootness apply when the parties to the lawsuit no longer possess any personal interest in the results of the litigation or when the "claim ceases to be a live controversy."[184] Generally, the defendant's voluntary cessation of violations will not moot the lawsuit unless the defendant proves that it is "absolutely clear" the alleged misconduct will not recur in the future.[185] In such circumstances, the defendant usually has a "heavy burden" to prove that the alleged misconduct could not rationally be anticipated to recur.[186]

The Gwaltney case is the first that will be analyzed regarding the issue of mootness in the context of environmental citizen suits.[187] In this case, the Supreme Court held that citizen suits filed under the CWA become moot once the defendant has demonstrated that "the allegedly wrongful behavior could not reasonably be expected to recur."[188] The Court, however, did not speak to whether the principles of mootness applied only to injunctive claims or also applied to civil penalty claims.[189] The Fourth Circuit Court of Appeals (on remand from the Supreme Court), however, clarified this issue by holding that mootness applied only to claims for injunctive relief and not to claims for civil penalties.[190]

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181 McIntosh, *supra* note 178.

182 Werner, *supra* note 46, at 805.

183 *Id.* at 805-06; Monaghan, Henry, (1973), Constitutional Adjudication: The Who and When, Yale L.J., Vol. 82, p. 1384.

184 Werner, *supra* note 46, at 804.

185 484 U.S. 49, 66 (1987).

186 *Id.*

187 *Id*. at 53 (In the Gwaltney case, two environmental groups filed a suit against Gwaltney and claimed that Gwaltney had engaged in violations of the CWA by exceeding its NPDES permit limitations and had polluted the Pagan River.).

188 *Id*. at 66-67 ("Long-standing principles of mootness, however, prevent the maintenance of suit when there is no reasonable expectation that the wrong will be repeated. In seeking to have a case dismissed as moot, however, the defendant's burden is a heavy one. The defendant must demonstrate that it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. The mootness doctrine thus protects defendants from the maintenance of suit under the Clean Water Act based solely on violations wholly unconnected to any present or future wrongdoing, while it also protects plaintiffs from defendants who seek to evade sanction by predictable protestations of repentance and reform.").

189 Werner, *supra* note 46, at 801.

190 Chesapeake Bay Found., Inc. v. Gwaltney, of Smithfteld, Ltd., 890 F.2d 690, 696-97 (4th Cir. 1989) (Gwaltney III); Werner, *supra* note 46, at 808.

The ruling that claims for citizen suit civil penalties do not become moot once claims for injunctive relief become moot had been favored until the Supreme Court decided in Lujan v. Defenders of Wildlife[191] in 1992.[192] Under the Lujan case,[193] claims for civil penalties in citizen suits become moot once injunctive claims become moot.[194] The Supreme Court found that claims for citizen suit civil penalties alone could not survive because citizen plaintiffs failed to establish adequate standing in that they could not demonstrate redressability.[195] This demonstration required that citizen plaintiffs show that the court's judgment would probably redress plaintiffs' injuries.[196] The Court then went further and stated that civil penalties paid to the US general fund rather than to private plaintiffs do not redress environmental citizen plaintiff's injuries; thus, without redressability, plaintiffs no longer have adequate standing, and their claims for civil penalties become moot.[197]

Between the years of 1990 and 2000, the Supreme Court substantially prevented environmental citizen plaintiffs from filing suits on the grounds of mootness by the light of the Lujan case. However, in Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.,[198] the Supreme Court overturned this approach by reversing the decision of the Fourth Circuit.[199] The Court held that the plaintiff's claims for civil penalties could be mooted by the defendant's substantial voluntary compliance with the NPDES permit requirements.[200] Justice Ginsburg, writing for the Supreme Court, however, stressed that the "defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case,"[201] adding that civil penalty claims could only be mooted if it was "absolutely clear that Laidlaw's permit violations could not reasonably be expected to recur."[202] Consequently, the Supreme Court in

191 504 U.S. 555 (1992).

192 Werner, *supra* note 46, at 811.

193 504 U.S. 555, 557-59 (1992) (In this case, the plaintiff brought an action under the citizen suit provision of the ESA in order to compel the US Department of Interior to reconsider its regulations by claiming the regulations violated the Act itself because the ESA was unreasonably interpreted to apply only to governmental projects within the US or the high seas, not foreign ones.).

194 Werner, *supra* note 46, at 803.

195 *Id.* at 802.

196 504 U.S. 555, 561 (1992).

197 *Id*. at 802-03.

198 528 U.S. 167, 175-76 (2000) (In this case, multiple environmental groups brought an action under the citizen suit provision of the CWA against the owner of a wastewater treatment plant, who violated his NPDES permit.).

199 *Id.* at 173.

200 Attwood, *supra* note 55, at 815; 528 U.S. 167, 193 (2000).

201 Echlverria, John D., (2004), Standing and Mootness Decisions in the Wake of Laidlaw, Widener L. Rev., Vol. 10, p. 192; 528 U.S. 167, 173 (2000); Campbell, *supra* note 180, at 316.

202 Attwood, *supra* note 55, at 815; 528 U.S. 167, 193 (2000).

Laidlaw, overturned the earlier ruling that claims for civil penalties become moot by the defendant's voluntary post-complaint actions;[203] thus, it has made it easier for citizen plaintiffs to maintain their claims against violators of environmental laws.

Since the Supreme Court decided against the general rule, the courts of appeals have differed over how to apply the mootness doctrine in CWA citizen suits, and there is still a vigorous debate about whether or not civil penalty claims can become moot by the defendant's post-complaint efforts.[204] Unsurprisingly, this debate has had significant implications for the success or failure of citizen suits filed under the CWA, and will likely be challenged by both companies and environmental supporters.[205]

2- Upset Standard

A defendant charged with violating a permit issued under the CWA may claim that the violations arose from "some unintended and unavoidable events" and may cause the dismissal of the citizen suit filed under the Act on the grounds of upset defense.[206] An upset is "an exceptional incident in which there is unintentional and temporary noncompliance with technology-based effluent limitations set forth in a permit because of factors beyond the reasonable control of the permittee." [207] The alleged defendant must properly record the cause of the upset and prove that the facility was being used at the time, that accurate notice was provided to the proper permit authorities within 24 hours, and that necessary remedial measures were carefully taken in order to "successfully invoke an upset defense."[208]

It was held that the upset defense cannot be invoked if an upset provision has not been contained in a state-issued permit;[209] however, a great majority of permits include a provision dealing with the upset standard.[210]

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203 Echlverria, *supra* note 201, at 191.
204 *Id.* at 195-98.
205 *Id.* at 198.
206 Gross & Stelcen, *supra* note 79, at 134.
207 *Id.*
208 *Id.*
209 Frye, *supra* note 50, at 191.
210 Gross & Stelcen, *supra* note 79, at 134.

V. ADDITIONAL ASPECTS OF THE CLEAN WATER ACT'S CITIZEN SUITS

1- Parties

a) Plaintiffs

According to the CWA, "any citizen" can bring a suit.[211] The Act defines a citizen as "a person or persons having an interest which is or may be adversely affected."[212] Furthermore, the Act also defines the term of "person."[213] The definition for a person is very broad, and includes individuals and a large range of entities such as corporations, partnerships, associations, municipalities, commissions, and interstate bodies.[214] Moreover, Section 505 of the Act itself indicates that the term of person includes "the United States, and any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution."[215] To sum up, any of these stated entities can be a plaintiff under the citizen suit provision of the CWA.

b) Defendants

Under the CWA, citizen suits can be brought against "any person" violating the law.[216] As mentioned above in the discussion of plaintiffs, the definition of person includes individuals and a large range of entities such as corporations, partnerships, associations, municipalities, commissions, and interstate bodies.[217] Additionally, the citizen suit provision of the CWA itself indicates that the term of person includes "the United States, and any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution."[218] Furthermore, the CWA authorize citizen suits against the Administrator of particular federal agencies for their failure to perform mandatory duties.[219] To sum up, citizen plaintiffs can bring a lawsuit against all of these mentioned entities under the citizen suit provision of the CWA.

2- Appropriate Venue

According to the CWA, citizen suits for violation or violations of "an effluent standard or limitation or an order respecting such standard or limitation" may be brought in the district court where the source of the violation is located.[220]

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211 33 U.S.C. § 1365(a).
212 33 U.S.C. § 1365(g).
213 33 U.S.C. § 1362(5).
214 *Id.*
215 33 U.S.C. § 1365(a)(1).
216 *Id.*
217 33 U.S.C. § 1362(5).
218 33 U.S.C. § 1365(a)(1).
219 33 U.S.C. § 1365(a)(2).
220 Shepherdson, *supra* note 5, at 260; 33 U.S.C. § 1365(c)(1).

Citizen suits against the Administrator of identified federal agencies for failing to carry out their mandatory duties may be brought in any judicial district where the alleged defendant or the plaintiff resides, or where a large part of the events or omissions caused the action.[221]

The question to be addressed in this framework is whether citizen plaintiffs may bring a suit in state courts or whether they are exclusively required to file a suit in federal courts. There is no consensus on that matter. For example, in a 1998 case, the Sixth Circuit stated that state courts had concurrent jurisdiction with federal courts over a citizen suit of the RCRA, while other courts have stated that federal courts have exclusive jurisdiction over the RCRA citizen suits.[222]

3- Intervention

Like most federal environmental statutes, the CWA provides that citizens may intervene in a government action brought in a court by the US or a state to assure that their interests are preserved in government suits.[223] The CWA clearly states that citizens maintain their rights to intervene in a government action if they cannot commence an action because of the diligent prosecution bar.[224] In other words, even though a government action is considered diligent, citizens may intervene in such an action. Additionally, the EPA is also authorized to intervene in any citizen suit as a matter of right under the CWA.[225]

4- Remedies

In general, remedies provided to the government by the CWA are practicable for citizen plaintiffs;[226] they can seek civil penalties and injunctions. If a case is resolved by settlement rather than litigation, the federal government occasionally allows courts to order defendants to pay for environmentally-beneficial projects rather than order payment of monetary penalties.[227]

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221 Shepherdson, *supra* note 5, at 260.

222 Riesel, Daniel, (1997), Environmental Enforcement: Civil and Criminal, Ch.15, § 15.02, Law Journal Press, p. 25.

223 33 U.S.C. §1365(b)(1)(B); 42 U.S.C. §7604(b)(1)(B).

224 33 U.S.C. §1365(b)(1)(B).

225 33 U.S.C. § 1365(c)(2).

226 Shepherdson, *supra* note 5, at 262.

227 Gelpet, Marcia R. & Barnestt, Janis L., (1990), Penalties in Settlements of Citizen Suit Enforcement Actions Under the Clean Water Act, Wm. Mitchell L. Rev., Vol. 16, p. 1028.

a) Civil Penalties

The citizen suit provision of the CWA authorizes courts "to apply any appropriate civil penalties under section 1319(d) of this Act,"[228] which provides that "any person" violating specified provisions of the Act, permit conditions or limitations, or administrative orders issued by the Administrator of the EPA "shall be subject to a civil penalty not to exceed $37, 500 per day for each violation."[229] As is evident, civil penalties in citizen suits are parallel to those in governmental enforcement actions "to the extent appropriate."[230]

Courts are told to consider the following factors in determining the amount of a civil penalty: (1) "the seriousness of the violation or violations, (2) the economic benefit (if any) resulting from the violation, (3) any history of such violations, (4) any good-faith efforts to comply with the applicable requirements, (5) the economic impact of the penalty on the violator, and (6) such other matters as justice may require."[231] Courts separately consider each of these six factors; however, the economic benefit factor is one that courts specifically emphasize.[232] Courts have held that the economic benefit could be calculated by the profit gained by the defendant during periods of action in breach of the CWA; furthermore, courts have considered "the delayed and avoided costs" that have resulted from inappropriate compliance while assessing the economic benefit.[233] In addition to these stated six factors, courts may consider factors and calculations presented in the EPA's CWA settlement penalty policy while determining the amount of a civil penalty.[234]

Courts have usually applied both "top-down" and "bottom-up" approaches while assessing penalties.[235] In the top-down approach, the amount of statutory maximal penalty is first evaluated and then reduced based on a scrutiny of the mitigating factors.[236] The bottom-up approach, on the other hand, begins with an assessment of the economic benefit obtained by noncompliance and then adjusts that amount up or down considering the other factors.[237] Courts have generally been inclined to apply the bottom-up approach;[238] for instance, in

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228 33 U.S.C. § 1365(a).
229 Gelpet & Barnestt, *supra* note 227, at 1027; 33 U.S.C. § 1319(d).
230 Gelpet & Barnestt, *supra* note 227.
231 33 U.S.C. § 1319(d).
232 Gross & Stelcen, *supra* note 79, at 125.
233 *Id.* at 126.
234 Ginsberg, Beth S. & Morgan, Jason T., (2011), Civil Judicial Enforcement, in The Clean Water Act Handbook, Mark A. Ryan eds., 3rd ed., ABA Publishing , p. 238.
235 *Id.*
236 Gross & Stelcen, *supra* note 79, at 126.
237 *Id.*
238 Ginsberg & Morgan, *supra* note 234, at 239.

United States v. Smithfield Foods, Inc., the Fourth Circuit first assessed a $4.2 million economic benefit and then tripled that amount to $12.6 million as a final penalty.[239]

The problem to be addressed in this framework is under what circumstances the CWA should allow citizen plaintiffs to demand an assessment of civil penalties under the citizen suit provision of the Act. There is no consensus on that matter. Some courts have adopted an "ongoing violation" standard that allows assessment of penalties "only against polluters who remain in violation at the time suit is brought" while a great number of courts have allowed lawsuits based only on past violations.[240] Additionally, several courts have allowed the assessment of "penalties for past or ongoing violations" by adopting an "intermediate approach."[241]

Civil penalties imposed under the CWA's citizen suit provision must be paid to the US Treasury, not to citizen plaintiffs.[242] Such penalties that go to the treasury do not directly help the improvement of the environment;[243] therefore, EPA officials have been willing to allow violators to perform Supplemental Environmental Projects (SEPs) in lieu of payment.[244] These projects are defined as "environmentally beneficial projects included in settlements of environmental enforcement cases."[245] In contrast to the requirement that civil penalties be paid into the US Treasury, SEPs may direct funds toward environmentally beneficial initiatives.[246]

b) Injunctions

The CWA authorizes the EPA to seek a temporary or permanent injunctive relief to redress violations of the Act.[247] Such an authorization is also applicable to plaintiffs filing a suit under the citizen suit provision of the CWA. Principally, injunctions are sought if a violation continues; however, in many cases violators have been ordered to remove contaminants that allegedly arose from previous discharges through dredging of polluted sediments.[248] Such

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239 Gross & Stelcen, *supra* note 79, at 126.

240 Thompson, James L., (1987), Citizen Suits and Civil Penalties Under the Clean Water Act, Mich. L. Rev., Vol. 85, p. 1658.

241 *Id.*

242 Shepherdson, *supra* note 5, at 262; Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 175 (2000).

243 Gelpet & Barnestt, *supra* note 227, at 1029.

244 Gross & Stelcen, *supra* note 79, at 128.

245 Lloyd, Edward, (2004), Supplemental Environmental Projects Have Been Effectively Used In Citizen Suits To Deter Future Violations As Well As to Achieve Significant Additional Environmental Benefits, Widener L. Rev., Vol. 10, p. 414.

246 Gross & Stelcen, *supra* note 79, at 128.

247 33 U.S.C. § 1319(b).

248 Gross & Stelcen, *supra* note 79, at 124-25.

mandates demonstrate that injunctive reliefs may also be sought for past violations.

Citizens may bring injunctive relief cases in the district court of the US, in a district where the defendant resides or transacts business.[249] They must prove "some kind of irreparable injury" to get injunctive relief.[250] Some courts, however, have asked "little demonstrated impact to impose relief."[251]

5- Settlements

Most citizen suits, like most other civil enforcement proceedings, are resolved through settlements[252] which help both parties to save money and time.[253] Settlements are generally embodied in judicial consent decrees.[254] Section 505(c)(3) of the CWA mainly requires all consent decrees to be sent to the EPA and the Department of Justice (DOJ), which deals with all of EPA's federal cases, and then requests that the department comment on consent decrees within 45 days.[255] One of the stated purposes of the 45-day period was to provide the government "the opportunity to identify, to challenge and to deter, as much as possible, problematic settlements."[256]

Citizen enforcement suits filed under the CWA are often settled by SEPs.[257] As mentioned earlier, such projects are defined as "environmentally beneficial projects included in settlements of environmental enforcement cases."[258] They are brought to courts "as provisions in consent decrees."[259] Though there are no exclusive and extensive instructions as to the application of supplemental environment projects by citizen plaintiffs,[260] the use of such projects is principally covered by the EPA's SEPs Policy, which provides certain types of environmentally beneficial projects for violators to perform such as pollution prevention, pollution reduction, and environmental restoration and protection.[261]

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249 33 U.S.C. § 1319(b).
250 Frye, *supra* note 50, at 193.
251 *Id.*
252 Ginsberg & Morgan, *supra* note 234, at 239.
253 Seidenfeld & Nugent, *supra* note 6, at 278.
254 Gross & Stelcen, *supra* note 79, at 127.
255 33 U.S.C. § 1365(c)(3).
256 Lloyd, *supra* note 245, at 422.
257 Jorgenson, Lisa, & Kimmel, Jeffrey J., (1988), Environmental citizen suits: confronting the corporation, Bureau of National Affairs, p. 19; Lloyd, *supra* note 245, at 415.
258 Lloyd, *supra* note 245.
259 *Id.* at 416.
260 May, *supra* note 18, at 30; Lloyd, *supra* note 245, at 414.
261 Gross & Stelcen, *supra* note 79, at 127-28.

6- Attorney's Fees Provision

Congress's initial objective for adopting attorney's fee provision "was to provide attorneys with an incentive to litigate citizen suit actions."[262] The provision encourages attorneys to represent citizens in environmental citizen suits with the expectation that defendants will pay their fees if citizen plaintiffs prevail.[263] Similarly, they encourage citizens to enforce environmental laws because the high cost of the litigation prevents them from initiating an enforcement action.[264]

Attorney's fee provision, on the other hand, compels citizen plaintiffs to select circumstances "in which they have a direct interest." [265] The fear of paying litigation costs precludes the abuse of citizen suit provisions of environmental laws and thus prevents frivolous and harassing litigation by citizen plaintiffs.[266]

In citizen suit provisions of major federal environmental statutes, courts are principally authorized to award costs and attorney's fee to any prevailing or substantially prevailing party.[267] The CWA, for example, states that "[t]he court… may award costs of litigation (including reasonable attorney and expert witness fee) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate…"[268] This principle is a statutory exception to the "American Rule" which provides that each party must bear its own costs of litigation, including attorney's fee, unless otherwise specified by statutes.[269] Congress intentionally chose to make an exception in order to mitigate severe effects of the rule and to goad citizen enforcement of the Act.[270]

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262 Hollander, Joshua E., (2010), Fee-Shifting Provisions in Environmental Statutes: What They Are, How They Are Interpreted, and Why They Matter, Geo. J. Legal Ethics, Vol. 23, p. 633; Burrows, Matthew, (2009), The Clean Air Act: Citizen Suits, Attorneys' Fees, and the Separate Public Interest Requirement, B.C. Envl. Aff. L. Rev., Vol. 36, p. 114-15.

263 Florio, Kerry D., (2000), Attorneys' Fees in Environmental Citizen Suits: Should Prevailing Defendants Recover? Boston College Environmental Affairs Law Review, Vol. 27, p. 708.

264 *Id*.; Glover-Rogers, Mary Cile, (2011), Who's Footing the Bill for the Attorneys' Fees?: An Examination of the Policy Underlying the Clean Water Act's Citizen Suit Provision, Mo. Envtl. L. & Pol'y Rev., Vol. 18, p. 64-65.

265 Lopez, *supra* note 104, at 193.

266 Smith, *supra* note 4, at 17.

267 33 U.S.C. § 1365(d); 42 U.S.C. § 300j-8(d); Florio, *supra* note 263, at 707.

268 33 U.S.C. § 1365(d).

269 Riesel, *supra* note 222, at § Ch. 15, 15.04 1; Florio, *supra* note 263, at 713; Knedlik, Lana, (1996), Attorneys' Fees in Private Party Cost Recovery Actions Under CERCLA: The Key Tronic Decision, U. Kan. L. Rev., Vol. 44, p. 370.

270 Florio, *supra* note 263, at 714; Nicyper, Dean R., (1984), Attorneys' Fees and Ruckelshaus v. Sierra Club: Discouraging Citizens from Challenging Administrative Agency Decisions, Am. U. L. Rev., Vol. 33, p. 784.

Courts, addressing the issue of attorney's fee, must primarily decide if any party of the litigation is eligible to be entitled as the "prevailing or substantially prevailing party."[271] Courts, however, have failed to establish precise standards for the interpretation of the language of "prevailing party" under citizen suit provisions of environmental statutes.[272]

The Supreme Court in Farrar v. Hobby, explaining the "prevailing party" criterion, held that a plaintiff is considered to be a prevailing party if the plaintiff "wins nominal damages."[273] The Court then went further and held that citizen plaintiffs succeed when actual relief on the merits of their claims substantially changes the legal connection among the parties by altering defendants' behaviors "in a way that directly benefits the plaintiff."[274] Consequently, the Farrar case determined that a small amount of relief is adequate for a citizen plaintiff to win attorney's fee as a prevailing party.[275]

Many lower courts followed the Supreme Court's lead in Farrar v. Hobby; for example, in 1998, the Eighth Circuit in Armstrong v. Asarco held that a plaintiff prevails if a violator settles with governmental agencies after the initiation of a citizen suit because the suit prompted the settlement.[276] Similarly, in Comfort Lake Ass'n, Inc. v. Dresel Contracting, Inc., the Eighth Circuit held that a plaintiff should still be eligible for an award of attorney's fee as a prevailing party if a citizen suit "was the catalyst for agency enforcement action" that caused the termination of violations of the CWA.[277] The "catalyst theory" allows a plaintiff to be considered prevailing if a suit was the catalyst to an alteration in the action underlying the suit.[278]

In 2001, however, the Supreme Court in Buckhannon Board Care Home v. West Virginia Department of Health and Human Services struck down its earlier ruling and held that the "catalyst theory" is no longer a practicable approach in determining a prevailing party.[279] Refusing the "catalyst theory," the Supreme Court in the Buckhannon case adopted a new rule to award attorney's fee; accordingly, in order to win attorney's fee as a prevailing party, the prevailing party must obtain "a court-ordered change in the legal

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271 Klein, Jason Douglas, (2003), Attorney's Fees and the Clean Water Act after Buckhannon, Hastings W.- Nw J. Envt'l L. & Pol'y, Vol. 9, p. 111.

272 Glover-Rogers, *supra* note 264, at 69.

273 *Id.* at 70; Farrar v. Hobby, 506 U.S. 103, 112 (1992).

274 506 U.S. 103, 111-12 (1992); Glover-Rogers, *supra* note 264, at 70.

275 Glover-Rogers, *supra* note 264, at 70; 506 U.S. 103, 114 (1992).

276 Campbell, *supra* note 180, at 340-41; Armstrong v. Asarco, 138 F.3d 382, 387 (8th Cir. 1998).

277 Comfort Lake Ass'n, Inc. v. Dresel Contracting, Inc., 138 F. 3d 351, 357 (8th Cir. 1998); Campbell, *supra* note 180, at 341.

278 Glover-Rogers, *supra* note 264, at 71.

279 *Id.*; 532 U.S. 598, 602 (2001); Klein, *supra* note 271, at 109.

relationship between the plaintiff and the defendant."[280]

The Ninth Circuit in Saint John's Organic Farm v. Gem County Mosquito Abatement District, however, did not follow the Buckhannon standard and adopted a new one while addressing the issue of attorney's fee.[281] As a result, a district court may reject the award of attorney's fee to a prevailing party under the citizen suit provision of the CWA "only where there are special circumstances."[282] Under this "special circumstances" standard, the prevailing plaintiff is generally awarded attorney's fee "unless special circumstances would render such an award unjust."[283] The Ninth Circuit, however, did not explain what constitutes "special circumstances;" instead it only held that no such circumstances were found in the case.[284] The Ninth Circuit then went further and clarified that the new standard has given "limited discretion" to courts to deny attorney's fee to the prevailing party.[285] The Saint John's ruling clearly encourages private citizens to enforce environmental laws since it is ensured that their litigation costs, including attorney's fee, are very likely to be compensated by the other party.[286]

One may wonder whether prevailing defendants may also recover attorney's fee as do prevailing plaintiffs. There has been a "dual standard" for the purposes of awarding attorney's fee, which commonly provides more stringent standards for prevailing defendants.[287] Both the case law and the legislative history indicate that defendants can only recover attorney's fee in very limited situations.[288] Courts, in this regard, have followed the Supreme Court's ruling in Christiansburg Garment Co. v. EEOC, which held that a prevailing defendant may obtain such fee only if a "plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."[289] Therefore, citizen plaintiffs, bringing harassing and frivolous suits, may be penalized by being asked to pay prevailing defendants'

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280 Glover-Rogers, *supra* note 264, at 71; 532 U.S. 598, 604 (2001).

281 574 F.3d 1054, 1063-64 (9th Cir. 2009).

282 574 F.3d 1054, 1063-64 (9th Cir. 2009); Hollander, *supra* note 262, at 644; Glover-Rogers, *supra* note 264, at 78.

283 Glover-Rogers, *supra* note 264, at 78.

284 Hollander, *supra* note 262, at 642.

285 574 F.3d 1054, 1063-64 (9th Cir. 2009); Glover-Rogers, *supra* note 264, at 78.

286 Glover-Rogers, *supra* note 264, at 81-82.

287 Berger, David, (1987), Court Awards of Attorneys' fees: Litigating Antitrust, Civil Rights, Public Interest and Securities Cases-Prevailing Party Concepts in Court Awards of Attorneys' Fees, Pli/Lit., Vol. 324, p. 77; Florio, *supra* note 263, at 722.

288 Florio, *supra* note 263, at 731.

289 Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 418 (1978); Florio, *supra* note 263, at 722 (Although Christiansburg Garment Co. v. EEOC is a Civil Rights Act case, courts have followed its ruling because the legislative purpose of environmental laws and the fee-shifting provisions resemble civil rights laws.)

attorney's fee.[290]

After a court addresses the issue of prevailing party status, it then determines whether or not the award of such fee is appropriate.[291]According to the appropriateness standard, attorney's fees may be granted to the prevailing party whenever the court decides it is appropriate.[292]

The plain language of the CWA requires the use of the appropriateness standard; courts, however, have been unable to use uniform criteria in applying it.[293] Many courts have interpreted the word "appropriate" widely and have most often "automatically awarded attorney's fees" to prevailing or substantially prevailing citizen plaintiffs.[294] Other courts, conversely, have rigorously applied the "appropriate standard" and have assumed broad discretion on the part of courts to deny attorney's fees to prevailing parties.[295] This incompatibility is mainly because the Supreme Court has never applied the "appropriateness standard" in determining attorney's fees under citizen suit provisions of environmental statutes.[296]

VI. THE ROLE AND IMPORTANCE OF CITIZEN ENFORCEMENT UNDER THE CLEAN WATER ACT

Citizen suits have played a major part in the enforcement of environmental laws; they are essential and significant for healthy and clean environment. They allow individuals and organizations to take an active role in protecting the environment. They are necessary and important to ensure preventing or reducing a violation or violation of such laws[297] because governmental authorities haven't succeeded in efficiently enforcing those laws.[298]

Environmental litigation would fail if it does not include citizen enforcement mechanism.[299] This is because first, citizen suits, unlike the federal and state government's actions, are not restricted by financial constraints.[300] Second,

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290 Florio, *supra* note 263, at 722; Russell, III, Walter B. & Gregory, Paul Thomas, (1984), Awards of Attorneys' Fees in Environmental Litigation: Citizen Suits and the "Appropriate" Standard, Ga. L. Rev., Vol. 18, p. 358.

291 Klein, *supra* note 271, at 116.

292 Russell & Gregory, *supra* note 290, at 309; Florio, *supra* note 263, at 716.

293 Glover-Rogers, *supra* note 264, at 72.

294 Florio, *supra* note 263, at 716; Klein, *supra* note 271, at 116; Glover-Rogers, *supra* note 264, at 72.

295 Glover-Rogers, *supra* note 264, at 72.

296 *Id.* at 77.

297 Elliot, *supra* note 24, at 177.

298 May, *supra* note 18, at 5.

299 Russell & Gregory, *supra* note 290, at 324-25.

300 Bender, Phillip M., (1997), Slowing the Net Loss of Wetlands: Citizen Suit Enforcement of Clean Water Act Section 404 Permit Violations, Envtl. L., Vol. 27, p. 251.

citizens or citizen groups can enforce environmental laws more easily than governmental authorities since they are free from time-consuming and complex bureaucratic procedures that government agencies have to deal with.[301] Third, government authorities may abstain from pursuing violators of environmental statutes due to political pressure.[302] Fourth, compared to government agencies, local citizens are much more capable to monitor and control negative effects of violations of environmental laws[303] since local information and expertise are valuable to notice such effects.[304] Fifth, government authorities do not have enough staff to perform efficiently in the field of the enforcement.[305] To sum up, citizen participation is needed and significant for the efficient environmental litigation; it is especially vital when governmental authorities fail to enforce environmental laws.

According to the CWA, citizens are not the only authority that can enforce the Act's standards and requirements. It has given the EPA huge authority to enforce the Act; at the same time, states have held an important role in the enforcement of the CWA.[306] Congress intended that both the federal government and state governments have primary enforcement authority and private citizens only act as a supplement to primary government enforcement.[307]

However, both the federal government and state governments have failed to efficiently enforce the CWA.[308] Statistics indicate that many states have demonstrated failure to successfully enforce the CWA's requirements and standards.[309] This is because first, only states with certified permits may initiate an enforcement action against violators of the CWA.[310] Second, limited

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301 *Id.*

302 Russell & Gregory, *supra* note 290, at 324-25.

303 Adler, Jonathan H., (2002), Stand or Deliver: Citizen Suits, Standing, and Environmental Protection, Duke Envtl. L. & Pol'y F., Vol. 12, p. 44.

304 *Id.*

305 Russell & Gregory, *supra* note 290, at 324-25.

306 Andreen, William L., (2007), Motivating Enforcement: Institutional Culture and the Clean Water Act, Pace Envtl. L. Rev., Vol. 24, p, 69.

307 Head, III, Thomas R. & Wood, Jeffrey H., (2004), No Comparison: Barring Citizen Suits in Dual Enforcement Actions, Nat. Resources & Env't., Vol. 18, p. 57.

308 Rechtschaffen, Clifford, (2004), Enforcing the Clean Water Act in the Twenty-First Century: Harnessing the Power of the Public Spotlight, Ala. L. Rev., Vol. 55, p. 781-95.

309 *Id.* at 784; Rechtschaffen, Clifford, (2000), Competing Visions: EPA and the States Battle for the Future of Environmental Enforcement, Envtl. L. Rep., Vol. 30, p. 10,807-09 (For example, Minnesota Pollution Control Agency found that approximately 18% to 31% of Minnesota's municipal and industrial facilities were in critical noncompliance, and that 45% of these facilities exceeded their effluent standards or limitations at least one time.).

310 Yates, Edward E., (1983), Federal Water Pollution Laws: A Critical Lack of Enforcement by the Enforcement Protection Agency, San Diego L. Rev., Vol. 20, p. 951.

government financial resources and increasing interstate competition hinder rigorous state enforcement.[311] Third, local political issues and concerns prevent stringent enforcement activities.[312] Lastly, water pollution does not consider jurisdictional and political boundaries.[313]

Just like state governments, the federal government, the EPA, has failed to successfully enforce the CWA due to organizational constraints, lack of interior standards and guidelines, and strong discretionary authority not to enforce.[314] Additionally, the EPA has also failed to efficiently and sufficiently performs its duty to control and encourage state enforcement.[315] This is because first, local EPA employees have had close relationship with the states that they control; therefore, they have been hesitant to commence necessary and proper actions against them.[316] Second, due to restricted financial resources and political concerns, many oversight mechanisms are rarely used; additionally, other old mechanisms have not been enough effective and generalized in order to control and promote state enforcement activities.[317]

In summation, citizen suits are undoubtedly vital and essential and have contributed greatly to the protection of the environment. They assure compliance with environmental statutes, especially when government authorities fail to enforce those statutes. According to the CWA, the federal government and state governments hold primary enforcement authority;[318] however, they both have failed to successfully enforce the CWA's standards and requirements.[319] As a result, the enforcement duty falls on private citizens who have been authorized to enforce the CWA through citizen suits.

VII. CONCLUSION

The US citizen involvement in the form of environmental citizen suits was derived from the need for larger public participation in the enforcement of environmental laws due to the lack of efficient governmental enforcement mechanism,[320] and citizen participation has become a "central element" of the enforcement of environmental laws.[321] Statistics show that environmental

311 Hodas, *supra* note 97, at 1572.
312 Yates, *supra* note 310.
313 *Id.*
314 *Id.* at 952.
315 Rechtschaffen, *supra* note 308, at 787.
316 *Id.*
317 *Id.*
318 Head & Wood, *supra* note 307.
319 Rechtschaffen, *supra* note 308.
320 Sunstein, *supra* note 41.
321 Cleve, *supra* note 42.

enforcement actions mostly arise from citizen suits[322] and that the majority of environmental citizen suits have been filed under Section 505 of the CWA,[323] which empowers citizens to bring an action against a violator or violators of the Act.[324]

The substantive innovation sparking this Section was that it authorized citizens or citizen groups to enforce the standards of the CWA. Plaintiff citizens would no longer bear the relatively difficult burden of proof to succeed in their lawsuit. They would only have to prove that the defendant was out of compliance with the Act.

Congress has placed some limitations on citizen suit provisions of environmental laws in order to prevent frivolous or harassing suits. In this regard, the CWA provides some procedural and substantive requirements, which have a remarkable impact on the success of citizen suits, because citizen plaintiffs' failure to satisfy such requirements may cause the dismissal of suits. In addition to these requirements, the citizen suit provision of the CWA has some other general aspects such as remedies and the attorney's fee provision provided under the Act.

According to the CWA, enforcement authority is shared by the states, federal government, and private citizens.[325] The historical and legislative background of the Act indicates that Congress intended the federal government and state governments to be primarily responsible for the enforcement of the CWA and citizens or citizen groups only act as a supplement to primary government enforcement.[326] However, statistics show that both federal and state authorities have been enforcing the CWA less robustly and less frequently.[327] Since there is a sharp decline in governmental enforcement activities,[328] citizen suits under the CWA are critical enforcement tools to ensure the protection of the nation's waters.

In conclusion, this study has shown the need and importance of citizen participation in the scheme of the modern federal water pollution enforcement mechanism under the CWA, in order to promote the adoption of the CWA's citizen suit provision and practices presented in the Act by other countries. The study argues that citizen enforcement is vital and necessary to

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322 May, *supra* note 18, at 8.

323 McCrory, Martin A., (2001), Standing in the Ever-Changing Stream: The Clean Water Act, Article III Standing, and Post-Compliance Adjudication, Stan. Envtl. L.J., Vol. 20, p. 76.

324 33 U.S.C. §1365.

325 Hodas, *supra* note 97, at 1578; 33.U.S.C. § 1365.

326 Head & Wood, *supra* note 307.

327 Rechtschaffen, *supra* note 308; Yates, *supra* note 310, at 951- 54.

328 May, *supra* note 18, at 4.

ensure compliance with the CWA, to promote water pollution enforcement, and to provide better protection for the nation's waters, particularly when government authorities fail to enforce the Act.

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BIBLIOGRAPHY

Adler, Jonathan H., (2002), Stand or Deliver: Citizen Suits, Standing, and Environmental Protection, Duke Envtl. L. & Pol'y F., Vol. 12, p. 44.

Andreen, William L., (2007), Motivating Enforcement: Institutional Culture and the Clean Water Act, Pace Envtl. L. Rev., Vol. 24, p, 69.

Appel, Peter A., (2004), The Diligent Prosecution Bar to Citizen Suits: The Search for Adequate Representation, Widener L. Rev. Vol. 10, p. 101.

Armstrong v. Asarco, 138 F.3d 382, 387 (8th Cir. 1998).

Attwood, Jason, (2000-2001), ARTICLE III - Standing - Article III Standing is Available To Citizen Group Seeking to Enforce Provisions Of The Clean Water Act Through Citizen Suit Provision - Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167 (2000), Seton Hall Const. L.J., Vol. 11, p. 796.

Baker, Bryce & Garratt, Justin & Lane, Mari, (2006), Best Brief for Intervenor: Eighteenth Annual Pace National Environmental Law Moot Court Competition, Pace Envtl. L. Rev., Vol. 23, p. 639-40.

Barnum, Cassandra, (2010), Injury in Fact, Then and Now (and Never Again): Summers v. Earth Island Institute and the Need for Change in Environmental Standing Law, Mo. Envtl. L. & Pol'y Rev., Vol. 17, p. 4.

Battle, Jackson B. & Lipeless, Maxine I., (1998), Water Pollution, 3rd ed., Anderson Publishing Co., p. 2.

Bender, Phillip M., (1997), Slowing the Net Loss of Wetlands: Citizen Suit Enforcement of Clean Water Act Section 404 Permit Violations, Envtl. L., Vol. 27, p. 251.

Berger, David, (1987), Court Awards of Attorneys' fees: Litigating Antitrust, Civil Rights, Public Interest and Securities Cases-Prevailing Party Concepts in Court Awards of Attorneys' Fees, Pli/Lit., Vol. 324, p. 77.

Berger, Emily A., (2000), Standing at the Edge of a New Millennium: Ending a Decade of Erosion of the Citizen Suit Provision of the Clean Water Act, Md. L. Rev., Vol. 59, p. 1373.

Burrows, Matthew, (2009), The Clean Air Act: Citizen Suits, Attorneys' Fees, and the Separate Public Interest Requirement, B.C. Envl. Aff. L. Rev., Vol. 36, p. 114-15.

Campbell, Jonathan S., (2000), Has the Citizen Suit Provision of the Clean Water Act Exceeded its Supplemental Birth?, Wm. & Mary Envtl. L. & Pol'y Rev., Vol. 24, p. 318.

Casdorph, Laveta, (1999), The Constitution and Reconstitution of the Standing Doctrine, St. Mary's L.J. , Vol. 30, p. 547.

Chin, Courtney, (2015), Standing Still: The Implications of Clapper for Environmental Plaintiffs' Constitutional Standing, Colum. J. Envtl. L., Vol. 40, p. 333.

Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 418 (1978).

Cleve, George Van, (1999), Congressional Power to Confer Broad Citizen Standing in Environmental Cases, Envtl. L. Rep., Vol. 29, p. 10038.

Comfort Lake Ass'n, Inc. v. Dresel Contracting, Inc., 138 F. 3d 351, 357 (8th Cir. 1998).

Coplan, Karl S., (2014), Citizen Litigants Citizen Regulators: Four Cases Where Citizen Suits Drove Development of Clean Water Law, Colo. Nat. Resources, Energy & Envtl. L. Rev., Vol. 25, p.65.

Echlverria, John D., (2004), Standing and Mootness Decisions in the Wake of Laidlaw, Widener L. Rev., Vol. 10, p. 192; 528 U.S. 167, 173 (2000).

Elliot, Sharon, (1987), Citizen Suits Under the Clean Water Act: Waiting for Godot in the Fifth Circuit, TUL. L. Rev. Vol. 62, p. 176.

Evans, Lynwood P., Bennett v. Spear: A New Interpretation of the Citizen-Suit Provision, Campbell L. Rev. Vol. 20, p.173.

Fadil, Adeeb, (1985), Citizen Suits Against Polluters: Picking Up the Pace, Harv. Envtl. L. Rev., Vol. 9, p. 50-51.

Farrar v. Hobby, 506 U.S. 103, 112 (1992).

Florio, Kerry D., (2000), Attorneys' Fees in Environmental Citizen Suits: Should Prevailing Defendants Recover? Boston College Environmental Affairs Law Review, Vol. 27, p. 708.

Friends of the Earth v. Consolidated Rail Corp., 768 F.2d 57, 63 (2d Cir. 1985).

Friends of the Earth v. Gaston Copper Recycling Corp., 629 F.3d (4th Cir. 2011).

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 175 (2000).

Frye, Russell S., (1993), Citizens' Enforcement of the US Clean Water Act, in Water Pollution Law and Liability, Patricia Thomas ed., Graham & Trotman & International Bar Association, p.183.

Gelpet, Marcia R. & Barnestt, Janis L., (1990), Penalties in Settlements of Citizen Suit Enforcement Actions Under the Clean Water Act, Wm. Mitchell L. Rev., Vol. 16, p. 1028.

Gilles, Myriam E., (2001), Representational Standing: U.S. ex rel. Stevens and the Future of Public Law Litigation, Cal. L. Rev., Vol 89, p. 323-25.

Ginsberg, Beth S. & Morgan, Jason T., (2011), Civil Judicial Enforcement, in The Clean Water Act Handbook, Mark A. Ryan eds., 3rd ed., ABA Publishing , p. 238.

Glover-Rogers, Mary Cile, (2011), Who's Footing the Bill for the Attorneys' Fees?: An Examination of the Policy Underlying the Clean Water Act's Citizen Suit Provision, Mo. Envtl. L. & Pol'y Rev., Vol. 18, p. 64-65.

Goodman McKinney, Carie, (1986), Statute of Limitations for Citizen Suits under the Clean Water Act, Cornell L. Rev., Vol. 72, p. 201.

Gross, Joel M. & Stelcen, Kerri L., (2012), Clean Water Act, 2nd ed., ABA Publishing, p. 131.

Gwaltney of Smithfield Ltd. v. Chesapeake Bay Foundation Inc., 484 U.S. 49 (1987) (Gwaltney I).

Gwaltney of Smithfield Ltd. v. Chesapeake Bay Foundation Inc., 844 F.2d 170, 172 (4th Cir. 1988) (Gwaltney II).

Chesapeake Bay Found., Inc. v. Gwaltney, of Smithfteld, Ltd., 890 F.2d 690, 696-97 (4th Cir. 1989) (Gwaltney III).

Head, III, Thomas R. & Wood, Jeffrey H., (2004), No Comparison: Barring Citizen Suits in Dual Enforcement Actions, Nat. Resources & Env't., Vol. 18, p. 57.

Hodas, David R., (1995), Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority is Shared by the United States, the States, and Their Citizens?, Md. L. Rev., Vol. 54, p. 1621-22.

Hollander, Joshua E., (2010), Fee-Shifting Provisions in Environmental Statutes: What They Are, How They Are Interpreted, and Why They Matter, Geo. J. Legal Ethics, Vol. 23, p. 633.

Jackson, Jr., Ronal P., (2004), Recent Development: American Canoe Association v. Murphy Farms, Inc.: The Fourth Circuit Reaffirms That an Environmental Organization with Article III Standing to Sue under the Citizen-Suit Provision of the Clean Water Act Must Satisfy the Requirements of the Gwaltney Test, U. Balt. J. Envtl. L. Vol. 11, p. 91.

Jorgenson, Lisa, & Kimmel, Jeffrey J., (1988), Environmental citizen suits: confronting the corporation, Bureau of National Affairs, p. 19; Lloyd, *supra* note 245, at 415.

Karr v. Hefner, 475 F.3d 1192, 1197 (10th Cir. 2007).

Klein, Jason Douglas, (2003), Attorney's Fees and the Clean Water Act after Buckhannon, Hastings W.- Nw J. Envt'l L. & Pol'y, Vol. 9, p. 111.

Knedlik, Lana, (1996), Attorneys' Fees in Private Party Cost Recovery Actions Under CERCLA: The Key Tronic Decision, U. Kan. L. Rev., Vol. 44, p. 370.

Krent, Harold J. & Shenkman, Ethan G., (1993), Of Citizen Suits and Citizen Sunstein, Mich. L. Rev., Vol. 93, p. 1793.

Lazerow, Shana, (2003), Once Adequate, Always Adequate: The Courts Are Getting the Clean Water Act Notice Requirements Right, Hastings W.-Nw J. Envt'l L. & Pol'y, Vol. 9, p. 151.

Lehner, Peter H., (1996), The Efficiency of Citizen Suits, Alb. L. Envtl. Outlook, Vol.2, p. 4.

Leonard, Arne R., (1995), When Should an Administrative Enforcement Action Preclude a Citizen Suit Under the Clean Water Act?, Nat. Resources J. Vol. 35, p. 605.

Lloyd, Edward, (2004), Supplemental Environmental Projects Have Been Effectively Used In Citizen Suits To Deter Future Violations As Well As to Achieve Significant Additional Environmental Benefits, Widener L. Rev., Vol. 10, p. 414.

Lloyd, Edward, (2012), Citizen Suits and Defenses Against Them, in ALI-ABA Continuing Professional Education Environmental Litigation, p. 899.

Longfellow, Emily, (2001), Friends of the Earth v. Laidlaw Environmental Services: A New Look At Environmental Standing, Environs Envtl. L. & Pol'y J., Vol. 24, p.12.

Lopez, Alberto B., (2001), Laidlaw and the Clean Water Act: Standing in the Bermuda Triangle of Injury in Fact, Environmental Harm, and "Mere" Permit Exceedances, U. Cin. L. Rev., Vol. 69, p. 159.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 559 (1992).

Mann, David S., (1991), Polluter-financed environmentally beneficial expenditures: Effective use or improper abuse of citizen suits under the Clean Water Act?, Envtl. L., Vol. 21, p. 180.

Masucci, Amanda J., (2001), Stand By Me: The Fourth Circuit Raises Standing Requirements in Friends of the Earth, Inc. v. Gaston Copper Recycling Corp. - Just as Long as You Stand, Stand by Me, Vill. Envtl. L.J., Vol. 12, p. 181.

May, James R, (2004), Now More than Ever: Trends in Environmental Citizen Suits, Widener L. Rev., Vol. 10, p. 1-2.

May, James R., (2004), The Availability of State Environmental Citizen Suits, Nat. Resources & Env't., Vol. 18, p. 53.

May Peters, Lori, (1999), Comment, Reloading the Arsenal in the Informational War on Pollution - Citizens As Soldiers in the Fight and How a Lack of "Actionable" Legs On Which to Stand Nearly Forced a Cease-Fire, Vill. Envtl. L.J., Vol. 10, p. 159.

McCall Jr., Eugene C. & Trail, Ryan W., (2012), Citizen Suits to Enforce Environmental Laws, S.C. Law., Vol. 23, p. 36.

McCrory, Martin A., (2001), Standing in the Ever-Changing Stream: The Clean Water Act, Article III Standing, and Post-Compliance Adjudication, Stan. Envtl. L.J., Vol. 20, p. 76.

McIntosh, Ben, (2005), Standing Alone: The Fight to Get Citizen Suits Under the Clean Water Act Into the Courts, Mo. Envtl. L. & Pol'y Rev., Vol. 12, p. 175.

McQueary Smith, Beverly, (1990), The Viability of Citizens' Suits Under the Clean Water Act After Gwaltney of Smithfield v. Chesapeake Bay Foundation, Case W. Res., Vol. 40, p. 8-9.

Miller, Jeffrey G., (1983), Private Enforcement of Federal Pollution Control Laws, Part I, Envtl. L. rep., Vol. 13, p.309.

Miller, Jeffrey G., (2003), Overlooked Issues in the "Diligent Prosecution" Citizen Suit Preclusion, Widener L. Rev. Vol. 10, p. 70.

Miller, Jeffrey G. & Environmental Law Institute, (1987), Citizen Suits: Private Enforcement of Federal Pollution Control Law § 9-4, p.1.

Monaghan, Henry, (1973), Constitutional Adjudication: The Who and When, Yale L.J., Vol. 82, p. 1384.

National Environmental Foundation v. ABC Rail Corp., 926 F.2d 1096, 1097-98 (11th Cir. 1991).

Nichol, Jr., Gene R., (2002), Standing for Privilege: The Failure of Injury Analysis, B.U. L. Rev., Vol. 82, p. 304.

Nicyper, Dean R., (1984), Attorneys' Fees and Ruckelshaus v. Sierra Club: Discouraging Citizens from Challenging Administrative Agency Decisions, Am. U. L. Rev., Vol. 33, p. 784.

Potts, Elizabeth Rae, (1999), A Proposal for an Alternative to the Private Enforcement of Environmental Regulations and Statutes Through Citizen Suits: Transferable Property Rights in Common Resources, San Diego L. Rev., Vol. 36, p. 554.

Pub. Interest Research Grp. of N.J., Inc. v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 75 (3d Cir. 1990).

Rechtschaffen, Clifford, (2000), Competing Visions: EPA and the States Battle for the Future of Environmental Enforcement, Envtl. L. Rep., Vol. 30, p. 10,807-09.

Rechtschaffen, Clifford, (2004), Enforcing the Clean Water Act in the Twenty-First Century: Harnessing the Power of the Public Spotlight, Ala. L. Rev., Vol. 55, p. 781-95.

Rideout, Christine L., (2011), Where are all the citizen suits?: the failure of safe drinking water enforcement in the United States, Health Matrix, Vol. 21, p. 657-58.

Riesel, Daniel, (1997), Environmental Enforcement: Civil and Criminal, Ch.15, § 15.02, Law Journal Press, p. 25.

Robinson, Gail J., (1987), Interpreting the Citizen Suit Provision of the Clean Water Act, Case W. Res., Vol. 37, p. 516.

Russell, III, Walter B. & Gregory, Paul Thomas, (1984), Awards of Attorneys' Fees in Environmental Litigation: Citizen Suits and the "Appropriate" Standard, Ga. L. Rev., Vol. 18, p. 358.

Salzman, James & Thompson, Jr., Barton H., (2010), Environmental Law and Policy, 3rd ed., Foundation Press, p. 79.

Seidenfeld, Mark & Satz Nugent, Janna, (2005), "The Friendship of the People": Citizen Participation in Environmental Enforcement, Geo. Wash. L. Rev., Vol.73, p. 298.

Shepherdson, Melanie, (2011), Citizen Suits, in The Clean Water Act Handbook, Mark A. Ryan eds., ABA Publishing, p. 257-258.

Sierra Club v. Chevron U.S.A., Inc., 834 F.2d 1517, 1521 (9th Cir. 1987).

Smith, Kristi M., (2004), Who's Suing Whom?: A Comparison of Government and Citizen Suit Environmental Enforcement Actions Brought Under EPA-Administered Statutes, 1995-2000, Colum. J. Envtl. L., Vol. 29, p. 365.

Snook, Robert D., (1998), Environmental Citizen Suits and Judicial Interpretation: First Time Tragedy, Second Time Farce, W. New Eng. L. Rev. Vol. 20, p. 315.

S. Rep. No. 50, 99th Cong., 1st Sess. 28 (1985).

S. Rep. No. 414, 92d Cong., 1st Sess. 80 (1972).

Sunstein, Cass R., (1992), What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III, Mich. L. Rev., Vol. 91, p. 193.

Thompson, James L., (1987), Citizen Suits and Civil Penalties Under the Clean Water Act, Mich. L. Rev., Vol. 85, p. 1658.

Thompson, Jr., Barton H., (2000), The Continuing Innovation of Citizen Enforcement, U. Ill. L. Rev., Vol. 2000, p. 185.

Townsend, Leonard 0., (2000), Note: Hey You, Get Off [of] My Cloud: An Analysis of Citizen Suit Preclusion under the Clean Water Act, Fordham Envtl. L.J., Vol. 11, p. 91.

United States Clean Air Act (42 U.S.C. 7401 et seq.).

United States Clean Water Act (33 U.S.C. 1251 et seq.).

United States Endangered Species Act (16 U.S.C. 1531 et seq.).

United States Resource Conservation and Recovery Act (42 U.S.C. 6901 et seq.).

United States Toxic Substances Act (15 U.S.C. 2601 et seq.).

Washington Trout v. McCain Foods, Inc., 45 F.3d 1351 (9th Cir. 1995).

Werner, Matthew M., (1995), Mootness and Citizen Suit Civil Penalty Claims Under the Clean Water Act: A Post-Lujan Reassessment, Envtl. L., Vol. 25, p. 801.

Yates, Edward E., (1983), Federal Water Pollution Laws: A Critical Lack of Enforcement by the Enforcement Protection Agency, San Diego L. Rev., Vol. 20, p. 951.

GLOBAL LEGAL PLURALISM: A NEW CHALLENGE TO INTERNATIONAL LAW?

Küresel Hukuki Çoğulluk: Uluslararası Hukuk İçin Yeni bir Meydan Okuma Mı?

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ABSTRACT

In the new era of jurisdictional pluralism, the need for international order has further scaled up depending upon a diverse range of international actors, numerous regulatory regimes and overlapping jurisdictional assertions of authority. Accordingly, legal literature has more intensively touched upon the subject of legal pluralism and scholars have tendency to investigate what the current effects of global legal pluralism are and what kind of outcomes it might bring in foreseeable future namely: Unity, Multiplicity or Fragmentation? On this subject matter, this paper aims at evaluating to what extent international law provides an explicit and common set of standards applicable in the new era. In line with this target, it initially adopted a comparative approach and examined how different perspectives have interpreted international law historically and how their premises have changed over time. Later, it analysed whether or not the conflict of laws could have corrosive effects to the universality of rule of law according to the standpoints of United Nations and prominent scholars. At last, it inferred that in an attempt to understand transnational legal dynamics better, international law should be recognized as a utilisable living instrument which is in constant need of reformation.

Keywords: Legal pluralism, unity, multiplicity, fragmentation

ÖZET

Yargı yetkisine ilişkin çoğulluğun bulunduğu yeni çağda, uluslararası düzen ihtiyacı çok çeşitli uluslararası aktörler, sayısız düzenleyici rejimler ve çatışan yargı yetkisi iddialarına bağlı olarak daha da artmıştır. Dolayısıyla, hukuk literatürü hukuki çoğulluk konusuna daha yoğun şekilde değinirken, akademisyenler küresel hukuki çoğulluğun mevcut sonuçlarının neler olduğunu ve ön görülebilir gelecekte ne tip sonuçlar doğurabileceğini araştırmışlardır. Sonuç birlik mi, çok çeşitlilik mi yoksa parçalanma mı olacaktır? Bu hususta çalışma, uluslararası hukukun ne ölçüde açık, ortak ve uygulanabilir bir standartlar seti sağladığını değerlendirmeyi amaçlamaktadır. Bu amaca paralel olarak, öncelikle karşılaştırmalı bir yaklaşım benimsemekte ve farklı perspektiflerin uluslararası hukuku tarihsel olarak nasıl yorumladığını ve öncüllerinin zamanla nasıl değiştiğini incelemektedir. Daha sonra, Birleşmiş Milletlerin ve öne çıkan bilim insanlarının bakış açısına göre yasalar çatışması durumunun hukukun üstünlüğünün evrenselliği açısından yıpratıcı etkiler doğurup doğurmadığını analiz etmektedir. Sonunda, ulus-aşırı hukuki dinamiklerin daha iyi anlaşılabilmesi için, uluslararası hukukun daimi bir reform ihtiyacı olan, faydalı ve yaşayan bir araç olarak tanınması gerektiği sonucuna varmaktadır.

Anahtar Kelimeler: Hukuki çoğulluk, birlik, çok çeşitlilik, parçalanma

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Introduction

The role of jurisdictional pluralism is of paramount importance in sculpting our perception of rule of law today. Admittedly, its implications are noticeable in many ways. At first, both the extent and scope of international law have unprecedentedly broadened after the second half of the 20th century. States have tended towards international alliances on new areas such as trade, environment, intellectual property, human rights, investment and so forth.[1] Afterwards, they have created not only sub-systems (regulatory regimes) of law on the subject or geographical basis but also detailed rules of law by signing many bilateral or multilateral treaties.[2] Thereby, the intensification of cooperation amongst countries resulted in far-reaching expansion of governmental and intergovernmental norms.

However, heightened governmental and intergovernmental norms were only one aspect of multidimensional global legal pluralism (GLP). In addition to this, multiple "non-state communities"[3] have participated into that system by their own way of promotion of law and use of legal techniques. Thereafter, multifaceted interconnectedness between global, regional and national legal structures has further escalated the complexities of law. Consequently, the state-centric notion of legal authority has been eroded over time by the generation of quasi-legal regimes and overlapping assertions of jurisdictional power.[4]

On the one hand, interaction between multiple actors led to "intermingling of normative systems"[5], but on the other hand, this situation brought about a hybrid legal space in which there are competing assertions on jurisdictional authority over the same subject matter by various actors.[6] Then, deep concerns have been raised about how to reconcile newly existing and ever-increasing rules and actors with the prolonged and traditional ones. Therefore, many legal scholars have been sceptical of that question: "Does international law provide a clear and acceptable set of standards that can form a common baseline for rule of law promotion applicable to both states and new forms of governance?"[7]

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1 Melda Sur, *Uluslararası Hukukun Esasları* (2nd edn Beta Basım Yayım, İstanbul 2006) 4.

2 Talat Kaya, 'Uluslararası Hukuk Bölünüyor mu? Uluslararası Hukukun Genişlemesi ve Farklılaşmasından Kaynaklanan Zorluklar' (2012) 61 AUHFD 149, 150.

3 Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge University Press, 2012) 3.

4 Berman, (n.3),1-8. In an attempt to analyse the results of this process both in theory and practise, see, f.e., Saim Üye, *Teoride ve Pratikte Hukuki* Çoğulluk (Turhan Yayınevi, Ankara 2013).

5 Paul Schiff Berman, 'The New Legal Pluralism' (2009) 5 Annu. Rev. Law Soc. Sci. 225.

6 Berman, (n.3), 1-5.

7 Andre Nolkaemper, 'Rule of Law Dynamics in an Era of International and Transnational

In line with this question, legal literature has more intensively touched upon the subject of jurisdictional pluralism and scholars have tendency to investigate what the current effects of GLP are and what kind of outcomes it might bring in foreseeable future namely: Unity, Multiplicity or Fragmentation?

In this regard, the aim of this paper is to elucidate in what ways jurisdictional pluralism has affected the cogency of rule of international law. In line with this target, the comparison between old and new perceptions of international law might help to understand what has changed with GLP. Accordingly, the first section is adopted a comparative approach and devoted to examine how different approaches have interpreted international law historically and how their premises have changed over time. The following part seeks to illustrate the extent to which conflict of laws could have corrosive effects to the universality of rule of law according to the UN perspective and standpoints of prominent scholars. At last, it infers that to understand transnational legal dynamics better, the rule of laws should be recognised as a "living instrument" in an ongoing cycle of transformation.

1. Different Approaches to International Law: Understanding Law from Global Legal Pluralism Perspective

In 1986, Griffiths defined legal pluralism as "that state of affairs, for any social field, in which behaviour pursuant to more than one legal order occurs".[8] Since this definition, the plurality of legal orders has continued to rise even further by the engagement of a great bulk of non-state communities into the system. Nonetheless, normative orders initiated by non-state actors have never thought as applicable law at the beginning; however, current developments depict that it is not possible to equate international law to state-made law anymore.[9] Hence, this process posed a challenge to the traditional understanding of international law.

Meanwhile, numerous jurisdictions have been easily affected by that process thanks to cutting-edge communication technology, the growth of multinational corporate bodies, and increased mobilization of people and capital across boundaries.[10] Accordingly, the boons of globalisation paved the way for spreading of the "jurisdictional redundancy"[11]across the world.

Governance' [2011] citing ACIL Research Paper No 2011-10 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1933701> accessed 08 November 2013.

8 John Griffiths, 'What Is Legal Pluralism?' (1986) 24 *J. Legal Pluralism* 1, 2.

9 Ralfh Michaels, 'the Re-statement of Non-State Law: The State Choice of Law, and the Challenge from Global Legal Pluralism' (2005) 51 WL Rev 1209, 1212.

10 Berman, (n. 3), 5.

11 Robert M. Cover, 'The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation' (1981) 22 Wm. & Mary L. Rev. 639.

For example, almost 125 international institutions, which might assert jurisdictional authority, were recognized by the Project on International Courts and Tribunals.[12]

Clearly, there has been little agreement in academic circles on how to interpret rule of international law. Nevertheless, GLP initiated a new era in which legal approaches have revised their premises and mitigated their claims rather than being hard-line supporters of their beliefs. To understand this tendency, this section traces how the perceptions of different approaches on international law have evolved in time.

1.1. Legal Positivism

As one of the prominent legal positivists, Hart claims that international law has the deficiency of international legislation, rule of recognition, centrally systemized binding sanctions and international court with well-established jurisdiction, so it just contains very basic rules of obligation which actually inhibits any theoretical or practical aim.[13] Put it differently, since it does not have sovereign mandate or general criteria for recognition of its wider rules, it might not be categorized as law in a real sense. Moreover, he criticized that seemingly valid rules on paper do not have a real value in practise. For instance, law enforcement provisions of the Charter were paralyzed by veto in Korean War when their adoption is of paramount importance.[14] Resultantly, legal positivists such as Bentham, Kelsen, Hart and Raz were generally doubtful of whether international law is really law or not. Also, many of them totally rejected it. To exemplify, in "The Province of Jurisprudence" Austin revealed that law between nations is established by general opinion and imposed by moral sanctions and fear of hostility, so it is improperly called as law.[15]

Also, on classical positivists' view, international law emanates from the state's own free will, so it exclusively regulates the rights and obligations of states *inter se* rather than that of other actors.[16] Furthermore, if there are certain norms created by non-state communities, they cannot be valid until they become a part of the written documents of states.[17]

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12 Project on International Courts and Tribunals, *The International Judiciary in Context* (2004), <http://www.pict-pcti.org/publications/synoptic_chart/synop_c4.pdf> accessed 27 December 2013.

13 H.L.A. Hart, *The Concept of Law (*3rd edn, OUP 2012) 213-218.

14 Hart, (n.13), 217.

15 John Austin, *The Province of Jurisprudence Determined* (London: The University of London 1832) 210.

16 M.W. Janis, 'Jeremy Bentham and Fashioning of International Law' (1984) 78 AJIL 405, 409.

17 Hans J. Morgenthau, 'Positivism, Functionalism and International Law' 34 AJIL 272.

Yet, the scope of international law has been extended to constitute some non-state law in the GLP process. Correspondingly, Dworkin has developed his interpretive theory to customs and admitted that judges often call upon not only official acts of promulgations but also many others.[18] Then, Roberts has argued that since there is a fluid nature of customary international law owing to an increasing number and diversity of states; modern customary law should be conciliated with the sovereignty of state through Dworkin's interpretative theory which amalgamates description and normativity into a single approach.[19]

Likewise, post-modern positivists in the 21st century urged for deep reformation in classical paradigms of jurisdictional positivism to be much more inclusive towards non-state norms.[20] For this reason, many hard-line legal positivists give up futile debates of "is international law really law?"[21] and revise their traditional assumptions. Accordingly, global legal pluralism debate was brought to agenda instead of old, vain arguments. Nevertheless, some sovereigntists[22] still insist on "top-down models that focus solely on coercive power and the interests of nation-states"[23] to resolve the problems of multiplicity and fragmentation.

1.2. Universalism and Cosmopolitanism

As opposed to sovereigntists, universalists believe that since international norms are more right-protecting and liberal, they should not be subordinated to national practices.[24] Besides, the proponents of this approach at first draw attention to interconnection between international legal systems, and then trump the primacy of a single universal welfare rather than that of state or local welfare.[25] Accordingly, they have built universalism on certain fundamental moral principles and ethical values which are appropriate means to apply all time and all around the world.[26]

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18 Ronald M Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press 1977) 40.

19 A.E. Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation)' (2001) 97 AJIL 757, 773-776.

20 J. Kammerhofer & J. D'aspremont (eds), *International Legal Positivism in a Post-Modern World* (Cambridge: Cambridge University Press 2014, Forthcoming) <http://www.jura.uni-freiburg.de/institute/rphil/rtheo/ilp> accessed 23 December 2013.

21 The comparison between national and international law and critics about legal nature of international law mostly came to an end.

22 Berman borrowed that term from Peter Spiro, The New Sovereigntists: American Exceptionalism and Its False Prophets, Foreign Affairs 9-15 (2000).

23 Paul Schiff Berman, 'A Pluralist Approach to International Law' (2007) 32 Yale J. Int'l L. 301, 326-327.

24 Berman, (n.3), 14.

25 Berman, (n.3), 11.

26 W. Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (1st edn, Cambridge University Press 2008) 127.

In other respects, there have been particular refinements and distinctions among universalists, and accordingly five different forms of universalism have occurred throughout the history namely: normative, descriptive, ethnocentric, consensual and surface universalism.[27] Almost all of these groups emphasise a single global set of governing rules; however, especially consensual and surface universalism focused on diversity beneath the surface and highlighted the prominence of consensus in jurisdictional pluralism which can be reached through the means of negotiation, persuasion, coercion, convergence or imposition.[28] Therefore, it is noticeable that universalism aims at connecting humankind by underlining morality and ethics in general; however, it generally refuses "particularistic ideas of belonging" or "individualistic approach to understanding society"[29]. The GLP has not changed that tendency much. Otherwise, if we understand universalism as an extension of moral and ethical values to the entire planet, it can be claimed that GLP made international law more universal.[30]

Obviously, universalism and cosmopolitanism overlap in many respects; however, the distinction between them is also worth to mention. Since cosmopolitan order is based on common humanity in which each person ascertains his or her rights in relation to others, it centres on different universalism which emphasises the role of individuals.[31] For instance, as a well-known cosmopolitan, Slaughter discusses that in a world of liberal states individuals acquired a right to monitor their governments through an international or national legislative process, which is for good for the sake of transparency.[32] Thereby, the role of "global citizens" is highlighted as the bearers of both rights and responsibilities by cosmopolitans.[33]

Moreover, cosmopolitanism encourages the formation of a common moral code by emphasising the virtue of humanity, justice and tolerance. However, since it acknowledges multiple refracted differences among people, it does not offer "a model of international citizenship in the sense of international harmonization and standardization".[34] Instead of standardization, it offers

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27 Twining, (n.26), 127-130.

28 Twining, (n.26), 128-129.

29 C.M. Augiar, 'Cosmopolitanism' (28 September 2006) McMaster University/CAPES Foundation <http://www.globalautonomy.ca/global1/glossary_entry.jsp?id=CO.0074> accessed 24 December 2013.

30 P. Korkman and V. Makinen (eds), *Universalism in International Law and Political Philosophy*, 4, (Helsinki Collegium for Advanced Studies 2008) 40-42 (emphasis added).

31 Augiar, (n.29).

32 Anne-Marie Slaughter, 'International Law in a World of Liberal States' (1995) 6 Eur. J. Int'l L. 503, 533.

33 Augiar, (n.29).

34 Berman, (n.3), 12.

procedural mechanisms, institutions and structures to manage legal hybridity, so it opposes to either assimilation or ostracism' of the "other".[35] Briefly, since cosmopolitans adopt one of the most liberal and inclusive standpoints to interpret the rule of international law, GLP is welcomed by them.

1.3. Legal Pluralism

Santos, Griffiths, Twinning, Teubner, Benda-Beckmann, Koskenniemi, Sally Engle and many others believe that even if state-centric jurisdiction is a vital element of international law; GLP has increased the complexity of system, and thus the rule of international law will not be based on inter-sovereign interaction anymore. In this sense, legal pluralists would prefer to observe the interplay of multiple jurisdictions and diverse range of actors without proposing any hierarchy among them.[36]

Also, pluralists have never underestimated the fragmentation issue but they tended towards assessing it as a postmodern anxiety rather than as a threat.[37] Accordingly, they would rather lay stress on the mission of newly-introduced legal hybridity which could be contributory to the traditional understanding. Furthermore, they believe that the consensus on substantive norms and values is hard to reach; however, ensuring participation of more viewpoints, actors and norms might result in better decision-making, higher obedience by participants and eventually more desirable real-world outcomes.[38] To illustrate, on a pluralist point of view, if courts take plural community affiliations into account and set hybrid rules for the resolution of multistate disputes, they would effectuate their state's interest in a world community.[39]

As indicated by Burke-White, international legal pluralists appreciate the worth of multiplicity in the traditions, approaches and choices of actors when they generate new procedures, rules, norms and even courts.[40] It is widely admitted that international law does not specify which norms supersede over the others (except: *jus cogens and erga omnes*) and who should decide about right means to legitimate aims. However, for pluralists that situation does not

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35 Berman,(n.3),10-12.

36 Berman, (n.3),16.

37 Martti Koskenniemi & Paivi Leino, 'Fragmentation of International Law: Postmodern Anxieties' (2002) 15 LJIL 553.

38 Berman, (n.3), 11.

39 Paul Schiff Berman, 'Choice of Law and Jurisdiction on Internet: Towards a Cosmopolitan Vision' (2005) 153 U.Pa.L.Rev. 1819, 1864.

40 William W. Burke-White, 'International Legal Pluralism' [2004] MJIL 963, 978. <https://www.law.upenn.edu/cf/faculty/wburkewh/workingpapers/25MichJIntlL963(2005).pdf> accessed 08 November 13.

lead to any problem since they suppose that an everlasting contest of very diverse input could generate more efficient reaction to non-state jurisdictional assertions.

As one of the most well-known pluralists, Berman criticizes universalism and legal positivism by stating that policy makers and scholars should not pin their faith on jurisdictions which either premised upon seeking for universals or imposing state-centric territorial insularity.[41] According to him, sovereigntists do ignore possible benefits of different norms, perspectives and actors while designing institutions, procedures and discursive practices.[42]

Also, even if the application of universal norms is normatively desirable, to convince each actor to the necessity of these principles is hard to achieve. At the same time, the complex relationship between imperialist ambitions and these norms increases the tyranny of sovereigntists' voices. Due to these reasons, it is inevitable to prevent current anxiety about competing norms by proposing a single set of governing principle. Nonetheless, since legal pluralists have strived to find out the ways of managing them without eliminating any aspects.

2. Conflict of Laws: Multiplicity or Fragmentation?

The interpretation of the legal pluralism process by the primary actors can be very crucial to depict the extent of the fragmentation problem. Accordingly, this section initially examines how the UN has interpreted the GLP: whether as a multiplicity of input or fragmentation threat. Also, after discussing counter-fragmentation efforts of the UN to deal with overlapping legal orders, it gives an overview of the literature concerning the GLP. At the end, it defends the view that changes in international law can be explained by its living nature.

2.1. The UN: An Architect of Coherency?

In fact, the rule of law has been regarded as an agenda issue by the UN General Assembly since 1992.[43] Nevertheless, due to increasing concern over the cogency of rule of law principles for new international and trans-national context, the UN renewed its interest to coordinate it much more effectively. Thereby, especially in the 21st the UN reiterated the mission of current legal regulations more than ever and called for accountability, transparency, check and balance system, coordination and so on.[44] In addition, the establishment

41 Berman, (n.3), 10.

42 Berman, (n.3), 8-11.

43 United Nations, 'Rule of Law' <http://www.un.org/en/ruleoflaw/> accessed 20 December 2013.

44 See. Report of the Secretary-General, 'the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies' UN Doc S/2004/616 para.6 which defines Rule of Law.

of Rule of Law Unit in 2006 or the founding of Rule of Law Coordination and Resource Group in 2007 might be regarded as initiatives of the UN to fortify proper operation of international law.

Additionally, International Law Commission (ILC) study group to work on the fragmentation issue was established in 2002.[45] In 2006, this group published a report named as "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law".[46] It points out current anxieties and says "principles that may often point in different directions… new types of treaty clauses or practices that may not be compatible with old general law or the law of some other specialized branch".[47] By this expression, study group seems to acknowledge that diversification of legal principles might increase the incoherence of international law.

On the other hand, incoherency is not considered counterproductive to the enforcement of international law. The report mentions that since coherency provides legal security and predictability, it is valued positively; however, if a legal system is regarded as unfair or impracticable in some respects, it could not claim any added value in its formal and abstract virtue.[48] Therefore, it is better to make use of "constitutive value of pluralist system" in the multiple sovereignties world rather than insisting on coherent but unworkable provisions.[49] Hence, it is fair to proclaim that the study group has adopted a clear pluralist standpoint and struggled to manage the diversity without preventing the occurrence of plural normative orders.

This report also states that fragmentation pushes international law into jurisdictional pluralism but during this process it generally keeps using the essential resources of international law namely: customary law, peremptory norms (*jus cogens*), "obligations owed to the international community as a whole" (*erga omnes*), "general principles of law recognized by civilized nations" and the rules of the Vienna Convention on the Law of Treaties (VCLT).[50] Thereby, the development of special treaty-regimes has not weakened the legal security, predictability or the equality of legal subjects in a real sense.[51]

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45 International Law Commission (ILC), 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion International Law' (30 June 2005) <http://legal.un.org/ilc/summaries/1_9.htm> accessed 19 December 2013.

46 UNGA International Law Commission (ILC), 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion International Law'. Finalized by Martti Koskenniemi (13 April 2006) UN Doc A/CN.4/L.682.

47 International Law Commission (ILC), (n.45), para15,14.

48 International Law Commission (ILC), (n.46), para 491, 248.

49 International Law Commission (ILC), (n.46), para 491, 248.

50 International Law Commission (ILC), (n.46), para 492, 248-249.

51 International Law Commission (ILC), (n.46), para 492, 248-249.

Another argument was that it is possible to provide more comprehensive analysis of each case by interpreting it with reference to "Article 103 of the Charter of the United Nations"[52], Article 30 of the VCLT and the systematic integration approach mentioned in "Article 31(3) (c) of the VCLT"[53]. Also, this report draws attention to the principles of *"lex specials, lex posterior and lex superior"*[54] *as* effective criteria to decide about cases in which there are multiple jurisdictions on the same subject. However, on the basis of *textuality principle* and it states that all relevant legal sources had better to be taken into account while adjudicating a case.

To exemplify, in *Southern Bluefin Tuna*[55] Japan claimed *inter alia* that the 1993 Convention on the Conservation of the Southern Bluefin Tuna (CCSBT) prevails the 1982 the United Nations Convention on the Law of the Sea (UNCLOS) (lex *specialis derogat legi generali).* However, the Arbitral Tribunal stated that "The *lex specialis* prevails substantively and procedurally, and hence it – i.e., Article 16 of the1993 Convention – determines jurisdiction. While it is in theory possible that a given act may violate more than one treaty, on the facts of this case that is not possible principle".[56]

Furthermore, in *Nicaragua v United States* the International Court of Justice (ICJ) put forward that "it would not be appropriate that a State should bring a claim based on a customary-law rule if it has by treaty already provided means for settlement of such a claim".[57]Accordingly, it acknowledges the priority of *lex-specialis* in the event of collision on the same subject matter. However, even if customary law rules was subordinated to the provision of the treaty between them, it does not mean that customary law has lost its significance because actually these treaties is generated in a way that it cannot contradicts with the customary law. Therefore, when the United States of America violated its obligations under Article XIX of the Treaty of Friendship, Commerce and Navigation by laying a general embargo on trade, Nicaragua contended that the US was in a breach of the *pacta sunt servanda* principle of customary law since it "impede due performance of treaty".[58]

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52 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI Art.103.

53 International Law Commission (ILC), (n.46), para 413, 208.

54 *Lex specials, lex posterior, lex superior* supersede over *the lex generalis, lex prior* and *lex inferior* respectively. See. UN Doc A/CN.4/L.682.

55 *Southern Bluefin Tuna Case (Australia and New Zealand v. Japan)* (4 August 2000) UNRIAA vol.13 (2004).

56 *Southern Bluefin Tuna Case*, (n.55), para.38(c).

57 *Nicaragua v. United States of America* [1986] ICJ 14, para 274.

58 *Nicaragua*, (n.57), para 146 (10) and para 270.

To sum up, this report admits that pluralism is irreducible today and collision of rules, norms, and regimes are inevitable outcome rather than being a "technical mistake".[59] Moreover, it indicates "no homogenous, hierarchical meta-system is realistically available to do away with such problems"[60] ;however, fundamental resources of international law, certain principles, harmonization and systematic integration approach "provide a basic professional tool-box that is able to respond in a flexible way to most substantive fragmentation problems".[61] In other words, since the formulation of a cogent hierarchical structure between normative legal systems appears to be unattainable or deficient, the priority among any legal regulations should be elucidated by legal reasoning of heterogeneous materials and they should reflect political preferences of not only states but also other international actors.[62]

2.2. Crossing-over Crisis?

Since the very beginning, legal system is defined as a structure in which both courts and judges are supported by not only states but also many other non-legal forms of normative ordering.[63] To defend that view Merry mentioned that even before the imposition of European Colonial Law to the Indigenous Law in Asia, Africa, and the Pacific, virtually each society was legally plural in its own system due to its diverse range of tribunals, written codes, sub-groups and so on.[64] Consequently, legal pluralism is regarded as a constant fact of each legal system even in primitive societies.

However, the fluid nature of globalisation and the crisis in sovereignty have further aggravated the level of criticism to the state-centric nature of international law from ethical, sociological and practical standpoints.[65] Afterwards, this situation has given non-state communities more room to manoeuvre. Once international developments have been affected by a great number of epistemic communities and informal networks, international politics go beyond the rigid forms of sovereign equality and other Westphalian notions.[66] Thereby, state legal pluralism has been replaced by the GLP.[67]

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59 International Law Commission (ILC), (n.46) para 484, 245.
60 International Law Commission (ILC), (n.46) para 493, 249.
61 International Law Commission (ILC), (n.46) para 492, 249.
62 International Law Commission (ILC), (n.46) para 484-486, 245 246.
63 Sally Engle Merry, 'Legal Pluralism' (1988) 22(5) L. & Soc'y Rev., 870.
64 Merry, (n.63), 870-872.
65 Martti Koskenniemi, 'What is International Law for?' in M Evan (ed), *International Law* (1st edn OUP,2003), 94.
66 Koskenniemi, (n.65), 95.
67 Michaels, (n.9), 1221.

To exemplify, in *MOX Plant*[68] Ireland instituted a judicial proceeding under three rule-complexes namely: the universal rules of the UNCLOS, the regional rules of the Convention of the Marine Environment of the North-East Atlantic Convention (OSPAR), and the regional rules of the European Atomic Energy Community (EC/EURATOM).[69] Also, this case is adjudicated under many courts and tribunals such as OSPAR arbitral tribunal, ad hoc Arbitral Tribunal under UNCLOS, International Tribunal for Law of Sea (ITLOS) and the European Court of Justice (ECJ). At the end, although there is not a clear determinative between multiple overlapping jurisdictions, trans-boundary litigation is conducted by many actors.

The new administration bodies of global governance may also be indicators of GLP. For instance, the creation of intergovernmental administration bodies (e.g., Asian Development Bank, G8, G20 and numerous United Nations bodies), transnational networks of state officials (i.e., Basel Committee on Banking Supervision or Financial Action Task Force (FATF)), hybrid private-public administration units (e.g., the partnership between Gates Foundation and World Health Organisation), purely private governance bodies (i.e., International Olympic Committee), issue specific sub-systems of law (e.g., International Commercial Law, International Environmental Law) and regional legal systems (i.e. The African Court of Human and People's Rights, the European Court of Human Rights, Inter-American Court of Human Rights, the European Court of Justice) might depict that we live in a world of vigorous international connection in which ever-expanding role of new international players are clearly perceivable.[70]

Yet, these developments are not valued positively by all jurists. To begin with, the number of bilateral and multilateral treaties amongst the states has clearly escalated, which seems as a positive development. However, international law still highly based on bilateral relations rather than plurilateral and multilateral basis. As Ku states that among the 6000 multilateral treaties signed from 1648 to 1995, only 30% of them were open to participation of all states.[71] Accordingly, even if the connections between countries are increasing through treaties, transnational law is still seen as "a universe of interconnected islands".[72] Thus, the complexities of jurisdictional system have bred their concerns about fragmentation and "sustainable diversity" of law.[73]

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68 *The MOX Plant Case (Ireland v United Kingdom)* PCIJ (24 June 2013) 42 ILM 118.

69 International Law Commission (ILC), (n.46), para 10, 12.

70 Benedict Kingsbury, Director of Institute for International Law and Justice, 'Administrative Governance' (Audio-Visual Library of International Law Lecture Series, n.d.) <http://legal.un.org/avl/ls/Kingsbury_IL_video_1.html> accessed 18 November 2013.

71 Charlotte Ku, 'Global Governance and the Changing Face of International Law (2001) ACUNS Reports & Papers 2001/2, 10.

72 Joost Pauwelyn, 'Bridging Fragmentation and Unity: International Law as a Universe of Inter-connected Islands', (2004) 25 Mich. JIL 903.

73 Patrick Glenn, 'Sustainable Diversity in Law' (2011) 3 HJRL 1.

Besides, Fischer-Lescano and Teubner stand out autonomy of legal orders and assert that a "rapidly accelerating expansion of international organizations and regulatory regimes…established themselves as autonomous legal orders".[74] Thereby, on the one hand, inter-regime conflicts have emerged as a major problem of global governance; on the other hand, functional regimes have become the criteria to identify applicable law to a particular problem as well. Then, they mention that if a transnational legal problem occurs, the choice of law should be determined in accordance with autonomous functional regimes relevant to that problem.[75]

Once they pointed out an increasing number of private legal regimes (e.g., *lex mercatoria, lex constructionis or lex digitalis)*, they said that these regimes should be regarded as the post-national formations which results from "the self-juridification of highly diverse societal fragments".[76] Therefore, they consider that due to privatization of globalised governance, fragmentation is multi-dimensional (legal, economic, cultural and political) and unescapable today, so unity is a vain hope to cling in a world of irreducibly plural legal order.[77] On the contrary, on Michaels' view, if states treated all communities as their equals, legal pluralism could lead to the end of substantive law; however, states maintain their ability to decide about the rivalry between diverging factions by incorporating, deferring to or delegating.[78]

Moreover, Passas adopts a realistic outlook and expresses that difficulty to govern in international realm depends on three factors: a) the absence of a universal norm-making authority, b) incoherent enforcement of rules and c) the existence of a regulative patchwork of overlapping judicial practices and traditions.[79] Moreover, he condemns the high dependency of international law to the power of rich states and says that international law is more essential to maintain global order today; however, great powers do not commit to the needed pooling of sovereignty and they do block the improvement of specific legislations.[80] Thereby, he draws attention to the role of "*Real-Politik"*[81] in international law and criticises the hegemony of superpowers.

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74 Andreas Fischer-Lescano & Gunther Teubner, 'Regime Collisions: the Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 24 Mich. J. Int'l L. 999, 1000.

75 Fischer-Lescano & Teubner, (n.74), 1021.

76 Fischer-Lescano & Teubner, (n.74), 1010-1012.

77 Fischer-Lescano &Teubner, (n.74), 1004.

78 Michaels, (n.9), 1249.

79 Nicos Passas, 'Global Anomie, Dysnomie, Economic Crime: Hidden Consequences of Neoliberalism and Globalization in Russia and Around the World' (2000) 27(2) SJ 77, 98.

80 Passas, (n.79), 38.

81 Realpolitik (see also Political realism; from German: real "realistic", "practical" or "actual"; and Politik "politics") refers to politics or diplomacy depended principally on power and on practical and material factors and considerations rather than ideological notions or moralistic or ethical premises.

However, the GLP has transformed the nature of *Real-Politik* paradigm. Accordingly, Koskenneimi concentrates on the power struggle of non-state communities rather than states and stresses that when the normative preferences of bodies are differed; a new type of hegemonic struggle begins in which each institution aims to be only arbiter in its hybrid legal space.[82] Furthermore, he believes that the extent of fragmentation or homogeneity shows the alterations in political preferences and unsteady success of hegemonic powers.[83] Therefore, while adopting a pluralist approach Koskenneimi has not ignored the relation between GLP and *Real-Politik* but he has believed that bright sights of GLP overweighs.

Likewise, Berman draws our attention to the boons of jurisgenerativity, which is an outcome of GLP, and suggests that when a norm is internalized by a society, its binding force even exceeds the power of a state-backed law.[84] The internalization process transforms the social context of society. Thereby, when democratic governments become responsive to popular opinion of that society, they can make more binding rule of laws.

Furthermore, Burke-White indicates that due to the unprecedented growth, shift and expansion of international law over the past few decades, considerably a broad variety of substantive areas have been created by ever-expanding scope of jurisdictional sources; and put into force in far more tribunals and courts than before.[85] Therefore, it is possible to see both the cursors of fragmentation (e.g., diversification of tribunals, the growing density of treaties, the access of non-state actors to international fora) and the pluralism (e.g., the blending of procedures, the hybridization of enforcement, inter-judicial dialogue) today. [86] Nevertheless, he stresses that despite the high risk of conflict among legal regulations, denser international law is demonstrative of the high significance of international legal regimes.[87]

In spite of the creation of legal space beyond national boundaries, the role of state still crucial because non-state actors are not able to exercise "autonomous legality"[88]. Berman's jurispersuasion reiterates this fact by stating that while a non-state community asserts jurisdiction by using its soft power, the enforcement of that jurisdiction relies on "whether those who

82 Koskenniemi, (n.65), 110.
83 Koskenniemi, (n.65), 110.
84 Berman, (n.22), 323.
85 Burke-White, (n.40), 965.
86 Burke-White, (n.40), 964.
87 Burke-White, (n.40), 968.
88 Michaels, (n.9), 1211.

assert jurisdiction can persuade who possess coercive power".[89] For instance, international human rights system has come into existence after a long period of rhetorical persuasion.[90]

Similarly, in "Re-state-ment of non-state law", Michaels draws attention to authority of the states for choice of law and mentions four ways for states to deal with non-state norms namely: rejection, incorporation (translating into state's own law: e.g., Lex Mercatoria's incorporation into English Common Law), deference (legality by granting them a private space) and delegation (separate from the law of state but denies full autonomy).[91] Hence, judicial discretion of states is still higher than any legal actor and new stakeholders in law are deriving their authority from the state.

To sum up, all these standpoints prove that GLP is an undeniable fact of today's legal conjuncture and shift from rule of law to rule of laws approves that jurisdiction seems to go towards cosmopolitan pluralist legal order. Moreover, the root causes of fragmentation turn out to be the basis of the legal codification system in which almost each rule encounters the risk of being overridden by another. However, even if public international law notions seem to be conflicting, it is actually "providing a surface for the inclusion of the claimants as members of a pluralistic community".[92] In this regard, there is nothing to diminish the need for "basic operating code" which ensures a framework for the new rule of law.[93] Furthermore, political authorities might ensure legitimacy for their institutions by incorporating Rule of Law concept into international law.[94] Therefore, the rule of international law will have a functional mission to complete as long as there is an assertion of political authority.

Finally, this paper also recognizes law as a "multifunctional instrument to achieve ends".[95] However, the mission defined by classical international law cannot meet the necessities for the time being. In other words, classical international law is "overly constraining rubric" which needs to change its overarching theoretical framework that founded on legal positivism.[96]

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89 Paul Schiff Berman, 'From International Law to Law and Globalization' (2005) 43 Colum. J. Transnat'l L. 534.

90 Berman, (n.3), 304.

91 Michaels, (n.9), 1227-1237.

92 Koskenniemi, (n.65), 106.

93 Anne-Marie Slaughter, 'Disaggregated Sovereignty: Toward the Public Accountability of Global Government Networks' (2004) Government and Opposition 161, 163.

94 Nolkaember, (n.7), 17.

95 Brian Z Tamahana, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2007) 29 Sydney L. Rev. 1, 15.

96 Berman (n.89), 487.

Hence, this study holds the view that despite the dramatically altered legal conjuncture, rule of international law is still playing an essential role. Yet, it has to be tailored for the sake of much more inclusive and pluralistic rule of law. When this claim is considered with its functional mission, it can be stated that international law should be recognized as a utilisable living instrument which is in constant need of reformation.

3. Conclusion

This paper set out to determine whether the classical formation of rule of law principles is still valid in the era of jurisdictional pluralism or not. In line with this aim, it has initially given an account of how the perception of international law has changed in time regarding different approaches. Later, it goes on to examine to what extent conflicting norms and jurisdictional assertions of power is detrimental to universality of rule of law according to the UN and prominent legal jurists. Then, this study has found that due to a diverse range of international actors, numerous regulatory regimes and overlapping jurisdictional assertions of authority, the need for international order has further scaled up during the GLP process.

However, it suggests rather than rigid terms of classical rule of law, "a broader and more flexible framework will often be necessary to cope with the messy reality of law on the ground".[97] Accordingly, this paper believes that to prevent the one-size-fits-all solutions, classical legal positivist foundation of rule of international law should evolve and acknowledge the normative power of multiple legal orders. At last, since it recognizes law as an instrument with an ongoing mission, it states that despite its reformation needs, rule of laws is not retracting or losing its significance.

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REFERENCES

Table of Cases

Nicaragua v. United States of America [1986] ICJ 14.

Southern Bluefin Tuna Case (Australia and New Zealand v. Japan) (4 August 2000) UNRIAA vol.13 (2004).

The MOX Plant Case (Ireland v United Kingdom) PCIJ (24 June 2013) 42 ILM 118.

[97] Berman (n.3), 19.

Table of Legislation

Charter of the United Nations (26 June 1945) 1 UNTS XVI, entered into force 24 October 1945.

Convention for the Conservation of Southern Bluefin Tuna (10 May 1993) 1833 UNTS No. 1-31363, entered into force 20 May 1994.

United Nations Convention on the Law of the Sea (10 December 1982) 1833 UNTS 3, entered into force 16 November 1994.

Vienna Convention on Law of Treaties (23 May 1969) 1155 UNTS 331, entered into force 27 January 1980.

Additional Sources

Report of the Secretary-General, 'the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies' UN Doc S/2004/616.

UNGA International Law Commission (ILC), 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion International Law' (13 April 2006) UN Doc A/CN.4/L.687, finalized by Martti Koskenniemi.

United Nations, 'Rule of Law' <http://www.un.org/en/ruleoflaw/> accessed 20 December 2013.

Secondary Sources

Augiar C.M., 'Cosmopolitanism' (28 September 2006)McMaster University/ CAPES Foundation <http://www.globalautonomy.ca/global1/glossary_entry.jsp?id=CO.0074> accessed 24 December 2013.

Austin J., *The Province of Jurisprudence Determined* (London: The University of London 1832) .

Berman P.S., 'Choice of Law and Jurisdiction on Internet: Towards a Cosmopolitan Vision' (2005) 153 U.Pa.L.Rev. 1819.

– –, 'From International Law to Law and Globalization' (2005) 43 Colum. J. Transnat'l L. 534.

– –, 'A Pluralist Approach to International Law' (2007) 32 Yale J. Int'l L. 301, 326-327.

– – 'The New Legal Pluralism' (2009) 5 Annu. Rev. Law Soc. Sci. 225.

– –*Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge University Press, 2012).

Burke-White WW, 'International Legal Pluralism' [2004] MJIL 963, <https://www.law.upenn.edu/cf/faculty/wburkewh/workingpapers/25MichJIntlL963(2005).pdf> accessed 08 November 13

Cover RM, 'The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation' (1981) 22 Wm. & Mary L. Rev. 639.

Dworkin RM, *Taking Rights Seriously* (Cambridge: Harvard University Press 1977)

Fischer-Lescano A & Teubner G, 'Regime Collisions: the Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 24 Mich. J. Int'l L. 999.

Glenn H.P., 'Sustainable Diversity in Law' (2011) 3 HJRL 1.

Griffiths H., 'What Is Legal Pluralism?' (1986) 24 *J. Legal Pluralism* 1.

Hart H.L.A., *The Concept of Law (*3rd edn, OUP 2012).

Janis M.W., 'Jeremy Bentham and Fashioning of International Law' (1984) 78 AJIL 405.

Kammerhofer J. & D'aspremont J. (eds), *International Legal Positivism in a Post-Modern World* (Cambridge: Cambridge University Press 2014, Forthcoming) <http://www.jura.unifreiburg.de/institute/rphil/rtheo/ilp> accessed 23 December 2013.

Kaya T., 'Uluslararası Hukuk Bölünüyor mu? Uluslararası Hukukun Genişlemesi ve Farklılaşmasından Kaynaklanan Zorluklar' (2012) 61 AUHFD 149.

Kingsbury B., Director of Institute for International Law and Justice, 'Administrative Governance' (Audio-Visual Library of International Law Lecture Series, n.d.) <http://legal.un.org/avl/ls/Kingsbury_IL_video_1.html> accessed 18 November 2013.

Korkman P. & Makinen V. (eds), *Universalism in International Law and Political Philosophy*, 4, (Helsinki Collegium for Advanced Studies 2008).

Koskenniemi M., 'What is International Law for?' in M. Evan (ed), *International Law* (1st edn OUP,2003).

Koskenniemi M. & Leino P., 'Fragmentation of International Law: Postmodern Anxieties' (2002) 15 LJIL 553

Ku C., 'Global Governance and the Changing Face of International Law (2001) ACUNS Reports& Papers 2001/2.

Merry S.E., 'Legal Pluralism' (1988) 22(5) L. & Soc'y Rev. 870.

Michaels R., 'the Re-statement of Non-State Law: The State Choice of Law, and the Challenge from Global Legal Pluralism' (2005) 51 WL Rev 1209.

Morgenthau H.J., 'Positivism, Functionalism and International Law' 34 AJIL 272.

Nolkaemper A, 'Rule of Law Dynamics in an Era of International and Transnational Governance' [2011] citing ACIL Research Paper No 2011-10

Passas N., 'Global Anomie, Dysnomie, Economic Crime: Hidden Consequences of Neoliberalism and Globalization in Russia and Around the World' (2000) 27(2) SJ 77.

Pauwelyn J., 'Bridging Fragmentation and Unity: International Law as a Universe of Inter-connected Islands', (2004) 25 Mich. JIL 903.

Project on International Courts and Tribunals, *The International Judiciary in Context* (2004).

Roberts A.E., 'Traditional and Modern Approaches to Customary International Law: A Reconciliation)' (2001) 97 AJIL 757.

Slaughter A.M., 'International Law in a World of Liberal States' (1995) 6 Eur. J. Int'l L. 503.

– –, 'Disaggregated Sovereignty: Toward the Public Accountability of Global Government Networks' (2004) Government and Opposition 161.

Sur M., *Uluslararası Hukukun Esasları* (2nd edn Beta Basım Yayım, İstanbul 2006).

Tamahana B., 'Understanding Legal Pluralism: Past to Present, Local to Global' (2007) 29 Sydney L. Rev. 1.

Twining W., *General Jurisprudence: Understanding Law from a Global Perspective* (1st edn, Cambridge University Press 2008).

Üye S., *Teoride ve Pratikte Hukuki* Çoğulluk (Turhan Yayınevi, Ankara 2013).

ORGANIZATIONAL STRUCTURE AND FUNCTIONS OF THE JUSTICE ACADEMY OF TURKEY

Türkiye Adalet Akademisi'nin Kurumsal Yapısı ve Görevleri

Yılmaz AKÇİL[1]

ABSTRACT

Justice Academy of Turkey provides initial tranining for candidate judges and prosecutors and in-service tranining for judges and prosecutors, having legal entity, scientific, administrative and financial autonomy; and besides these main tasks the Academy provides consultancy services on national and international law and judicial and professional matters, develops legislation in accordance with the needs of the society and carries out researches and proposals for the conduct of the studies in this field, organizes scientific and academic meetings on issues related to the field of law and justice, makes review and research, follows publications of the international institutions on the developments of law and justice and translates and publishes the ones considered necessary, cooperates with Turkish Bar Association, Notaries Union of Turkey and other relevant institutions, organizations and committees, establishes an information and document center, a databank and a library to provide documents, legislation, court decisions and publications related to the field of law and justice for the benefit of those concerned, prepares bibliographies of Turkish law and justice and publishes them.

In this study, we will try to explain the duties and powers of the corporate structure of Justice Academy, considering its mission and vision, authority, duties and responsibilities, institutional structure and the duties of the affiliated units and basic policies.

Keywords: Justice, Justice and Law, Justice Academy of Turkey, Training of Judges and Prosecutors.

ÖZET

Hâkim ve Savcı adaylarının meslek öncesi eğitimleri ile hâkim ve savcıların meslek içi eğitimlerini veren, tüzel kişiliğe sahip, bilimsel, idarî ve malî özerkliği olan Türkiye Adalet Akademisi'nin bu temel görevinin yanında; ulusal ve uluslararası hukuk ile adlî ve meslekî konular hakkında danışmanlık hizmeti vermek, toplum ihtiyaçlarına uygun olarak mevzuatın geliştirilmesi ve bu yönde çalışmaların yürütülmesi bakımından araştırmalar yapmak ve önerilerde bulunmak, hukuk ve adalet alanını ilgilendiren konularda bilimsel ve akademik toplamtılar düzenlemek, inceleme ve araştırmalar yapmak yada yaptırmak, uluslararası kurum ve kuruluşların hukuk ve adalet alanındaki gelişmelerle ilgili yayınlarını takip etmek, gerekli görülenleri tercüme ettirerek yayımlamak, Türkiye Barolar Birliği, Türkiye Noterler Birliği ve diğer ilgili kurum, kuruluş ve kurullarla işbirliği yapmak, hukuk ve adalet alanını ilgilendiren belgelerin, mevzuatın, mahkeme kararlarının ve yayınların ilgililerin faydalanmasına sunulmasını sağlamak üzere bir bilgi ve belge merkezi, bilgi bankası ve kütüphane kurmak, Türk hukuk ve adalet bibliyografyalarını hazırlamak, hazırlatmak ve bunları yayımlamak gibi görevleri de bulunmaktadır.

Türkiye Adalet Akademisi'nin kurumsal yapısı ile görev ve yetkilerini anlatmaya çalışacağımız bu çalışmada; Akademi'nin misyonu ve vizyonu, yetki, görev ve sorumlulukları, kurumsal yapısı ve bağlı birimlerin görevleri ile temel politikalar ele alınacaktır.

Anahtar Kelimeler: Adalet, Adalet ve Hukuk, Türkiye Adalet Akademisi, Hâkim ve Savcı Eğitimi.

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INTRODUCTION

It is very important to follow up the changes and developments concerning the justice and law fields in today's world where there is a transition from industrial society to information society.

The Justice Academy of Turkey[2], which acquires a vision to be an exemplary institution in the world with projects and publications regarding the justice and law with the training of judicial professionals, is performing its studies by showing great efforts with devotion. The Academy plans pre-professional and vocational trainings of judges and public prosecutors by following the up-to-date legal developments in the country and international fields and providing these trainings generally with the instructors who have practical experiences within the frame of mission "To provide solution offers with scientific methods by making projects in national and international fields with occupational training, consultancy, studies, researches and publication activities with universal standards in justice and law fields."[3]

Furthermore, the Academy puts effort into sharing of country experiences and development of solution offers with the international projects and bilateral cooperation studies and into discussions on various current problems in the functioning of law and judicial system with the scientific researches and activities which are being performed; and provides publications to the services of judicial members and other legal experts which have been published with the purpose of making a contribution to meet the information needs in thelaw and justice fields.

The Academy performs its services and activities within a hierarchical structure subject to law, regulation, directive, instruction and other legislations. When performing the studies, attention is paid to coordination both within and out of the institution.

In the subjects which are within the Academy's line of duty; studies are being carried out on the development of management services, the finalization of information and data relevant with the performance and quality by analyzing, the increase of effectiveness of activities by studying internal and external factors which might effect the services.

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2 Hereinafter it will be referred to as the "Academy".

3 Türkiye Adalet Akademisi 2015 Faaliyet Raporu, Ankara, p.4.

I. Mission and Vision of the Academy

A. General

"TheTraining Center for Judge and Public Prosecutor Candidates" affiliated with the Ministry of Justice was established in Ankara in order to ensure trainings of apprentice judges and public prosecutors by the "Law on Establishment and Duties of Training Center for Judge and Public Prosecutor Candidates",numbered 3221 which has been put into effect after being published in the Official Journal of 15.06.1985 and numbered 18785.

In order to harmonize with the legislations and applications in the Member States during the European Union accession period, formation of an independent institution which will perform training and other services within the justice field came up and the Law on Justice Academy of Turkey with numbered 4954 was enacted on 23.07.2003. The which is a legal entity and has a scientific, administrative and financial autonomy was established with the said law.

The Academy started its activities on 31.10.2003 in Etlik Ankara and moved to its new campus with a total area of 132,000 sq m of which 106,587 sq m is open and 25,413 sq m is closed in İncek-Ankara location on 16.11.2005. In the campus, there are five service buildings including an administrative building, two training buildings, boarding facilities and a restaurant. As social and cultural activity fields, there are conference hall, simultaneous hall, hearing room, library, parking lot, animal shelter, football field, basketball field, tennis field, table tennis, fitness center and walking tracks. The training buildings have a capacity of 1400 people and boarding facilities have a capacity of 384 people.

Administrative and organizational structure of the Academy had been changed in order to enable realization of the activities directed towards increasing effectiveness and efficiency in the justice and law fields with a democratic, innovative and participative comprehension in conformity with the norms of our age after enacting the Law, numbered 6524 on 27.02.2014, which will provide contribution in carrying the services rendered by the Academy to top level in terms of quality and quantity.

B. Mission and Vision

Mission of the Academy is to closely follow up the changes and developments concerning the justice and law fields, to produce genuine information with scientific researches and developments and to share it with the society, to give trainings in compliance with the human rights and law directed towards adopting fair and speedy trial skills, to make projects in national and international fields and to find solutions with shareholders[4].

[4] Türkiye Adalet Akademisi 2015 Faaliyet Raporu, p.8.

Vision of the Academy is to be a training and research institution which is taken as a model in the field of justice and law.

C. Basic Values

The Justice Academy of Turkey performs its duties within the basic values mentioned below with its aforementioned mission and vision.

- To stick to democratic, secular and social law state principles,
- To be respectful to human rights and social values,
- To make contributions to public peace and safety,
- To show respect for labor and information,
- To be transparent and accessible,
- To be open to cooperation, change and development,
- To be equal and neutral,
- To be effective and leading in training,
- To attach importance to research and development activities,
- To use resources effectively,
- To encourage individual and institutional development,
- To develop and internalize occupational ethics consciuosness.

II. Authority, Duties and Responsibilities

It is possible to collect the duties assigned to the Academy with the Law on Justice Academy of Turkey, numbered 4954[5], which was put into force after being published in the Official Journal of 31.07.2003 and numbered 25185, under the main headings of training, consultancy and assistance, study, research and publication, documentation, international relations and projects.

A. Training

The principle duty of the Academy is training. Opening courses for pre-professional and vocational training and development of the judges and public prosecutors and auxiliary staff of justice services and notaries and upon request for lawyers; organizing specialty programs, seminars, symposiums, conferences and similar activities in certain fields; performing training and education programs which would be evaluated with certificates; assisting in performance and execution of training plans and research projects which had been prepared by institutions, establishments and boards relevant with law and justice fields; expressing opinions to institutions, establishments and boards relevant with law and justice fields about training and education

[5] Major amendments was made in this Law with the Law dated 15.02.2014 and numbered 6524.

studies concerning the law and justice fields are among the duties of the Academy.[6]

B. Consultancy and Assistance

Providing consultancy services about national and international law and judicial and occupational subjects and expressing opinions are the duties among the Academy's consultancy and assistance scope.

C. Study, Research and Publication

Within the scope of study, research and publication,the Academy performs the duties of making researches in order to develop legislations in compliance with the needs of the society and carrying out studies in this direction, giving suggestions on the basis of researches, publishing publications, in case of need preparing drafts, making researches and studies on subjects regarding to the law and justice fields, and have them made; organizing seminars, symposiums, conferences and similar activities on those subjects; publishing and supporting such studies, following up publications of international organizations and institutions on the developments in law and justice fields, publishing the ones considered necessary by having them translated; preparing a translation plan in cooperation with law faculties, Union of Turkish Bar Associations, Union of Turkish Public Notaries and other relevant institutions, organizations and boards for the foreign works which have been considered as useful for the law and justice field and taking necessary measures to realize this plan.[7]

D. Documentation

Establishing an information and document center, a data center and a library in order to put the documents, legislations, court decisions and publications concerning in the field of law and justice in Turkey and in other countries into use of relevant persons; preparing bibliographies of Turkish law and justice, have them prepared and publishing them; performing preparation and final periods of judicial and administrative jurisdiction judges and public prosecutors trainings according to this Law and regulation provisions; organizing pre-professional training programs for military jurisdiction judges and prosecutors and notaries and upon request during internships of lawyers are among the duties of the Academy within this scope.

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6 In this section there is also "military jurisdiction", however this phrase is removed from the Constitutional text with the article 16/D of the Law no 6771 published in the Official Journal dated 11.02.2017 and no 29976 and military courts have been abolished with the article 17/E.

7 Türkiye Adalet Akademisi 2017 Faaliyet Raporu, p.9.

E. International Relations and Projects

In addition to the aforementioned duties, the Academy performs the duties of organizing programs for the guests coming from abroad within the scope of international relations and projects; organizing abroad study visits for judges, public prosecutors and candidates; organizing instructional exchange programs; making joint studies with academies and judgeship schools providing training at abroad; preparing and performing protocols directed towards realization of bilateral and multilateral cooperations, providing coordination regarding to the projects implemented by the academy units, making feasibility studies, needs and impact analysis, making the required meetings and negotiations with the relevant institutions and organizations at the preparation and implementation stages of the project and following up the project activities which would be made with European Union and the other international institutions and organizations[8].

III. Organizational Structure of the Academy

The Academy is managed by the organs constituted from general board, executive board and supervisory Board. The internal operation is provided by the Presidency unit together with these boards.

A. General Board

1. Structure

General Board; is constituted from Minister of Justice and Undersecretary of the Ministry, Head of Inspection Board, Director General of Penal Affairs, Director General of Legal Affairs, Director General of Laws, Director General of European Union, Director General of Staff, Director General of International Law and Foreign Affairs, Director General and Prisons and Detention Houses, Head of Training Department and the following members who are elected for a period of four years[9]:

- Two members who are elected one from civil and one from criminal chambers by the Supreme Court's First Presidency Board,
- One member elected amongst the Council of State members by the Council of State Presidency Board[10],

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8 Justice Academy of Turkey, 2015 Activity Report, p.10; Prime Ministry Foreign Relations Presidency Foreign Relations Activity Report, Ankara, p.611 .ff.

9 Article 12 of the Law on Justice Academy of Turkey.

10 Although in this section there is phrase "A member elected amongst the Military Supreme Court members by the Military Supreme Court Presidency Board and a member elected amongst the judge members from Military High Administrative Court", it is not possible

- One member is elected amongst the members of High Council of Judges and Prosecutors,
- Four members assigned amongst the judicial judges and prosecutors who haven't lost the qualifications requiring to leave from first class, two members assigned amongst the administrative jurisdiction judges and prosecutors by the Minister,
- Two members elected amongst the faculty members of law schools in Turkey by the Higher Education Council,
- One member who would be elected by the Executive Board of Union of Turkish Bar Associations amongst the lawyers who actually practiced occupation at least fifteen years,
- One member who would be elected by the executive board of Union of Turkish Public Notaries amongst the first class notaries, President and Vice-President are naturally members of the General Board.

2. Duties

The General Board performs the following duties[11]:

- To elect permanent and associate members who will participate in the executive board,
- To conclude annual study report submitted by The Executive Board and Supervisory Board report by examining them,
- After negotiations, to conclude short and long-term training plan and annual study program submitted by the Executive Board,
- To conclude the annual budget and personnel needs offered by the Executive Board after examining them,
- To take decision on discharge of President and Executive and Supervisory Boards.

B. Executive Board

1. Structure

The executive board is constituted from the following members of which six of them are permanent with the President and three of them are associate members[12]:

to adopt this provision since Military Supreme Court, Military High Administrative Court and Military Courts have been abolished with the article 17/E of the Law, numbered 6771 published in the Official Journal dated 11.02.2017 with numbered 29976.

11 Article 14 of the Law on Justice Academy of Turkey.

12 Article 15 of the Law on Justice Academy of Turkey.

- Director General of Staff of Ministry of Justice,
- Five permanent and three associate members who would be elected amongst its own members by the General Board.

Period of office for the members elected is four years. Nevertheless, first of all two of the Executive Board permanent members came with election are renewed, then three of them are renewed biennially. Members whose period of office terms are ended may be reelected.

If one of the members who was assigned with election leaves with any reason, then associate members are called for duty. The associate member fulfills the time of the member who has been replaced for. When there is no Director General of Staff of the Ministry, Deputy Director participates in the Executive Board by proxy.

2. Duties

Executive boards duties are to submit the annual study report and program prepared by the presidency and the annual budget and personnel needs to General Board after examining them, examining and accepting the regulations and similar arrangements prepared by the presidency, preparing short and long term training plans, taking decision regarding to training and education services, buying movable and immovable within the scope of the Academy's assignments, to have them built, sold, leased, performing transactions required to establish lien and mortgage, preparing, changing and executing the price tariff which would be taken against the services rendered by the Academy.

C. Supervisory Board

1. Structure

The supervisory board is constituted from three permanent and two associate members elected amongst the members of the General Board. Period of office for the members is two years. In case of need the Supervisory Board might request assistance from supervisor staff of public institutions and organizations[13].

2. Duties

The Supervisory Board is responsible from administrative and financial auditing of the Academy. The Supervisory Board might perform audit at any time within the year in case of necessity. An annual audit report is prepared

[13] Article 18 of the Law on Justice Academy of Turkey.

at the end of each year and until the end of February it is submitted to the General Board and the Ministry one copy for each.

D. Presidency

1. General

Presidency of the Academy is constituted of a President and three Vice-Presidents[14]. The departments which the Vice-Presidents are responsible, are determined by the President.

President is charged with or assigned for a period of four years by the Council of Ministers amongst three members presented with the consents taken by the Minister from Supreme Court and Council of State members, first class judicial and administrative jurisdiction judges and prosecutors and the ones considered within the same class, law professors, lawyers who actually practiced the profession for at least twenty years or notaries who actually practiced the profession for at least twenty years[15].

Vice-Presidents are charged with their duties or assigned by the Minister amongst the ones mentioned above. A president, whose period of office ended, may be reelected for one more period with the same procedure[16].

In case the president is on leave or has an excuse or temporarily leaves the office, then the duties and authorities vested on the President are fulfilled by the vice-president assigned by the President. Reassignment is made in accordance with the procedures written under the first paragraph of the Law on Academy for a period of four years for any presidency or vice-presidency office vacated before its time. The ones chosen for presidency and vice-presidency from public institution, organization or board members are assigned to these duties in line with their requests. The ones who are assigned are considered as on leave with salary during their assignment, they aren't removed from the roster of the public institution, organization or board. The ones whose period of office in the Academy are ended and who were assigned as president and vice-president from public institutions, organization or boards are assigned to their former duties or another duty at their vested right salary level upon their application to their own institution, organization or board within thirty days following the day their assignment terminates. The ones who are assigned when they were working as a lawyer or a notary can't perform their original occupation during their assignment.

14 Article 8 of the Law on Justice Academy of Turkey.
15 Article 9/1 of the Law on Justice Academy of Turkey.
16 Article 9/1 of the Law on Justice Academy of Turkey.

2. Duties of President and Vice-Presidents

President is the top and authorizing officer representing the Academy. President prepares the work program, work report of the Academy and submits it to the executive board; ensures implementation of the processes required to realize this program; performs the decisions of the executive board; makes offers to executive board for the training and research staff of the Academy. President is responsible from management of the Academy, implementation of the training and research activities in conformance with the work program, duly performance of the duties by instruction and research personnel and their supervision. Vice-presidents perform the duties charged by the laws or President[17].

IV. Units And Duties

The Academy constitutes of several units. They are from Pre-Professional and Vocational Department Head affiliated to Training Center Head, Foreign Relations and Projects Department Head, Scientific Publications and Information Department Head, Strategy Development Department Head and Human Resources and Support Services Department Head units.

A. Training Center Head

The Training Center performs duties within the Academy in Ankara in order to engage in pre-proffessional and in-service trainings of judicial and administrative jurisdiction judges and prosecutors, lawyers and notaries and pre-proffessional trainings and in-service trainings of auxiliary staff in justice services.

Each year short and long-term training plans and annual study program are prepared and submitted to the approval of the Executive Board. Training and education plan prepared by the approval of General Board is implemented.

Training plan covers the training activities which are projected towards the purpose of bringing occupational knowledge, experience and qualifications of judicial judge and prosecutor candidates and administrative jurisdiction judge candidates, judicial and administrative jurisdiction judges and prosecutors, institutional lawyers, legal counsels, notaries and auxiliary staff in justice services upto top level and keeping at the the top level by taking the changes in law and justice field during the European Union harmonization period into consideration in accordance with the Law on Justice Academy of Turkey, numbered 4954.

[17] Article 10 of the Law on Justice Academy of Turkey.

1. Pre-Professional Training Department Head[18]

The training programs given to judicial and administrative jurisdiction judge and prosecutor candidates and lawyer and notary candidates are executed by the Pre-Professional Training Department Head.

Pre-professional training duration for the ones assigned as judge and prosecutor candidates in judiciary and administrative jurisdiction is two years. This duration includes three periods which are prep class training, internship period and final period training. However it is stated in the second paragraph of the provisional article 14 annexed to the Law on the Justice Academy of Turkey numbered 4954 "for a period of five years following the date this law is enacted, if judicial and administrative jurisdiction judge and prosecutor candidates who completed their one-year internship period are accepted to the profession by the Council of Judges and Prosecutors upon decision of the Council of of Judges and Prosecutors with the offer of Ministry of Justices can be assigned to their judgeship and prosecution professions, basics on the application of this paragraph would be arranged with the regulation entered into force by the Ministry with the opinion of the Academy." Nowadays studies to shorten the two-year internship are still in progress within the frame of the authority vested upon the Ministry of Justice.

Within the last four years the Academy of Justice gave pre-professional training;

in total to 1099 judge and prosecutor candidates of whom 888 of them in judiciary (363 of them transferred from attorneyship profession) and 211 of them in administrative jurisdiction in the year 2014,

in total to 818 judge and prosecutor candidates of whom 617 of them in judiciary and 201 of them in administrative jurisdiction in the year 2015,

in total to 4835 judge and prosecutor candidates of whom 3878 of them in judiciary (856 of them transferred from attorneyship profession) and 957 of them in administrative jurisdiction in the year 2016,

in total to 2426 judge and prosecutor candidates of whom 2240 of them in judiciary (1239 of them transferred from attorneyship profession) and 186 of them in administrative jurisdiction(61 of them transferred from attorneyship profession) in the year 2017.

Thus, within the last four years 9178 judge and prosecutor candidates received training in the Academy. Within the year 2018, 4367 judge and prosecutor candidates are planned to come to theAcademy of whom 2473

[18] For the 2016 activities of this unit, see Türkiye Adalet Akademisi Faaliyet Raporu, Ankara, p.39 ff.

of them are still continuing their internship, 394 of them will start internship after passing the examination (transferring from attorneyship profession), 1500 of them took the written exam on 24.12.2017 and will start their duties after the interview[19].

In Turkey the ones who want to transfer from attorneyship profession to judge and public prosecutor candidacy must have performed their profession at least three years, not be older than forty-five years old as of the first day of January of the entrance exam is made, age limitation for direct transfer to the profession after undergraduate degree is thirty-five years old as of the first day of January of the entrance exam is made[20]. In other words according to the current regulations there is an upper age limitation whereas no lower age limitation is set forth. However, in many countries there is a stipulation which sets forth a condition of being older than a certain age and having a professional experience for a certain period of time.

The need for instructors who will instruct in pre-professional training is met from the department heads and members assigned in higher courts and investigation judges, from the judges and prosecutors assigned in regional courts of justice, courts of first instance, Ministry of Justice, Council of Judges and Prosecutors, judges and public prosecutors assigned in the Academy, academicians working in universities on the voluntary basis. Currently there are 320 instructors from judiciary and 80 instructors from administrative jurisdiction in the instructors pool[21].

Within the frame of the legislations; the subjects of the courses are primarily the procedural lessons and the issues met in the first years of the profession, effecting the character development and the formation of occupational identity, concerning the administrative duties required by the profession. These subjects are consistently revised and updated by observing the needs seen in justice and law fields, the technological developments and the changes in legislations.

Conferences, course, tours, social responsibility activities and sporting activities are organized with the purpose of knowledge, manner, skill and experience enhancements of the candidates besides the occupational courses. It is aimed to have judge and prosecutor candidates know the society more closely by taking them to visit especially places such as hospitals, prisons, nursing homes, children's homes.

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19 Türkiye Adalet Akademisi Meslekönces i Eğitim Daire Başkanlığı Verileri,for the years between 2004 and 2017.

20 Article 8 of the Law numberde 2802.

21 Türkiye Adalet Akademisi Meslekönces i Eğitim Daire Başkanlığı 2017 Aralık Verileri.

Furthermore high court chairmen, official and civilian institutions' senior managers, people who are specialists in their fields and country wide known such as historians, artists, sociologists, psychologists are invited to the Academy for conversations. In every training term courses such as English, Arabic, Ottoman Turkish, painting, charcoal drawing, photography, marbling art, cooking, needlecraft, bağlama (instrument with three double strings), violin, ney (end-blown flute), body language and folk dances are organized. Presentations, debates about the books and movies in law and justice fields are made.

At the end of the training the candidates are taken to a written exam relevant with the subjects they had been given during the training perod. The written exam is made by the written exam commission which constitutes of a chairman selected by the Executive Board among the instructors who give lecture in the Academy and four permanent members and two associate members. A second exam right is given to the ones within two months who cannot pass the first written exam. The ones who take at least seventy from the written exam are taken to oral examination.

The oral examination is made by the oral examination commission which constitutes of two permanent and one associate members chosen among the instructors who give lectures in the Academy by Ministry of Justice Inspection Board Head, Director Generals of Penal Affairs, Legal Affairs and Staff and the Executive Board under the presidency of the Academy President. Sum of sixty percent of the written examination result and forty percent of the oral examination result should be at least seventy in order to be evaluated as successful at the end of the training.

Assignment of the ones who are evaluated as successful at the end of the training are made according to the provisions of the Law on Judges and Prosecutors dated 24.02.1983 no 2802. The ones who cannot be successful in the examination made at the end of the training might be assigned to general administrative services in the provincial organizations or in the headquarters by the Ministry upon their request otherwise their candidacy is terminated by the Ministry[22].

[22] Article 28 of the Law on Justice Academy of Turkey.

a. Pre-Professional Trainings of Judicial Judge and Public Prosecutor Candidates

Pre-professional training is separated into two parts in the judiciary:

First Part: It starts with the assignment of candidates as judge and prosecutor candidates. In this part, the same pre-professional training program is applied to all of the candidates as three months prep class training, three months general internship period. The prep class training is given by the Justice Academy of Turkey Training Center Head.

Second Part: It starts by determination of candidates as either judges or public prosecutors. This part constitutes of internship period and final training period. The internship period is fourteen months, final training period is four months. The final training is given by the Justice Academy of Turkey Training Center Head.

b. Pre-Professional Trainings of Administrative Jurisdiction Judge Candidates

This training includes three periods of which are prep class training of three months, internship period of seventeen months, final training period of four months. Prep class and final final training are given by the Justice Academy of Turkey Training Center Head.

c. Pre-Professional Trainings of the Judge Candidates Who Transferred from Attorneyship Profession

Second parapgrah of the article 10 of the Law on Judges and Prosecutors numbered 2802 is amended with the article 47 of the Governmental Decree dated 24.12.2017 and numbered 696.[23] As a result of this amendment, trainings of the ones who are taken from the attorneyship profession is six months and it covers two periods constituting of prep class and internship periods. The terms of these periods, places where the internship would be made and internship periods and how the periods which haven't been considered as pre-professional training would be completed and other issues are regulated with the regulations entered into force by the Ministry of Justices provision is set forth.

[23] In the previous regulation, it was stated as "This training constitutes of two periods. It is six months in total where prep class training is three months and final training period is three months. The entire time of this internship is spent in the Justice Academy of Turkey Training Center Head".

d. Pre-Professional Training of Lawyer Candidates

A pre-professional training might be given to the lawyer candidates up to three months in the Justice Academy of Turkey Training Center Head upon request of Union of Turkish Bar Associations and the relevant bar association. However, no request has been made for such training of lawyer candidates until today.

e. Pre-Professional Training of Public Notary Candidates

A pre-professional training program might be organized to the public notary candidates not exceeding three months in the Justice Academy of Turkey Training Center Head upon request of Union of Turkish Public Notaries. No such training is made for the Notary candidates yet.

2. Vocational and In-Service Training Department Head[24]

Activities are performed by means of vocational trainings and specialty programs such as seminars, symposiums, conferences, courses and similar activities directed towards gaining expertise to judicial and administrative jurisdiction[25] judges and prosecutors, lawyers and notaries and for their vocational trainings.

a. Vocational Training

Article 119 of the Law on Judges and Prosecutors no 2802 has been changed with the article 3 of the Law no 6524 that entered into force after being published in the Official Journal on 27.02.2014; "responsibility of vocational training which is right and assignment of judges and prosecutors is given to the Justice Academy of Turkey"[26]. Thus, the Academy became the only institution authorized in trainings of judges and prosecutors.

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24 For the 2016 activities of this unit see Türkiye Adalet Akademisi Faaliyet Raporu, p.94 ff.

25 In this section there is "military jurisdiction" phrase however since Military Supreme Court, Military High Administrative Court and military courts are abolished with the article 17/E of the Law numbered 6771 published in the Official Journal dated 11.02.2017 and numbered 29976 there is no possibility to apply this provision.

26 Article 119 of the Law on Judges and Prosecutors numbered 2802 is amended with the article 22 ofthe Governmental Decree no 650 published in the Official Journal dated 26.08.2011 and numbered 28037 and it was regulated that the vocational trainings of the judges and prosecutors would be organized by the Council of Judges and Prosecutors however upon abolishment of this article by the Constitutional Court's decree dated 18.07.2012, Docket no: 2011/113, Decree no:2012/108 with the same regulation accepted again with the article 22 of the Law dated 27.06.2013 and numbered 6494. But this regulation is amended with the article 3 of the Law numbered 6524.

Vocational training programs are performed as courses, seminars, symposiums, conferences, similar activities and organizations. When determining the vocational training subjects; in line with the opinions of Ministry of Justice, Council of Judges and Prosecutors, high courts, regional judicial and administrative courts, courts of first instance, bar associations and law faculties; issues basis of reversals in the high courts and criticized and found insufficient by the supervisors of Ministry of Justice and Council of Judges and Prosecutors during the supervisions, legislation amendments and applications frequently seen in public, surveys and field studies made with the participants after the training programs are taken into consideration.

Within the scope of this activity in-service training has been given to 12580 persons in total from the beginning of the year 2014 to the end of the year 2017 who were judicial judges and public prosecutors, administrative jurisdiction judges and military jurisdiction judges by the Vocational Training and In-Service Training Department Head. The ratio of general satisfaction is determined as 86% according to the surveys carried out at the end of the training programs[27].

Appeal department heads and two members from every department handling the cases relevant with the subjects have been assigned in all of the vocational training programs which had been performed after the Regional Judiciary and Regional Administrative Courts entered into service on 20.07.2016, so that it was aimed performance of appeals smoothly and ensured a consensus in practice.

The presentation made during the training programs are put into use of all legal experts in the Academy web page under the title "Vocational Training Documents".

b. In-service Training

Programs are organized within the scope of the in-service training for the lawyers, legal councels working in justice and law fields of the official institutions and organizations other than the judicial bodies, notaries, civil administration chiefs, supervisors, internal auditors, experts, assistant experts and personnel. Between the years 2014 and 2017 In-Service Training was given to 7552 persons in total within the scope of in In-Service Training activities[28].

[27] Türkiye Adalet Akademisi Meslekiçi ve Hizmetiçi Eğitim Daire Başkanlığı 2014-2017 Verileri.
[28] Türkiye Adalet Akademisi Meslekiçi ve Hizmetiçi Eğitim Daire Başkanlığı 2017 Verileri.

On the other hand, within the scope of in-service training execution office directors and deputies, chief clerks, court clerks, notarial clerks, other employees assisting in justice services are taken into training programs with the purpose of having them gain better knowledge and qualifications necessitated by their assignments.

c. Specialization Training

Specialization training is organized with the purpose of gaining expertise in the justice and law fields for judicial and administrative jurisdiction judges and prosecutors, legal counsels and lawyers working in public institutions, organizations, boards or working as freelance, notaries, foreigners who were offered as candidates to specialty programs or for other training studies by their own governments.

The ones who earned the right to enroll to the programs and who are working in public institutions, organizations and boards are excused from their duties during their training period. The successfully completed periods are evaluated in gradual progress and evaluation of degree promotion.

The ones who successfully complete the two-academic year program in the Academy of Turkey have the right to receive the "Expertise Diploma".

B. Foreign Relations and Projects Department Head[29]

1. Foreign Relations

The activities performed by the Academy within the scope of establishing occupational and scientific relations at international level are effectively carried out with almost all of the countries in the world, particularly The Balkans,The Middle Asia, Africa and The Middle East being in the first place.

Purpose of these activities is to increase knowledge and experience of the law professionals as well as increasing awareness of Turkish Judicial System by reaching to law professionals active in law fields in the relevant country with the help of the equivalent institution of the co-operated country.

The abroad activities are performed as seminars and working visits. Training modules which have been prepared directed towards the foreign delegations are shared with the instructors specialized in the field according to the requests and needs of the relevant country. Professional trainings are given with the titles "Fight Against Terrorism", "Forensic Medicine Criminal", "Right

[29] For the 2016 activities of this unit please see Justice Academy of Turkey, 2016 Activity Report, p.121 ff;Prime Ministry Foreign Relations Presidency Foreign Relations Activity Report, p.611 ff.

to Fair Trial", "Alternative Settlement of Disputes", "Juvenile Delinquency", "Freedom of Speech", "Prevention of Violence Against Women", "Organized Crimes Control", "Judicial Ethics" and "Fight Against Corruption" within this scope.

Currently the Academy has close cooperation with almost 100 countries. Training and cooperation protocols have been signed with twenty-two countries. Effective cooperation studies are being carried out with the institutions such as Turkish Cooperation and Coordination Agency, Administration for Turks Living Abroad and Related Communities , Yunus Emre Institute.

Embassy officials are invited to the Academy every year and cooperation meetings are held with the purpose of strengthening coordination of foreign relations activities and relations.

1756 foreign judiciary members visited our country and 569 Turkish judiciary members sent to foreign countries between the years 2014 and 2017[30].

Duties of Foreign Relations and Projects Department Head are as follows;

- To follow activities of abroad organizations.
- To provide support for organization of international programs and participation to such programs.
- To provide abroad experience for judges-prosecutors and judge-prosecutor candidates by organizing working visits etc.
- To organize training exchange programs.
- To perform the initiatives required to make projects planned to implement with the institutions and organizations abroad.
- In case of need to lead establishing sister school relations between the Academy and schools and judge schools providing judicial training abroad and in this way to contribute in providing integration within law and justice fields with foreign countries.
- To prepare and to follow up protocols directed towards realization of bilateral or multilateral international cooperation within the subjects under the duties of the Academy.
- To provide coordination regarding the projects implemented by units of the Academy.
- To perform feasibility studies, needs and impact analysis of the projects.

[30] Türkiye Adalet Akademisi Dışilişkiler ve Projeler Daire Başkanlığı 2017 Verileri,

- To perform the required meetings and contacts with the relevant institutions and organizations during the preparation and implementation stages of the projects.
- To provide coordination between the projects.
- To follow up the project activities those will be carried out with the other international institutions and organizations or European Union and to announce and coordinate to and with the relevant units.
- To give technical support to the projects which will be prepared by the other units within their areas of responsibilities.

The foreign institutions with training protocols are given below;

- Justice Academy of Macedonia
- Justice Academy of Germany
- Justice Academy of Crotia
- Judicial Institute of Kosovo
- Judge and Prosecutor Training Center of Bosnia-Herzegovina
- Chief Public Prosecutor's Office of Turkish Republic of Northern Cyprus
- Judge and Prosecutor Training Center of Serbia - Justice Academy
- Judiciary Training Center of Montenegro
- Judge School of Albania
- National Judicial Institute of Bulgaria
- Supreme Court of Kingdom of Morocco
- National Studies Center of Egypt
- Prosecutors College of China
- Justice Academy of Ukraine
- Kyrgyzstan Chief Public Prosecutor's Office State Law Academy
- Qatar Supreme Court Prosecutor's Office
- Indonesia Judicial Commission
- Justice Academy of Russia
- Yemen Ministry of Justice
- Judicial Institute of Dubai
- Justice Academy of Azerbaijan
- Justice Training Center of Georgia
- Judicial School of Mongolia
- Prosecution Institute of Kazakhstan
- Gambia Ministry of Justice
- Iran Ministry of Justice
- Judicial Institute of Kuwait
- Embassy of Rwanda
- Justice Academy of France

2. Projects

The whole activities, performed with the purpose of obtaining tangible outcomes to reach the targets designated previously within a certain process, constitute the basics of the projects. In general projects with high budgets with the organizations such as European Council, United Nations, etc. are put to the service of Turkish Jurisdiction. The Academy is the main shareholder in some of these projects and is co-beneficiary in some of them. And contribution is provided for some of the projects.

The projects completed between the years 2014 and 2016 are as follows;

- Development of Effectiveness of the Turkish Criminal Justice System Project
- Justice for Children Project
- Effective and Professional Justice Academy Project
- Development of Relations in Mass Media and Jurisdiction Project

Projects currently executed by the project unit;

- Strengthening Capacity of Turkish Jurisdiction on the Freedom of Speech Project
- Individual Application to Constitutional Court
- Increasing the Effectiveness of Family Courts and Better Protection of Family Members' Rights Project
- Increasing Effectiveness of Internship Productivity of Judge and Prosecutor Candidates Project
- Strengthening Judicial Ethics in Turkey Project
- Strengthening Criminal Justice System and Increasing Capacity on Prevention of ECHR Violation by the Judicial Members Project
- Development of Investigation Techniques of the Public Prosecutors Project
- Access to Justice for Asylum-Seekers and Refugees Projects
- Development of Access to Justice for Refugees and Unaccompanied Children Project[31]

[31] Türkiye Adalet Akademisi Dışilişkiler ve Projeler Daire Başkanlığı Verileri,.

C. Scientific Studies and Information Department Head[32]

Duties of this unit are as follows.

- To determine, in coordination with the editorial board, the principles on composition and classification of the works and legislations which will be published.

- To perform preliminary review of the articles and other treatises sent to be published in the magazines of the Academy.

- To ensure compilation or editing of the works such as book, gazette, brochure, court decree which are predicted to be published and distributed.

- To perform free distribution or sale of the publications.

- To determine the books, magazines, articles, audio and visual publications, etc. and conventions, laws, regulations and court decrees in foreign languages which might serve to the purpose of the academy and which have been evaluated as beneficial in the subjects involving the law and justice fields and to ensure have their translations made.

- To edit the translated foreign resources for publication.

- To perform the transactions regarding the electronic publications.

- To determine the documents required for the library by making the resource analyze studies in coordination with the editorial board.

- To make studies for providing the new technologies to the library by following up the developments in library science.

- To determine the fields which might be subjects of research and study and to examine, to evaluate the offers in these subjects and to ensure coordination with the relevant institutions and organizations in order to enable the advantageous ones transformed into projects.

- To make cooperations with the international research institutions and universities.

- To make social researches and needs analysis directed towards making legislation studies in justice and law fields.

- To form a healthy and reliable database that will be taken as basis scientific researches and legislative regulations which will be made in justice and law fields and to make comparative law studies.

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[32] For the 2016 activities of this unit see Türkiye Adalet Akademisi 2016 Faaliyet Raporu, p.182 ff.

- To provide consultancy services to the institutions on the subjects that fall within the responsibility fields of the Academy.

- To express opinions on the preparation and performance subjects of the occupational training programs concerning the law and justice fields of the other institutions and organizations.

- To provide legal consultancy to the institutions, organizations and boards assigned with the legal problems which our country had confronted internationally.

- To express opinions concerning the legislative regulations and treaties which would be made in legal subjects in national and international fields, in case of need to prepare drafts.

- To organize national and international law congresses periodically.

-To perform preparatory studies of the organizations such as seminars, symposiums, panels those would be organized on the subjects fall within the responsibility fields of the Academy.

-To provide participation of the Academy by following the national and international organizations.

- To follow up the developments in law and justice fields and to perform scientific activities about the subjects concerning our country.

- To make organizations directed towards supplying information to law makers and representatives of legislative organs by following the legislative agenda of the country.

a. Seminars, Symposiums, Workshop Activities

The activities performed by the Scientific Studies and Information Department Head between the years 2014 and 2016 are given as follows[33];

- International Victim Rights Symposium had been organized in Ankara with the participation of 150 people.

- 2nd International Law Education Symposium had been organized in Ankara with the participation of 250 people.

- Turkish-German Science Year Criminal Law Symposium had been organized in Ankara and İstanbul with the participation of 100 people.

[33] Türkiye Adalet Akademisi Bilimsel Çalışmalar ve Enformasyon Daire Başkanlığı Verileri,2015-2016-2017.

- Role of Law and Justice in Fight Against the Financing of Terrorism Symposium had been organized in Ankara with the participation of 100 people.

- Competition Law Symposium had been organized in Bolu with the participation of 51 people.

- 2nd Criminal Law Reforms Congress Symposium had been organized in İstanbul with the participation of 175 people.

- Conventional 13th Workshop of Legal Experts on Turkish Civil Law Procedures and Enforcement and Bankruptcy Law had been organized in Antalya with the participation of 185 people.

- Presumption of Innocence, the Right Against Self-Incrimination, Plea Bargaining and Demurrer to Indictment Workshop had been organized in İstanbul with the participation of 45 people.

- Legal and Criminal Responsibilities of Physicians Symposium had been organized in Mersin with the participation of 200 people.

- Energy Law Symposium had been organized in Afyonkarahisar with the participation of 100 people.

- Pre-professional and Vocational Trainings of Judges and Public Prosecutors had been organized in İzmir with the participation of 100 people.

- Legal Remedies within the Frame of Code on Criminal Procedures; Appeal, Cassation, Reinstatement Symposium had been organized in İstanbul with the participation of 500 people.

- Tax Offenses within the Frame of Tax Procedural Law Symposium had been organized in Ankara with the participation of 100 people.

- Prevention of Violence in Sport and Arbitration Symposium had been organized in Sakarya with the participation of 250 people.

- Biosafety Law and Applications Symposium had been organized in Antalya with the participation of 150 people.

- Information Technology Law Symposium had been organized in Ankara with the participation of 120 people.

- Possible Problems of Courts of Appeals and Solution Offers Workshop had been organized in Antalya with the participation of 170 people.

- Protection Measures and Regulations Regarding the Precaution Measures in Turkish Constitutions and New Constitution Offers Symposium had been organized in İstanbul with the participation of 200 people.

The activities performed by the Scientific Studies and Information Department Head in the year 2017 are given as follows[34];

- Symposium themed "Direct Examination and Cross Examination in Law on Criminal Procedure" had been organized in Ankara on the 4th of March, 2017 with the participation of judges and public prosecutors, academicians, lawyers and other relevant persons. 160 people participated in the symposium. Symposium print outs have been made available to the relevant persons.

- Symposium themed "Urban Transformation and Risk Area Applications" had been organized in İzmir - Çeşme on the 16th, 17th and 18th of March 2017. 250 people participated in the symposium.

- Comparative law symposium themed "Limitations of Legality Control within the Scope of Appellate Review of the Supreme Court after the Appeal Reform in Turkish Law" had been organized in cooperation with Supreme Court Presidency and the Academy in Ankara on the 20th and 21st of April, 2017. Approximately 500 people participated in the symposium.

- Workshop themed "Social Security Law" had been organized in Adana on the 28th, 29th and 30th of April 2017. Only a delegation of 40 people of Department Heads and members from Supreme Court who rule the relevant cases and academicians as the experts of the subject were invited, the problems had been thoroughly discussed and the outcomes are collected into a book.

- "Alternative Dispute Resolution Methods in Criminal Law" had been organized in Rize with the cooperation of our Academy and Ministry of Justice Directorate General of Penal Affairs on the 18th, 19th, 20th of May 2017. 150 people participated in the said symposium.

- "International Mecelle (Ottoman Code of Civil Law) Symposium" had been organized on the 25th, 26th and 27th of September 2017 in Bursa with the purpose of offering the law field system of a powerful rooted Empire who gave importance to justice to the service of today's legal experts and at the same time to evaluate the Mecelle-i Ahkamı Adliye (Ottoman Code of Civil Law) which is one of the biggest gifts of this rooted heritage to law world and the reflections of this Law to the modern world and 580 local, 30 foreigner guests participated in the sypmosium.

- "International Law Education Symposium" had been organized on the 4th, 5th and 6th of October 2017 in İstanbul with the purpose increasing educational quality of law students education in Law Schools and to produce the most effective and productive training methods by evaluating the

[34] Türkiye Adalet Akademisi Bilimsel Çalışmalar ve Enformasyon Daire Başkanlığı Verileri,2017

applications in foreign countries by approaching to current affairs in this field within the scope of training judicial professionals which is the primary mission of the Academy and 240 local, 60 foreign guests participated in.

- ”Tax Law Workshop” had been organized on the 20th and 21st of Octobr 2017 in Kırşehir where the problems in taxation law were discussed and 150 peopel participated in who were chairmen, members and judges from Council of State, Regional Administrative Tax Lawsuit Departments and Tax Courts and Ministry of Finance and academicians from universities. Current problems in the taxation jurisdiction were multi-directionally discussed and solution offers were evaluated.

- “5th Year of Turkish Commercial Code Symposium” had been organized on the 8th, 9th and 10th of November 2017 in Ankara in the 5th year of the Turkish Commercial Code and some parts of this Law were discussed and evaluation of some problems in practice had been considered.

Apart from these, in total 1,027 people have visited our Academy from 24 universities, nongovernmental organizations and secondary education institutions. As regards to introduction of judge and prosecutor professions the Justice had received visitors informing them about the law and justice fields.

b. Publications

The Academy is publishing in total six journals, of which four of them scientific and academic, two of them social and cultural.

Justice Academy of Turkey Journal; a quarterly published national refereed journal.

Global View Law Journal: semi-annually published translation law journal.

Human Rights Review Journal; a refereed journal published semi-annually in foreign language.

Law and Justice Review Journal; a refereed journal published semi-annually in foreign language.

Academy & Life Magazine; semi-annually published cultural and art magazine for judge and prosecutor candidates.

Academy & Chair Magazine; semi-annually published cultural and art magazine for judge and prosecutor candidates.

Moreover, many treatises and academic studies written in law field and legislation texts are published as books.

c. Graduate activities

Within the scope of increasing graduate and postgraduate capacities of judge and prosecutor candidates and judicial members currently active in their professions; Graduate program protocols have been made with 8 universities which are Kırıkkale, Ankara Yıldırım Beyazıt, İstanbul Medeniyet, İstanbul Sabahattin Zaim, Bahçeşehir, İstanbul Kemerburgaz, Gazi and Hacettepe Universities until today and it is targeted to make more protocols with more universities for graduate programs.

D. Strategy Development Department Head[35]

The activities performed by the Strategy Development Department Head in the year 2017 are given as follows;

- To make medium and long-term strategies and policies within the frame of national development strategies and policies, annual program and governmental program, to make the required studies in order to generate the purposes.

- To develop performance and quality criteria on subjects within the field of the administration and to perform other duties given within this scope.

- To collect, analyze and interpret information and data relevant with the development of services and management of the administration and the performance.

- To examine external factors which would effect the services on the subjects within the field of the administration, to make in-house capacity research, to analyze effectiveness and satisfaction level of the services and to make general researches.

- To perform services regarding the management informations systems.

- To perform secretarial services of Strategy Development Commission if it is established in the administration.

- To coordinate preparation of strategical plan and performance program of the administration and to execute consolidation studies of its outcomes.

- To prepare administration budget which also cover the estimate budget of following two years in conformance with the strategic plan and annual performance program and to monitor and evaluate administrative activities in convenience with them.

[35] For the 2016 activities of this unit please see Türkiye Adalet Akademisi 2016 Faaliyet Raporu, p.182 ff.

- To prepare detailed expenditure program within the frame of budget principles and fundamentals which would be determined in accordance with the legislation.

- To keep budget records, to collect data regarding the budget execution results, to evaluate and to prepare budget final account and financial statistics.

- To accrue administration incomes within the frame of the relevant legislation, to follow the income and receivables and to collect.

- To perform accounting services.

- To prepare activity report of the administration taking the unit activity reports as basis which are prepared by the units making the expenditures.

- To organize condensed statements regarding the movable and immovable under possession or use of the administration.

- To coordinate the preparation of investment program of the administration, to monitor application results and to prepare annual investment evaluation report.

- To perform and to conclude financial works and transactions of the administration which are required to be followed up.

- To provide the required information to the senior executive and to spending authorities on implementation of the other legislation relevant with the financial subjects and to provide consultancy services.

- To perform pre-financial control activity.

- Establishment of internal audit system, make studies on application and development of standards; to make the required preparations required for increasing the effectiveness and productivity of the senior management directed towards the internal audit are among the duties of the Strategy Development Department Head.

Budget figures of recent five years as follows;

- Year 2014 budget 15,284,000- TL
- Year 2015 budget 18,938,000- TL
- Year 2016 budget 21,117,000- TL
- Year 2017 budget 22,244,000- TL
- Year 2018 budget 22,588,000- TL

The Academy prepared the 2015-2020 Strategic Plan and put it into force. Budget studies are carried out every year with the purpose of allocation of the required budget in order to reach the targets identified in the Performance Program prepared within the frame of Strategic Plan. Within this scope, a multi-annual budget has been prepared covering the years 2017-2019. The Academy's activities performed in a year within the scope of the Strategic Plan and Performance Program are consolidated and announced to the public.

The Academy prepares a Performance Program every year in line with the performance based budget sense within the frame of Financial Status and Expectations Report and Strategic Plan with the Activity Report directed towards the General Board meeting.

Unit activities are consolidated and quarterly "Monitoring and Evaluation Reports" and "Investment Monitoring and Evaluation Report" are arranged. "Internal Control System" in which there is also 79 services standards which was standardized for the public institutions is internalized and studies are performed with the purpose of making it an institutional culture.

Tender processes are performed in conformance with the preliminary financial control transactions regulation with payment, accounting and final account transactions.

E. Human Resources and Support Services Department Head[36]

Human Resources and Support Services Department Head performs the following duties:

- To execute purchase, sale, building, leasing, letting, maintenance, repair and similar financial transactions which concern the entire administration and other units.

- To execute inspection, acceptance and control works relevant with the tender and purchase regarding to the procurement of goods and services and building works.

- To perform accrual transactions.

- To control the goods in warehouse and to distribute them to the relevant units.

- To make maintenance, repair and landscape planning of the Academy campus.

- To perform record, disciplinary, personnel and staff transactions.

[36] For the 2016 activities of this unit please see Türkiye Adalet Akademisi 2016 Faaliyet Raporu, p.194 ff.

- To execute arranging assignment approvals and placing internal circulars transactions.

- To execute maintenance, repair and technical support of systems such as electricity, water, heating, air conditioning, telephone, camera, TV, simultaneous and movable recording control transactions.

- To execute works and transactions regarding the private security and cleaning workers and vehicles procured with official and service procurement methods.

- To execute civil defense transactions.

- To make management of supervision of the dining hall contractor firm.

- To execute communication, general documents and archive services and ticket booking transactions.

F. Administration and Internal Control System

The Academy which is a legal entity and has a scientific, administrative and financial autonomy, is a relevant organization of Ministry of Justice, subject to private law provisions in cases where no arrangements were made with the laws.

Organs of the Academy are The Presidency, The General Board,The Executive Board andSupervisory Board as mentioned above.

Internal control is an integrity of financial and other controls covering the organization, the internal audit with method and process constituted by the administration in order to ensure timely and safe production of financial knowledge and management information, correct and complete recording of accounting entries, protection of assets and resources, execution of activities effectively, economically and efficiently in conformance with the purposes of the administration, legislations and specified policies.

In accordance with the Public Finance Management and Control Law no 5018, adoption of strategic management, realization of process management, linking performance based budgeting with strategic plan and establishing an effective internal control structure that will ensure healthy performance of the systems are still in progress.

Within the scope of establishing the internal control system effectively and ensuring its application; the Academy's Internal Control Standards Adaptation Action Plan is renewed within the frame of the Public Internal Control Standards Adaptation Circular prepared by the Ministry of Finance and delivered to all units.

Academy is subject to audit by Exchequer Court and Academy Supervisory Board. Furthermore three internal auditors positions have been allocated for the Academy and two internal auditors are assigned.

Physical status, administrative status, presidency, organization structure, activities, general board, executive board, supervisory board, incomes, expenses, movable registration transaction are controlled and evaluated in the audits performed regularly in every years by the Academy's Supervisory Board.

Within this scope the studies are performed taking Exchequer Court and Academy Supervisory Board reports of previous period into consideration.

V. Basic Policies And Priorities[37]

The Academy performs its services and activities within a hierarchical structure subject to law, regulation, directive, instruction and other legislations. When performing the studies, attention is paid to coordination both within and out of the institution.

On the subjects which are within the Academy's line of duty; studies are carried out on the development of management services, the finalizing of information and data relevant with the performance and quality by analyzing, the increase of effectiveness of activities by studying internal and external factors which might effect the services.

Under the "Justice" title of the 10th Development Plan, after including the improvements in the Turkish justice system in the recent years, primary goal of the justice system is projected as rapid, fair, effective, secure and accurately processing of judgment process in line with the universal law norms, the requirements of state of law and superiority of law, it is emphasized that also economical efficiency should be observed in the building and processing of justice and jurisdiction[38].

Basic policy of the Academy where trainings are given to judges and prosecutors and auxiliary staff, who are building block of the justices system, to meet the requirements of the judicial system stated in the Development Plan, Governmental Program and 2015-2017 Medium Term Program is to give trainings in compliance with the human rights and law directed towards adopting fair and speedy trial skills by closely following changes and developments concerning the justice and law fields; to establish occupational

[37] Türkiye Adalet Akademisi 2015 Faaliyet Raporu, p.205 ff.

[38] Please see: http://www.kalkinma.gov.tr/Lists/Kalknma%20Planlar/Attachments/12/Onuncu%20Kalk%C4%B1nma%20Plan%C4%B1.pdf for the 10th Development Plan, access date:22.02.2017.

and scientific national and international relations by producing genuine information with scientific researches and developments and to find solutions in justice and law fields by realizing projects.

The training services cover opening courses for pre-professional and vocational training and development of judicial, administrative and military jurisdiction judges and public prosecutors and auxiliary staff of justice services and notaries and upon request for lawyers; organizing specialty programs, seminars, symposiums, conferences and similar activities in certain fields; performing training programs which would be evaluated with certificates; assisting in performance and execution of training plans and research projects which had been prepared by institutions, organizations and boards relevant with law and justice fields[39].

Execution of consultancy-assist, study-research, foreign relations-projects and publication and documentation services, which the Academy is charged with, with a professional approach is one of the Academy's top priority basic policy[40].

CONCLUSION

The Academy as an affiliated institution of Ministry of Justice within the frame of its line of duty, provides services and trainings in judiciary field, analizes data in order to enhance effectiveness of activities.

Administrative advantages are autonomous structure of the Academy, authority to make cooperation, researches, studies and publications on any subject relevant with the justice and law in national and international areas, opportunity to provide trainings to various institutions and persons in justice and law fields at national and international levels, a participant, transparent and democratic governing structure and comprehension, having conscious on genuine information production and on giving trainings with contemporary methods, opportunity of assignment from various institutions and of persons in the academy management and instructor portfolio, attribution of importance to the Academy in the justice sector within the European Union process, having a dynamic, devoted human resource open to improvement, closely following the changes and developments in our country and in the world concerning the justice and law fields and reflecting them to the training programs.

39 Türkiye Adalet Akademisi Performans Programı, p.11.
40 Türkiye Adalet Akademisi 2016-2020 Stratejik Planı p.34 ff.

However, from the point of pre-professional training; the short term allocated to the Academy in the trainings of judge and prosecutor candidates, not to have permanent staff instructors, low additional course fees paid to the instructors, crowded classrooms for a professional law training, insufficient over night accommodation opportunities; from the point of vocational training; being unable to determine and assign the ones who really need training since the participants are chosen discretionary, difficulties to find specialist instructors in the programs performed outside Ankara, short periods for vocational trainings, insufficient level of personal rights of the personnel, not to have physical capacity and technical infrastructure at the expected level, legal and actual difficulties in realizing the important renovations which would be made with the purpose of creating new areas appropriate for training in the Academy facilities are the disadvantageous aspects.

Justice Academy of Turkey is rapidly progressing to be a training and research institution which is taken as model in the justice and law fields by the scientific research and development studies, by giving trainings in compliance with the human rights and law, by finding solution with projects in national and international fields.

It is evaluated that the law of establishment should be reconsidered by a commission with the participation of relevant institutions, organizations and leading experts and that a draft law directed towards achieving the targets of the Academy should be prepared.

REFERENCES

Türkiye Adalet Akademisi 2015 Faaliyet Raporu, Türkiye Adalet Akademisi Yayınları, Ankara.

Türkiye Adalet Akademisi 2015 Performans Programı, Türkiye Adalet Akademisi Yayınları, Ankara.

Türkiye Adalet Akademisi 2016 Faaliyet Raporu, Türkiye Adalet Akademisi Yayınları, Ankara.

Türkiye Adalet Akademisi 2016 Performans Programı, Türkiye Adalet Akademisi Yayınları, Ankara.

Türkiye Adalet Akademisi 2016-2020 Stratejik Plan, Türkiye Adalet Akademisi Yayınları, Ankara.

T.C.Başbakanlık Dış İlişkiler Başkanlığı Kamu Kurum ve Kuruluşları Dış İlişkiler Faaliyet Raporu, Ankara, 2015.

Türkiye Adalet Akademisi Meslek İçi ve Hizmet İçi Eğitim Daire Başkanlığı, 2013-2017 Yılları Verileri, Ankara.

Türkiye Adalet Akademisi Meslek Öncesi Daire Başkanlığı, 2004-2017 Yılları Verileri, Ankara.

http://www.kalkinma.gov.tr/Lists/Kalknma%20Planlar/Attachments/12/Onuncu%20Kalk%C4%B1nma%20Plan%C4%B1.pdf, Erişim Tarihi:22.02.2017.)

http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2017/02/20170223.htm&main=http://www.resmigazete.gov.tr/eskiler/2017/02/20170223.htm.

DOES THE PROBATION WORK? AN EVALUATION ON TURKISH PROBATION SYSTEM

Denetimli Serbestlik İşliyor mu?
Türk Denetimli Serbestlik Sistemi Üzerine Bir Değerlendirme

Dr. Hakan A. YAVUZ[1]

ABSTRACT

The probation is a new institution in the Turkish criminal justice system. Nowadays, the importance of probation has gradually increased especially in the execution of alternative sanctions/ measures and sentence of imprisonment. Nevertheless, lack of knowledge about philosophy of probation developed during its long history in Western Europe has led to certain problems in understanding and implementation of the practice in Turkey. In spite of its very short history, the Turkish probation system has been considered to be a panacea in order to reduce the increasing prison population and has been caused to face with a burden which is impossible to be coped with. Today, the practice of probation has become one of the most important part of the growing crisis experienced in the Turkish penal system, along with its other significant problems. In this article, brief history of the Turkish probation system, certain problematic fields of the system and some solution suggestions with respect thereto are discussed.

Keywords: Turkish probation system, criminal justice, alternative/community sanctions and measures, penal system

ÖZET

Denetimli serbestlik Türk ceza adalet sisteminde çok yeni bir kurumdur. Günümüzde özellikle alternative yaptırım ve tedbirlerin yerine getirilmesi ile hapis cezasının infazı süreçlerinde denetimli serbestliğin önemi gittikçe artmaktadır. Buna karşın Türkiye'de, denetimli serbestliğin Batı Avrupa'daki uzun tarihi boyunca gelişen teorisine ilişkin bilgi eksikliği, kurumun anlaşılması ve uygulanmasında bazı sorunların ortaya çıkmasına neden olmuştur. Kısa geçmişine rağmen Türk denetimli serbestlik sistemi günüzümüzde, artan cezaevi nüfusunun azaltılması için bir her derde deva bir yöntem olarak görülerek taşınması mümkün olmayan bir yükle başbaşa bırakılmıştır. Gelinen noktada denetimli serbestlik kurumu, diğer önemli sorunlarıyla birlikte Türk ceza infaz sisteminin büyüyen krizinin önemli bir parçası haline gelmiştir. Bu çalışmada, Türk denetimli serbestlik sisteminin kısa tarihi, bazı sorunlu alanları ve bunlara ilişkin çözüm önerileri sunulmaktadır.

Anahtar Kelimeler: Türk denetimli serbestlik sistemi, ceza adaleti, alternatif/ kamusal yaptırımlar ve tedbirler, infaz sistemi

Introduction

The Turkish penal legislation formulated on the basis of the Italian concept in 1925 was fully abolished eighty years later in 2005. It was then replaced with a legislation which was drawn up mainly under the influence of the German concept. However, the new process has not brought along significant

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reforms with regard to sanction and execution systems. The basic forms of sanctions such as imprisonment and judicial fine are maintained, and in addition, certain alternative sanctions were introduced. The probation, which is a practice having a significant accumulation of knowledge both in theory and in practice for dating back to previous centuries in Europe and the USA, was incorporated into the Turkish criminal justice system just upon the reform made in the field of criminal law in 2005. Besides problematic aspects in its establishment, as a result of the political-pragmatic arrangements which have been introduced in the system since 2005 and which much rather aim at reducing prison population, it has today become a controversial issue whether the probation is a new conception in the criminal justice system, a new opportunity to prevent reoffending and a reliable instrument of the rehabilitation for offenders.

The law-maker took into consideration incorrect and common belief adopted bythe community that increase in the crime rates results from insufficient and insubstantial penalties, and accordingly, increases have been made in amount of sentences with respect to certain crimes. However, increase in crime rates and prison population could be precluded in no way. In point of fact, the deterrence of the penalties is closely related with their duly enforceability and with whether or not instruments and procedures used during the execution can contribute to the rehabilitation of the offenders rather than with their amounts.[2] Therefore, crime prevention policies and police measures must be primarily focused on, and the existing execution system and especially philosophy of probation, method of its implementation and the results of this practice should be overemphasized.[3] This is because an unsuccessful probation practice equals to impunity.

In this article, in consideration of the foregoing, the issues of if the principal arguments of probation is brought into being with regard to the existent regulations and implementations in Turkey, and what sort of precautions can be taken in the long run will be discussed.

Short History of the Turkish Probation System

In the Turkish criminal law, imprisonment, as a method of punishment, was at the center of the penal theory and judicial practice of the last century,

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[2] **Kury H, Ferdinand TN, Doob AN and Sprott J** (2003) Does Severe Punishment Mean Less Criminality? *International Criminal Justice Review 13*, p. 123; **Lipton DS** (1998) The effectiveness of correctional treatment revisited thirty years later: Preliminary metaanalytic findings from the CDA TE study. Paper presented at the *12th International Congress on Criminology*, Seoul, S. Korea, p. 25-26.

[3] **Othmani A** (2008) *Beyond Prison, The Fight to Reform Prison Systems around the World, Translated from the French by Marguerite Garling*, New York: Berghahn Books, p. 38-44.

and all developments and experience taking place in the world in respect of the probation were ignored.[4] Notwithstanding, also subsequent to the reform of 2005, former methods were continued to be applied in order to deal with problems of the criminal justice system. The policy makers sought solutions for questions especially such as how to react to public pressure demanding an increase in the amounts of penalties prescribed in the law, following a criminal act causing public indignation and how to deal with the prison system which has become excessively overcrowded and where conditions and practices in breach of human rights have increased due to overcrowding. Instead, they policy makers should have determined the underlying reasons for commission of crime and taken measures (social measures and preventive police measures) in this respect or should have developed extrajudicial resolution methods. Such seeking has led political powers to be in a dilemma of, on one hand, making changes which have increased the amounts of penalties prescribed in the law for certain crimes causing loud-voiced reactions in the public (penal populism)[5] and which have also led to an increase in the number of inmates and, on the other hand, reducing the number of inmates through frequent changes, which bear consequences similar to those of pardon, in conditions and periods of execution of penalties.[6]

Following the reform, the amounts of penalties prescribed in the law for certain crimes that are commonly-committed crimes such as robbery, fraud, intentional injury and sexual abuse were increased, and the limitation periods for bringing an action and for execution of the imposed penalty and the periods during which the prisoners benefit from conditional release (from 1/3 to 2/3). These changes have led the new system to appear much more punitive and also led to a considerable increase in prison population and burden of the probation system.[7]

Upon the reform, the term of 'probation' (*denetimli serbestlik*) was included in the legislation for the first time. However, given its place in the system, the probation was incorporated into the criminal justice system not as a pre-designated part of this reform of which effects were foreseen, but as

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4 **Yavuz HA** (2011) *Ceza Adalet Sisteminde Denetimli Serbestlik (Probation in Criminal Justice System)*, Doctoral Dissertation, Ankara: Gazi University, p. 149-171.

5 **Roberts JV, Stalans LJ, Indermaur D and Hough M** (2003) *Penal Populism and Public Opinion: Lessons From Five Countries*, New York: Oxford University Press; **Othmani,** p. 17.

6 **Yavuz HA** (2016) Türkiye'de Denetimli Serbestlik Mümkün müdür? Dünü, Bugünü ve Yarınıyla Türk Ceza Adalet Sisteminde Denetimli Serbestlik (Is Probation Possible in Turkey? The Past, Today and Future of Probation in Turkish Criminal Justice System). In: *International 10th Anniversary Symposium of Turkish Probation Proceedings, International Approaches, 8-10 December 2015 İstanbul, Symposium Book (2016)*, Ankara: Ministry of Justice Pub., p. 15-23.

7 **Yavuz** (2016), p. 16-17.

a practice which was subsequently added thereto and which appears to be incompatible.[8] Following entry into force and the implementation of the laws, the question has become the main topic for practitioner and the public: *"what does the probation serve for?".* The term of 'probation measure' *(denetimli serbestlik tedbiri)* is used in several sections of the new Turkish Criminal Code (the TCC – Türk Ceza Kanunu) which was brought into force. The Code on the Execution of Sentences and Security Measures (CESSM – *Ceza ve Güvenlik Tedbirlerinin İnfazı Hakkında Kanun*) also did not make any clear reference to the probation, except for several articles set out in the TCC concerning the conditions for the application of probation measures and an article granting authorization for the establishment of the Probation and Aid Centers and the Boards of Protection. In addition, the Code on Probation numbered 5402 was enacted. However, the code did not contain even definition of the probation. Therefore, there was considerable lack of knowledge concerning the meaning of the probation and its functions within the criminal justice system.

Establishment of the institutional structure was initiated upon the reform. In other words, following the entry into force of the new legislation, a department responsible for the probation was established as a part of Directorate General for Prisons and Detention Houses of the Ministry of Justice. Moreover, local probation offices were organized in 139 centers (134 in the beginning) and such units started rendering services.

With a view to improving the practice of probation, three projects entitled *the Project of Development of Probation Services in Turkey (from 2005 to 2007)* and *the Project of the Development of Work with Juveniles, Victims by the Turkish Probation Service (from 2009 to 2010) and Strengthening of Probation Services' Instituonal Capacity in Transition to Electronic Monitoring System (from 2015 to 2017)* have been conducted since 2005 for making use of the European experience through the projects supported by the European Union.[9] These projects have made significant contributions to the improvement of the system.[10]

Impracticability of the alternative methods and increasing amounts of penalties for some crimes with the reform led to burden on the workload

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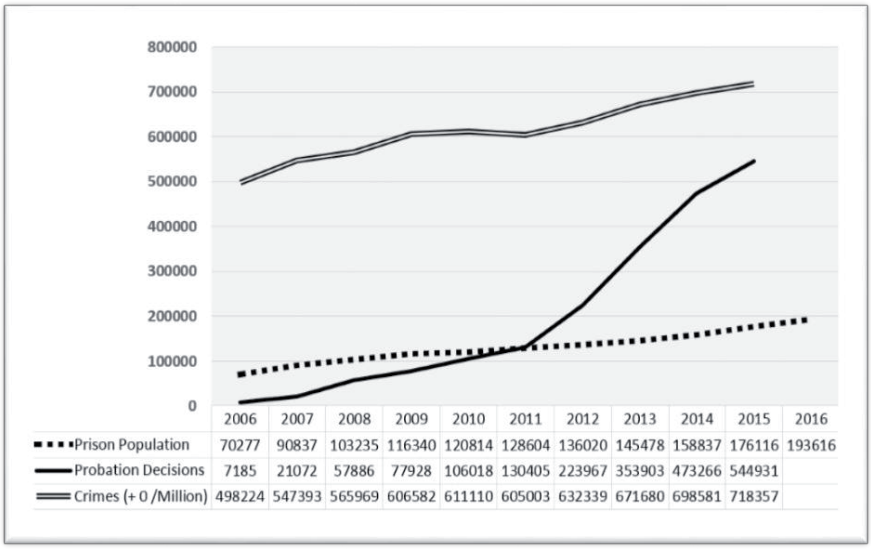
8 **Yavuz** (2011), p. 179; **Kamer VK** (2016) Türkiye'de Denetimli Serbestlik Sisteminin Kuruluşu ve Gelişimi (The Establishment and Development of the Probation System in Turkey). In: *International 10th Anniversary Symposium of Turkish Probation Proceedings, International Approaches, 8-10 December 2015 İstanbul, Symposium Book (2016), Ankara: Ministry of Justice Pub., p. 24-26.*

9 **Barry K and McFarlane MA** (2014) The Partnership between the United Kingdom in Developing Probation and Other Criminal Justice Services and Turkey's Path to Accession. In: **Canton R and McFarlane MA** (2014) *Policy Transfer in Criminal Justice, Crossing Cultures, Breaking Barriers,* (Editors) (2014) London, p. 15-36.

10 **Kamer,** p. 24-25.

of the police, prosecution and the courts and rapid increase in the prison population. At the end of 2006, as a solution for this trouble, an amendment was made to Article 231 of the Criminal Procedure Code (CCP – *Ceza Muhakemesi Kanunu*), and accordingly, the remedy of the 'suspension of the pronouncement of the judgment' was introduced with respect to judgments where the final amount of imprisonment imposed is maximum one year. It was also envisaged that suspension of the pronouncement of the judgment under the name of 'probation measure' may be subject to certain conditions. Nevertheless, in the beginnings of 2008, the scope of the probation measure was extended by means of increasing the period of imprisonment from one year to two years as there was no decrease in the prison population during the ongoing process. However, this change failed to serve the purpose. Indeed, as it was not a compulsory practice, the probation measure was rarely applied.

Following 2005, the dramatic population increase in prisons could be precluded by no means. An average increase of *15.000* persons steadily continued on annual basis. In 2012, the prisons with *136.020* inmates experienced the most crowded times of the history in Turkey. At this stage, the probation was discovered by the political power as a life buoy. In this respect, in the years of 2012, 2013, 2014, 2016 (after the coup attempt took place on 15 July 2016) and 2017 certain amendments were made to the CESSM and the regulations thereof, within the framework of the probation *(Figure 1)*.



	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
Prison Population	70277	90837	103235	116340	120814	128604	136020	145478	158837	176116	193616
Probation Decisions	7185	21072	57886	77928	106018	130405	223967	353903	473266	544931	
Crimes (+ 0 /Million)	498224	547393	565969	606582	611110	605003	632339	671680	698581	718357	

Figure 1: Official numbers of prison population, probation decisions and crime cases in the public prosecutor's offices between 2006 and 2016 (Source: http://istatistikler.uyap.gov.tr/, 01.02.2017)

Accordingly, a new article was added to the CESSM in 2012. In this article, it is envisaged that the offenders to become eligible for conditional release within a maximum period of one year may, by virtue of the enforcement judge's decision, utilize the new arrangement which is defined as 'the execution of sentence of imprisonment under probation' (article 105/A of the CESSM). The offenders were thereby enabled to be released one year earlier. By the amendment made in 2016, this period was extended and increased to 2 years. Although such arrangements were assigned with new names, the period for conditional release was indeed set to an earlier time; that is to say, one year earlier with the amendment of 2012 and two years with the amendment of 2016.[11] Moreover, the probation offices are directly assigned with the task of determining 'probation measures' in the form of community service, which is envisaged to be applied compulsorily in this execution method, and the other conditions. On the other hand, in 2014 an amendment was made to Article 106 of the CESSM which embodies the execution of judicial fine. It has been thereby enabled that the unpaid judicial fines be commuted to a community service (unpaid work), instead of being converted into sentence of imprisonment.

Upon the amendments made to Article 105 in 2013 and 2016, the execution of sentences of imprisonment respectively up to 18 months and 3 years by way of incarceration was halted, and thousands of offenders were released within a short period of time. In the same vein, amendment to Article 106 has led to release of the inmates, and several offenders failing to pay the judicial fine imposed are not incarcerated. At the end of this process, workload of the probation offices increased around 10 times within a short period of time.

In spite of all these improvements, the dramatic increase in prison population continued even after 2012 and reached to *193.616* at the end of 2016. *(Figure 1)* Due to these facts, the probation has been perceived by the public and the offenders as a type of 'pardon'.[12]

For those who have an idea about the long history of the probation, this process which took place in the last decade in Turkey probably does not sound too strange. As a matter of fact, the probation was used by the governments in many countries as a means of attaining the pragmatic goal of reducing prison population at first.[13] Furthermore, it cannot be denied that the problems and discussions taking place in this process would undoubtedly make contributions to the development of the institution.

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11 **Yavuz** (2016), p. 17.

12 **Yavuz** (2016), p. 18.

13 See: **Whitehead P and Statham R** (2006) *The History of Probation (Politics, Power and Cultural Change 1876-2005)*, Glasgow: Sweet and Maxwell Pub.

A Profile of the Turkish Probation System in the Light of Numbers

Based upon the presented information and assessments on the process which took place until the end of 2016, an overview of the probation system with respect to certain technical details will be given in the light of the numbers available.

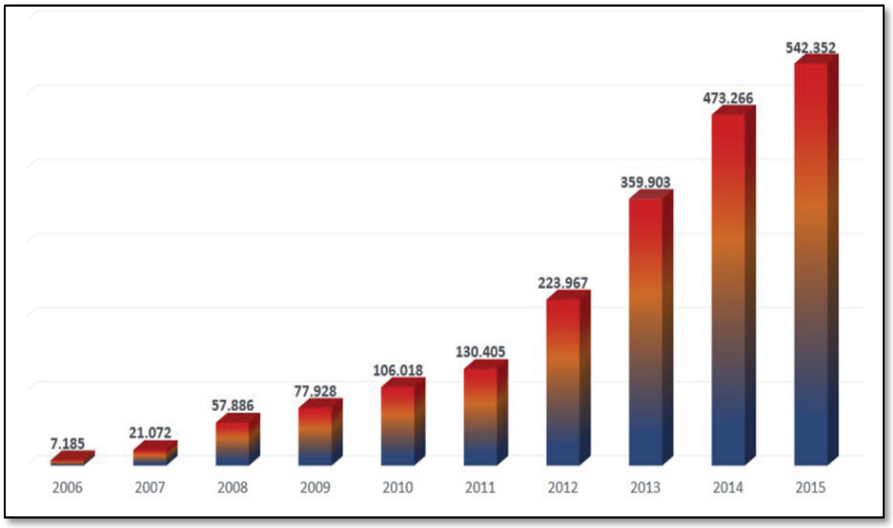

Figure 2: Official numbers of probation decisions by years from 2006 to 2015 (Source: Ministry of Justice of Turkey, http://www.cte-ds.adalet.gov.tr/, 01.02.2017)

According to the data available on the web-site of the Department of Probation, it appears that the probation attracts a great deal of attention; and that there has been a considerable increase in the number of works assigned to the probation offices since 2010. *(Figures 1 and 3)* It has been noted that especially upon the above-mentioned amendment of 2012, the number increased incrementally and reached up to *544.931* in 2015. The data indicate that the highest density on the probation system among the member countries of the Council of Europe is in Turkey.[14] According to the year-end data of 2015 provided by the Council of Europe, a total of *1.1173.278* people were supervised by the probation institutions in 47 member states (including Turkey) and *544.931* (on the basis of probation decision) of them were in Turkey.

[14] Council of Europe Annual Penal Statistics, Space I-II, Survey 2015. Available at http://wp.unil.ch/space/2017/03/space-i-and-space-ii-2015/, p. 34.

Then the question should be "Was this increase caused because the probation was considered as a more humanitarian alternative than imprisonment or was it because of the pragmatic regulations and practices carried out without any sufficient considerations of what they theoretically correspond to in the criminal justice system?" Now, I will try to find an answer to this question in the light of available data reflected in the official numbers pertaining to December 2016 *(Figure 3).*

Types of Probation Measures	*Total Numbers of Decisons in December 2016*
Judicial Control	**214.532**
Postponement of the pronouncement of the sentence/Deferral	970
Alternative Sanctions to Short-Term Imprisonment	4.293
Suspension of Custodial Sentence with Probation	495
Drug Treatment and/or Probation	**58.667**
Effective Remorse	602
Prohibition of Enjoying Certain Right and Power	4.805
Early Release/Execution of Sentences under Probation	**79.479**
Community Service Instead of Judicial Fine	**29.707**
Conditional Release and Probation for Recidivist after Release	8.756
Home arrest	84
Probation Sanctions for Juvenile under Supervision	301
Total	402.772

Figure 3: Official numbers of probation measures, December 2016, Ministry of Justice of Turkey
(Source:http://www.cte-ds.adalet.gov.tr/istatistik/2016/aralik_2016.pdf, 01.02.2017)

When considered from the numbers, it is observed that the highest density is in the decisions of judicial control (as alternatives to pre-trial detention) with the number of *214.532*. When the samples of comparative systems are examined, it is seen that the implementation of measures which is similar to the practice of judicial control does not reserve such an important place among the probation services and such measures are not even applied in some countries.[15] According to the regulation of 2013, as in the regulation of 2003, the monitoring of all of the decisions of judicial control which are set out in the Article 109 is still performed by the probation services and this situation

[15] Space II, Survey 2015, p. 34.

creates an unnecessary workload. As an easy solution to the problem, some measures of judicial control which do not require supervision of the offender within the society can be completely excluded from responsibility of the probation offices because of the fact that the fulfilment of many of these measures does not require supervision in real terms, they may be applied by means of establishing contact with the public prosecution services, the police or the relevant institutions.

The *second* density which is *79.479* in number concerns the supervision of the practice which is called as 'execution of sentences of imprisonment under probation' but which indeed means, in my opinion, the extension of the period of conditional release given both the manner of its implementation and its outcomes. This method is a new practice in the system. In fact, it should be mentioned that it was materialized for pragmatic reasons, was not arranged in accordance with the main targets of the probation and could not be applied properly. As a matter of fact, according to the arrangement and the current practice, the measure is a method which may be applied automatically in respect of almost all offenders satisfying the necessary conditions, without being based on any social or criminogenic evaluation. As a matter of fact, it is easily inferred from its perception by public as a type of 'pardon' and common expectation for its prolongation that this practice is a problematic issue.[16]

According to the data available, it is observed that the decisions of drug treatment under probation measures rendered in respect of the offences of using and possessing narcotics (Article 191 of the TCC) take the *third* place, with the figure of *58.667*, among the activities performed by the probation offices. In fact, the actions pertaining to such measures have steadily continued being placed near the top since 2006. This is due to the statutory obligation envisaging that each time a decision of conviction is rendered, a measure shall be applied automatically. The researches carried out indicate that there are significant difficulties in the application of this measure.[17] In many sample cases in the field of comparative systems, it is observed that such measures are applied by the specialized agencies.[18] Given the numbers,

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16 **Yavuz** (2016), p. 19-20.

17 **Yazici AB, Yazici E, Akkisi Kumsar N, Erol A** (2015) Addiction profile in probation practices in Turkey: 5-year data analysis, *Neuropsychiatric Disease and Treatment* 2015(11), p. 2259–2263; **Alptekin K, Mutlu E and Akın E** (2016) Madde Bağımlılığı Tedavisi İçin Denetimli Serbestlik Şubeleri Tarafından Amatem'e Gönderilen Kişilere Yönelik Uygulamalarda Karşılaşılan Sorunlar (Problems with the Practies for People Sent to Amatem by Probation Directorates for Substance Abuse Treatment). In: *International 10th Anniversary Symposium of Turkish Probation Proceedings, International Approaches, 8-10 December 2015 İstanbul, Symposium Book (2016)*, Ankara: Ministry of Justice Pub., p. 93-97.

18 See: **Kalmthout AM and Tigges L** (2008) *Netherlands, Probation in Europe 2008,* Confederation of European Probation.

the probation appeared to be a field of study allocated just for the offences of use and possession of narcotics during the period before 2012. In this respect, official data reveal that out of the total number of cases which amounts to *58.667*, the number of cases where the probation measures were applied is *52.280* by December 2010 while it is *76.752* out of *105.756* in December 2011.[19] This density unnecessarily imposes a restriction on the main field of activity of the probation offices and considerably increases their workload.

The *fourth* density, which is *29.707,* concerns the sanction of community service introduced upon the amendment of 2014 and applied instead of sentence of imprisonment in case of non-payment of judicial fines. As for me, use of community service especially for that purpose is a very positive development. As a matter of fact, as commonly taking place in comparative systems, it must be primarily ascertained, in line with the social reports to be drawn up by the probation officers, whether the accused could afford to pay the judicial fine to be imposed, before conviction. Thereupon, an actual individualization of sentencing must be ensured, and the court must directly rule on community service as an alternative sanction. Thus the offender would be thereby prevented from failing to pay the imposed fine.

Finally, it should be underlined that sanctions which, according to the available data, appear to have low density compared to others and which are applied within the framework of the suspension of the pronouncement of the judgment, alternative sanctions and conditional release should be near the top in terms of density, as the sample cases in comparative systems[20]; however, for the above-mentioned reasons, these sanctions have remained in the background.

The Importance of the Pre-sentence Reports and Individualization

One of the most important issues which appear not to be included in the official numbers which are regularly published is amount of the pre-sentence report (PSR). Reporting is probably one of the most important work for the probation offices. The probation services are generally divided into three main categories which are research and recommendation, monitoring and guidance, and planning and supervision of community sanctions.[21] The PSRs drawn up in respect of the offender by the probation officer as a result of the research carried out constitutes a resource which from the initial moment guides all

[19] **Yavuz** (2016), p. 19.

[20] Space II, Survey 2015, p. 34-35.

[21] **Raynor P** (2012) Is Probation Still Possible? *The Howard Journal* 51(2), p. 173-189; Probation Rules, Recommendation CM/Rec (2010)1 of the Committee of Ministers to Member States on the Council of Europe Probation Rules, article 1.

relevant actors in the course of the period starting from the identification of the offender and tracing to the post-execution of the sentence. Therefore, the PSRs play a critical role in individualization of sanctions nowadays. This is because the PSRs play a key role in the determination of the most appropriate type of sanction and method of execution for the interests of not only the offenders but also the victims and the society, whereas the information included in the case-file concerning the crime and the offender may be only used as data for revealing the material fact. However, it is known that the importance of the PSRs is not sufficiently recognized in Turkey. That's why the PSRs are not sufficiently relied on by the prosecution services and the courts. As the number of PSRs is not included in the official data published, there is no information about the current situation but the data of 2010 reveals that the total number of PSRs issued between 2005 and 2010 was about 20.000. However, there is no information which indicates to what extent these reports have an influence on the content of the decision rendered.[22]

Another important issue in respect to the PSRs is that the probation officer can make a 'recommendation' in the report which indicates the type of sanction or measure appropriate for the offender. The regulations of 2006 and 2007 did not grant any kind of authorization to the officer on the subject, while he was given the authority to a certain degree with the regulation of 2013. Nonetheless, it is known that the PSRs are not to be perceived by judges and prosecutors because of reports' being seen as an interference with their judicial power and therefore that judges and prosecutors are mainly in tendency to render a decision without the need for issuance of a report.[23]

Nowadays, the probation is mostly associated with types of alternative sanctions. The idea that individualization is a matter only concerning the period of the sanction must be abandoned by means of much more diversifying types of sanctions in the legislation. Moreover, individualization must be *per se* ensured in a meticulous manner in the determination of the type of sanctions to be preferred and the conditions of the execution of the sanction. In doing so, key role of the PSRs to be prepared within the scope of the probation services must be utilized in an absolute manner.

Lack of Data Source Concerning the Reoffending Rates

Another important issue which is not reflected in the official data is the non-existence of a measurable data system concerning reoffending rates in Turkey.[24] Unless a measurable data about which crimes are re-committed and

[22] **Yavuz** (2011), p. 206.
[23] **Yavuz** (2011), p. 206-214.
[24] **Topçuoğlu T** (2015) *Türkiye'de Suçluluğa ve İnfaz Politikalarına İlişkin Veri İhtiyacı,* TESEV

in what frequency, the rate thereof according to the sanctions applied and effects of the probation on the re-offending rates are available, it is not possible to carry out a study for the determination and correction of the problematic fields, and to have an accurate and effective idea about the efficiency of Turkish criminal justice system. Due to the lack of such an assessment, it is impossible to construe the increase in the number of probation cases which strangely shows parallelism with the unpreventable increase in prison population in spite of the elapsing 10 years during which the probation is in force.

The Needs of the Probation Officers

It is noted that the personality and knowledge of the probation officer are therapeutic tools in counseling services, controlling the sanctions and helping the clients.[25] Due to their significant role, the officers must be the ones who has received a decent education and they must be kept away from intra-agency factors which would adversely affect their productivity and communicational psychology. Moreover, they must be afforded necessary facilities to give good services. In a research carried out in England in 2010, it has been ascertained that the probation officers spend most of their times (76 %) at a desk by dealing with documents instead of performing studies directly with offenders.[26] Numbers which are assessed above *(Figure 3)* indicate that the probation officers in Turkey inevitably have the similar problem. According to the data of 2005, there were *4.027* probation officers worked in Turkey and only *955* of them were qualified officers.[27] Therefore, increasing the number of the probation officers, limiting the number of files per capita and adoption of a flexible working arrangement different than the work concept of the classic public officers are the necessities for the success of the system.

Demokratikleşme Programı Raporu, İstanbul, p. 1-14; **Dizman HI** (2016) Denetimli Serbestlik Tedbiri Altındaki Hükümlülerde Yeniden Suç İşleme Oranları, Bu Oranlarının Ölçülmesi ve Uluslararası Uygulamalara Dair Değerlendirme (Re-Offending Rates and Evaluation of International Applications with respect to the Method for Determination of These Rates Under Probation), In: *International 10th Anniversary Symposium of Turkish Probation Proceedings, International Approaches, 8-10 December 2015 İstanbul, Symposium Book (2016)*, Ankara: Ministry of Justice Pub., p. 292-294.

25 **Burbank EG and Goldsborough EW** (1954) The Probation Officer's Personality: A Key Factor in Rehabilitation, *Federal Probation,* 18(2), p. 11.

26 **Raynor,** p. 175.

27 Space II, Survey 2015, p. 64.

Conclusion

Regarding the facts that the criminal justice is an ancient issue as the history of humanity, the long bicentennial history of the probation in the world and the short history of probation in Turkey, it can be said that it is still at the beginning of the road. The greatest and undoubtedly the most humanitarian estimations of the modern criminal justice system are the probation in respect of the offender and the restorative justice in respect of the victim. Unfortunately, these ideas were realized in Turkey just in 2000s.

When the short history of the probation in Turkey is examined in terms of both the legislation and the outcomes of its application, it appears that the process which takes centuries in comparative systems occurred in a highly swift manner in Turkey. This has inevitably caused many important questions and problems to be encountered. Given the issues, some of which are discussed above, it is obvious that especially the philosophy of the probation and discussions about the proper goals of punishment are required to be comprehended in every aspect. Only with such an endeavor, it may be possible to obtain a much better legislation and more humanitarian and successful practice.

Although the Turkish criminal justice system imposed an inevitable obligation on law-makers and the practitioners in coping with many important problems, the presence of the probation which is a mechanism focusing not on judging and sentencing but on the discovery of 'human being' which is a source of innocence, and which endeavors for the rehabilitation and favor of the offenders, and the progress it has made within a short time period are sufficient reasons for us to be hopeful about its future.

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References

Alptekin K, Mutlu E and Akın E (2016) Madde Bağımlılığı Tedavisi İçin Denetimli Serbestlik Şubeleri Tarafından Amatem'e Gönderilen Kişilere Yönelik Uygulamalarda Karşılaşılan Sorunlar (Problems with the Practies for People Sent to Amatem by Probation Directorates for Substance Abuse Treatment). In: *International 10th Anniversary Symposium of Turkish Probation Proceedings, International Approaches, 8-10 December 2015 İstanbul, Symposium Book (2016)*, Ankara: Ministry of Justice Pub., p. 93-97.

Barry K and McFarlane MA (2014) The Partnership between the United Kingdom in Developing Probation and Other Criminal Justice Services and Turkey's Path to Accession. In: Canton R and McFarlane MA (2014) *Policy Transfer in Criminal Justice, Crossing Cultures, Breaking Barriers (Editors) (2014)* London, p. 15-36.

Burbank EG and Goldsborough EW (1954) The Probation Officer's Personality: A Key Factor in Rehabilitation, *Federal Probation,* 18(2), p. 11-14.

Canton R and McFarlane MA (2014) *Policy Transfer in Criminal Justice, Crossing Cultures, Breaking Barriers*, London: Palgrave Macmillan UK.

Dizman HI (2016) Denetimli Serbestlik Tedbiri Altındaki Hükümlülerde Yeniden Suç İşleme Oranlar, Bu Oranlarının Ölçülmesi ve Uluslararası Uygulamalara Dair Değerlendirme (Re-Offending Rates and Evaluation of International Applications with respect to the Method for Determination of These Rates Under Probation), In: *International 10th Anniversary Symposium of Turkish Probation Proceedings, International Approaches, 8-10 December 2015 İstanbul, Symposium Book (2016),* Ankara: Ministry of Justice Pub., p. 284-295.

Kalmthout AM and Tigges L (2008) *Netherlands, Probation in Europe 2008,* Confederation of European Probation. Available at: http://www.cepprobation.org/uploaded _files/Netherlands_The.pdf

Kamer VK (2016) Türkiye'de Denetimli Serbestlik Sisteminin Kuruluşu ve Gelişimi (The Establishment and Development of the Probation System in Turkey). In: *International 10th Anniversary Symposium of Turkish Probation Proceedings, International Approaches, 8-10 December 2015 İstanbul, Symposium Book (2016), Ankara: Ministry of Justice Pub., p. 24-26.*

Kury H, Ferdinand TN, Doob AN and Sprott J (2003) Does Severe Punishment Mean Less Criminality? *International Criminal Justice Review,* 13, p. 110-148.

Lipton DS (1998) The effectiveness of correctional treatment revisited thirty years later: Preliminary metaanalytic findings from the CDA TE study. Paper presented at the *12th International Congress on Criminology*, Seoul, S. Korea.

Othmani A (2008) *Beyond Prison, The Fight to Reform Prison Systems around the World, Translated from the French by Marguerite Garling*, New York: Berghahn Books.

Raynor P (2012) Is Probation Still Possible? *The Howard Journal* 51(2), p. 173-189.

Probation Rules, Recommendation CM/Rec (2010)1 of the Committee of Ministers to member states on the Council of Europe Probation Rules. Available at: http://www.cep-probation.org/wp- content/uploads/2015/03/CMRec20101E.pdf.

Roberts JV, Stalans LJ, Indermaur D and Hough M (2003) *Penal Populism and Public Opinion: Lessons From Five Countries*, New York: Oxford University Press.

Topçuoğlu T (2015) *Türkiye'de Suçluluğa ve İnfaz Politikalarına İlişkin Veri İhtiyacı,* TESEV Demokratikleşme Programı Raporu, İstanbul.

Whitehead P and Statham R (2006) *The History of Probation (Politics, Power and Cultural Change 1876-2005)*, Glasgow: Sweet and Maxwell Pub.

Yavuz HA (2016) Türkiye'de Denetimli Serbestlik Mümkün müdür? Dünü, Bugünü ve Yarınıyla Türk Ceza Adalet Sisteminde Denetimli Serbestlik (Is Probation Possible in Turkey? The Past, Today and Future of Probation in Turkish Criminal Justice System). In: *International 10th Anniversary Symposium of Turkish Probation Proceedings, International Approaches, 8-10 December 2015 İstanbul, Symposium Book (2016)*, p. 15-23. Ankara: Ministry of Justice Pub., p. 15-23.

Yavuz HA (2011) *Ceza Adalet Sisteminde Denetimli Serbestlik* (Probation in Criminal Justice System), Doctoral Dissertation, Ankara: Gazi University.

Yazici AB, Yazici E, Akkisi Kumsar N, Erol A (2015) Addiction profile in probation practices in Turkey: 5-year data analysis, *Neuropsychiatric Disease and Treatment* 2015(11), p. 2259–2263.

Official numbers of probation decisions by years from 2006 to 2015. Available at: Ministry of Justice of Turkey, http://www.cte-ds.adalet.gov.tr/, 01.02.2017.

Official numbers of prison population, probation decisions and crime cases in the public prosecutor's offices between 2006 and 2016. Available at: http://istatistikler.uyap.gov.tr/, 01.02.2017.

Council of Europe Annual Penal Statistics, Space I-II, Survey 2015. Available at http://wp.unil.ch/space/2017/03/space-i-and-space-ii-2015/, 01.02.2017.

THE CRITIQUE OF ISRAEL SUPREME COURT DECISIONS ON OCCUPATION UNDER THE INTERNATIONAL LAW

Uluslararası Hukuk Kapsamında İsrail Yüksek Mahkemesi'nin İşgal ile İlgili Kararlarının Eleştirisi

Mustafa İlhan ÖZTÜRK[1]

ABSTRACT

The Israeli occupation has a unique feature due to its length of almost fifty years. The Israel Supreme Court has made unprecedented decisions that address many aspects of occupation since the 1967 war when Israel occupied the West Bank. While these decisions have been criticised due to the legitimization of violations of the rights of thousands of Palestinians living under occupation and being incompatible with the interpretation of international law the Court was continuing to make controversial decisions in line with the state policy in the region. In many controversial decisions, the Court argued that due to the length of the occupation, the law should be adjusted to the reality in the territory. In this article, the Court's approach will be criticised from various perspectives. In doing so, it will be tried to critically assess how the specific and characteristic features of the Israeli occupation affects the decisions on controversial issues such as long-term occupation, protected person, and military needs.

Keywords: The law of occupation, Israel Supreme Court, West Bank, long-term occupation, military needs

ÖZET

Yaklaşık elli yıllık bir işgal olması nedeniyle İsrail'in Filistindeki işgali benzersiz özelliklere sahiptir. İsrail Yüksek Mahkemesi, İsrail'in Batı Şeria'yı işgal ettiği 1967 savaşından bu yana işgalin birçok yönünü ele alan farklı kararlar vermiştir. Bu kararlar, işgal altında yaşayan binlerce Filistinlinin haklarının ihlalinin meşrulaştırılması için kullanıldığı ve uluslararası hukuka uygun yorumlarla bağdaşmadığı gerekçesiyle eleştirilirken, Mahkeme, bölgedeki mevcut devlet politikası doğrultusunda tartışmalı kararlar vermeye devam etmiştir. Birçok tartışmalı kararda Mahkeme, bölgedeki işgal süresinin uzunluğu nedeniyle hukukun bölgedeki gerçekliğe uyum göstermesi gerektiğini savundu. Bu makalede Mahkeme'nin yaklaşımı çeşitli açılardan eleştirilecektir. Bu yapılırken, İsrail işgalinin karakteristik özelliklerinin, uzun süreli işgal, korunan kişiler ve askeri gereklilikler gibi tartışmalı konulara ilişkin mahkeme kararlarını nasıl etkilediği eleştirel olarak değerlendirilmeye çalışılacaktır.

Anahtar Kelimeler: İşgal hukuku, İsrail Yüksek Mahkemesi, Batı Şeria, uzun süreli işgal, askeri gereklilikler

I. THE LAW OF BELLIGERENT OCCUPATION

The law of belligerent occupation is part of the larger body of the international law of war. It was first codified at the Hague Peace Conferences of 1899 and 1907, culminating in the Regulations appended to the Fourth Hague

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Convention of the Laws and Customs of War on Land.[2] These Regulations are generally recognized as declarations of customary international law, and are thus binding upon all states.[3] This was first acknowledged in the Nuremberg Judgment of the International Military Tribunal:

> "[T]he rules of land warfare expressed in the Hague Convention undoubtedly represented an advance over existing international law at the time of their adoption. But . . . by 1939 these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war."[4]

The law of belligerent occupation was further codified in the 1949 Geneva Conventions, most notably in the Fourth Convention, Relative to the Protection of Civil Persons in Times of War.[5] The Conventions incorporated the Hague Regulations.

The law of belligerent occupation should take effect when, during the course of armed conflict, one nation's army has gained physical control of a rival state's territory. Article 42 of the 1907 Hague Regulations provides standards for determining when a territory is occupied:

> "[T]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."[6]

The law of belligerent occupation reflects an attempt to reconcile two divergent but legitimate priorities: the military necessity of the occupant and the humanitarian concerns of the occupied population. Military necessity involves securing the occupation forces from hostile acts of the indigenous population and generally preventing activities inimical to the interests of the occupant. These interests must be balanced against those providing for the maintenance of order and as normal a life as possible in the occupied territory.[7]

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2 Hague Regulations Respecting the Laws and Customs of War on Land, Annexed to Hague Convention (II), 1899, and Hague Convention (IV), 1907.

3 Yoram Dinstein, *The Law of Belligerent Occupation* (Cambridge University Press 2009) 5.

4 International Military Tribunal (Nuremberg), (1 October 1946) <https://crimeofaggression.info/documents/6/1946_Nuremberg_Judgement.pdf> accessed 23 December 2017

5 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, adopted 12 August 1949, in force 21 October 1950, 75 UNTS 287.

6 Hague Regulations (n 1) Article 42.

7 Yaron Butovsky, 'Law of Belligerent Occupation: Israeli Practice and Judicial Decisions Affecting the West Bank' (1983) 21, Canadian Yearbook of International Law, 218.

Consequently, the law of belligerent occupation, as expressed in both the Hague and Geneva Conventions, serves these basic purposes: to protect the inhabitants of the occupied territory; to allow the occupying power to protect itself by not requiring withdrawal until a peaceful settlement has been reached, while imposing an obligation on the occupier to negotiate in good faith for a peaceful settlement; and to safeguard the status and reversionary interest of the sovereign ousted by the occupant.[8]

II. APPLICABLE LAW

As noted above, the international law of belligerent occupation is connected to four main strata of customary and treaty law: Customary international law, the Hague Regulations, Geneva Convention (IV)[9] and Additional Protocol Relating to the Protection of Victims of International Armed Conflicts (AP I).[10] Although Israel was the first country in the world to ratify all four Geneva Conventions, at the beginning of the occupation it has objected that the former British authority's rules and the Convention are not applicable on the legal status of the West Bank and the Gaza Strip. Therefore, the Convention was not de jure applicable.[11] However, the government noted that the humanitarian provisions of the Convention would be respected by the Israel Defense Forces (IDF).[12]

The first petitions[13] against the actions of the military authorities in the occupied territory were based on the Hague Regulations and the Convention and as a result, the authorities were forced to decide on whether these provisions were applicable.[14] Although whether or not the region was occupied was unclear, the authorities began to comply with the rules of belligerent occupation in practice and these norms were accepted as a standard legal regime to evaluate actions of the government or military forces in the occupied regions.[15]

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8 Hüseyin Pazarcı, Uluslararası Hukuk (8. Bası, Turhan Kitabevi Yayınları, Ankara 2009) 558-561.

9 Geneva Convention (IV) (n 4)

10 Dinstein (n 2) 4.

11 ibid 20.

12 Meir Shamgar, 'The Observance of International Law in the Administered Territories' (1971) vol. 1, Israel Yearbook on Human Rights, 262–277.

13 HCJ 337/71, Christian Society for the Holy Places v. Minister of Defense (Christian Society case) (1972) vol. 2, Israel Year Book on Human Rights, 354-357; HCJ 256/72, Electricity Company for Jerusalem District v. Minister of Defence et al (Hebron Electricity case) (1972)

14 David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (State University New York Press, New York 2002) 35-40.

15 HCJ 1661/05, Gaza Beach Regional Council v. Knesset of Israel (21 June 2005)

The Court has shown its willingness to rely on provisions of the Convention, notwithstanding the hesitation of government about the formal application of the Convention in the occupied Palestinian territory.[16] However, for instance, in Yesh Din v. Commander of IDF Forces Case, although the petitioners claimed that all provisions of the Convention to be considered as a part of customary law, the Court rejected to rule on this argument. Nevertheless, the Court noted that it would continue to respect the customary provisions of the Convention as part of the applicable law.[17]

In conclusion, although the Court avoided ruling whether the Convention's provision applicable in the occupied territories or it is part of customary law, these provisions have become a standard practice of the Court over time.[18] Furthermore, some of the provisions of the Convention such as the principle of distinction between civilians and combatants has been recognized by the Supreme Court as a part of Israeli law due to being a norm of customary international law.[19] However, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, it was declared by the ICJ that not only the law of belligerent occupation but also the human rights treaties to which Israel is a party can be applied to actions in the occupied territory. In the Advisory Opinion, The ICJ stated that the human rights-based protection system continues in case of armed clashes due to the non-derogable rights.[20]

Furthermore, the International Covenant on Civil and Political Rights (ICCPR)[21], the International Covenant on Economic, Social and Cultural Rights

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16 HCJ 2056/04, Beit Sourik Village Council v. The Government of Israel (30 June 2004) <http://elyon1.court.gov.il/Files_ENG/04/560/020/A28/04020560.A28.pdf> accessed 13 September 2017

17 HCJ 2690/09, Yesh Din v. Commander of IDF Forces in the Judea and Samaria (28 March 2010) <http://www.hamoked.org/files/2010/111511_eng.pdf> accessed 13 September 2017

18 David Kretzmer, 'The Law of Belligerent Occupation in the Supreme Court of Israel' (2012) vol 94, International Review of the Red Cross, 213; Yesh Din v. Commander of IDF Forces (n 8) The petitioners argued that all provisions of GC IV are now regarded as part of customary law. The Court declined to rule on the argument but said that it would continue its practice of respecting the customary provisions of the Convention as part of the applicable law.

19 HCJ 769/02, Public Committee against Torture in Israel v. Government of Israel, (13 December 2006) para. 20. <http://www.haguejusticeportal.net/Docs/NLP/Israel/Targetted_Killings_Supreme_Court_13-12-2006.pdf> accessed 13 September 2017.

20 Advisory Opinion: Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 9 July 2004, ICJ reports, paras. 102-113. <http://www.icj-cij.org/files/case-related/131/131-20040709-ADV-01-00-EN.pdf> accessed 13 September 2017.

21 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976)

(ICESCR)[22], and the Convention on the Rights of the Child (CRC)[23] cover the persons outside of the territory and consequently, they are subject to the jurisdiction. Hence, the ICJ opined that all these conventions can be applied in the Occupied Palestinian Territory (OPT).[24]

Despite the reluctance of the Israeli government to formally apply human rights law in the occupied territories, some decisions have shown that the High Court of Justice (HCJ) has the different approach from the government.[25] The most well-known example of among these decisions is Marab Case in which the HCJ established that International Human Rights Law (IHRL) applies in the OPT. In this decision, HCJ ruled that the IHRL could be applied in the region.[26] The human rights-based approach has a key position in the judicial review of HCJ. The Court has referred to human rights treaties, particularly when assessing whether the actions of the military commander or the Israeli authority are legitimate. Whilst the Court rules on the cases, also it has noted some similarities between the human rights provisions and the basic laws of Israel.[27]

III. THE REALITY ON THE OCCUPIED TERRITORY

As noted below, the Court has emphasized duration of the Israeli occupation which is unique and demands to adjust the laws to the reality on the ground. Thus, in order to fully understand and analyse the motives in the given decisions, it is important to be able to consider the political and social realities of the region that change over time and are reflected in the Court decisions. Although the petitioners have the fundamental rights to expect to be guaranteed against illegal acts of authority in accordance with the basic principles of law, it would be unrealistic to expect a domestic court to be totally neutral to the socio-political realities of the country and the expectations of its citizens.[28]

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22 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976)

23 Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990)

24 Advisory Opinion (n 19) 128.

25 Orba Ben-Naftali and Yuval Shany, 'Living in Denial: The Application of Human Rights in the Occupied Territories' (2003 – 2004) vol. 37, Israel Law Review, 25-40.

26 HCJ 3239/02, Marab v. The IDF Commander in Judea and Samaria, (05 February 2003) paras. 19-27. <http://www.law.idf.il/sip_storage/FILES/7/347.pdf> accessed 13 April 2017

27 Aeyal M. Gross, 'Human Proportions: Are Human Rights the Emperor New Clothes of the International Law of Occupation?' (2007) vol. 18, The European Journal of International Law, 13.

28 Kretzmer, 'The Law of Belligerent Occupation' (n 17) 236.

It was seen that the term of military necessity was narrowly interpreted by the HCJ from 1967 to 1987. However, after the first Intifada, wider interpretations were made for the sake of security due to Israeli government settlement policy. When we examine two different decisions in these two different periods, we can fully understand the perspective of the Court based on political reality. In 1979, in Elon Moreh Case[29] The Court stated that Israeli authority can act on grounds of military necessity or security but cannot make any lasting plans despite the end of the occupation when the military government leaves the territory.

However, in 1991, in the Bargil Case,[30] whilst the Court examined whether the settlement policy of Israel in the OPT was illegitimate, it refrained from ruling on some issues related to land disputes on the grounds that it is a political issue. In some cases, which were related to the settlement policy, the HCJ had to face a thorny dilemma. On the one hand, while the acceptance of the legitimacy of settlement does not meet the legal standard of the international law, on the other hand claiming of its illegitimacy would bring about some conflicts between the Court and Israel authority. Therefore, the Court sustained a delicate balance by avoiding any clear decision on whether the settlement is lawful even if these decisions were to contradict its judicial legacy. [31]

Following the outbreak of the second Intifada in 2000, security concerns in the region have increased and the Court's approach to events has shaped accordingly. In this respect, the Abu Safiya Case[32] is a helpful example to understand the perspective of the Court. After the second Intifada numerous terrorist attacks committed against military vehicles and Israeli citizens in the Route 443 which have become Israel's the most important traffic routes since 1983. As a result of the deteriorating security conditions on the Route, Palestinian access was banned by the Israeli Military Commander of the area. Although the Court considers that the Commander is authorized to issue temporary and partial travel bans on behalf of the military authority in the occupied territories, which may restrict the movement of local Palestinians, and that such prohibitions may also be applied to protect Israeli citizens who

[29] HCJ 390/79 Duweikat v. Government Of Israel, (22 October 1979) <http://www.hamoked.org/files/2010/1670_eng.pdf> accessed 13 September 2017

[30] HCJ 4481/91 Bargil v. Government of Israel case, (25 August 1993) <http://www.hamoked.org/files/2011/3850_eng.pdf> accessed 13 September 2017

[31] Daphne Barak-Erez, 'Israel: The security barrier-between international law, constitutional law, and domestic judicial review' (2006) vol. 4, International Journal of Constitutional Law, 548.

[32] HCJ 2150/07 Abu Safiya v. The Minister of Defense, (29 December 2009) <http://www.acri.org.il/pdf/road443petition.pdf> accessed 13 September 2017

are residents in the outside of the territory, the Court ruled that it does not meet standards of the law of belligerent occupation due to its disproportionate and lack of jurisdiction.[33] This decision has been criticized due to allowing the military authorities to protect the benefits of Israeli rather than the Palestinian citizens who are the protected person under the law of belligerent occupation in the West Bank.[34] Thus the Court expanded the ratione materiae and ratione personae of occupation law.[35]

As a result, the judgment has contributed to the gradual expansion of the discretionary authority exercised by the military authorities in the occupied territories. In other words, the judgment is an indication of the adjusting and expanding the judicial boundaries of the laws of belligerent occupation according to the realities of occupation on the ground.[36]

IV. THE CRITIQUE OF THE SUPREME COURT'S APPROACH

Until 1990, whilst some central core of belligerent occupation such as military necessity, protected person, and proportionality were narrowly interpreted by the Supreme Court, after 1990, broader interpretations were made due to security concern and social change in the region. Particularly, first and second intifada, settlement policy and the duration of occupation have influenced the Court's decision. The HCJ has emphasized the duration of the occupation which needs an adaptation of the laws to the reality on the ground and therefore the economic and social relations with the region must be maintained in accordance with the modern age. The Quarries Case[37] is a significant example in order to understand the point of view and motive of the Court. In this case, the Court discussed whether the permission of the military authorities for Israeli companies operations in the quarries of the West Bank is legitimate. The petitioner was a non-governmental organization and their argument was based on Article 55 of the Hague Regulations. It was argued that the military forces were not entitled to any right to use and nor enjoy the public property. It was also claimed that the use of stones for Israel instead of for occupied territories indicates that behind the military authority's

[33] Guy Harpaz and Yuval Shany, 'The Israeli Supreme Court And The Incremental Expansion Of The Scope Of Discretion Under Belligerent Occupation Law' (2010) vol. 43, Israel Law Review, 515.

[34] ibid 515.

[35] For the terms of *"rationa materia*" and *"rationa personae"* Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and Its Interaction With International Human Rights Law* (Martinus Nijhoff Publishers, Leiden 2009) 5-18.

[36] Harpaz and Shany (n 32) 516.

[37] HCJ 2164/09, Yesh Din v. Commander of IDF Forces in Judea and Samaria, (26 December 2011) <http://www.hamoked.org/images/psak.pdf> accessed 13 September 2017.

consideration is benefits of the Israeli settlers rather than the interest of Palestinian local people. The Court examined that whether such actions and orders of military forces are lawful under the legal standards of Article 43 of the Hague Regulations and for the welfare of the local population. The Court gave a positive response to these questions on the grounds that stones were utilized by Palestinian local citizens, royalties were paid by companies to the local authority of the West Bank and local people were employed in these companies. This decision was contrary to the previous position of the Court that it had taken on this issue by examining the unintended impacts of the economic activity instead of the ostensible purpose of the military action. The Court's decision has been criticized for resembling a colonial approach. Furthermore, there is no reason why the commander ought to have permitted Israeli companies, instead of the local Palestinian residents to operate the quarries.[38]

However, the decision contradicts the Jam'iyat Iskan Case.[39] In the Jam'iyat Iskan Case Justice Barak held that the Hague Regulations revolve around two main axes:

> "[O]ne of them ensures the legitimate security interests of the occupying power in the territory; the other guarantee the interests of the civil local population who is subjected to belligerent occupation in the OPT. Between those two axes, the Hague Regulations endeavor to maintain this delicate balance: In some situations, the emphasis is on the military needs whilst in other situations, the emphasis is on the interests of the civilian individuals. The Military authority is not allowed to consider the national, economic or social interests of his own country in as long as there is not the risk of his security interest in the region or an implication for the interests of the local population. Even the needs of the army are his military needs and not the needs of national security in its broad sense. An area under belligerent occupation is not an open field for one kind of economic exploitation or another."

In the Jam'iyat Iskan Case, the Court concluded that the expropriation of land for the construction of a road is lawful by considering the interest of the protected local community regardless of the possibility that the expropriation and making a road would consequently also benefit the Israeli settlements. The Jam'iyat Iskan Rule in this context applied the dominant/secondary test in the outcome of actions of authority. It is clear that Israel's economic profit is explicit, substantial and direct profit derived from the licenses, whereas the

[38] Kretzmer , 'The Law of Belligerent Occupation' (n 17) 222.

[39] HCJ 393/82 Jam'iyat Iskan v. IDF Commander in Judea and Samaria, (28 December 1983) <http://www.hamoked.org/items/160_eng.pdf> accessed 13 September 2017

economic profit of local people is secondary and insignificant.[40]

Another controversial point is that the Quarries Case relies on the duration of the occupation. The Court argued that belligerent occupation of Israel in the region has unique characteristics such as the duration of the occupation. Therefore an adjustment of the laws to the reality on the ground is an essential requirement. Hence military authority obliges to manage normal life for an indefinite period of time even though it is legally temporary. Consequently, an adjustment to the prolongation of the occupation is a requirement under the traditional laws of occupation for the continuation of normal life in the region and the sustainability of economic relations between the occupier and the occupied. As a consequence of this situation, the Court argued that the obligations of the Military Authority should be assessed with a dynamic approach by considering that the military authority is responsible for the economic infrastructure and development in the region.[41]

The decision concluded that an extended interpretation of Articles 43 and 55 should be introduced due to the protraction of the occupation and thus this reality should alter the law that applies to the occupied region. Article 43 of the Hague Regulations affirms the basic obligations of an Occupying Power. Consequently, it might be regarded as the 'mini-constitution' of an occupation regime.[42] There is a no dispute that Article 43 has been accepted by the HCJ as a quasi-constitutional nature and such governs all the laws of occupation.[43] According to the article when the authority of legitimate power passes to the occupant, while it accepts to take all precaution to restore and ensure the public order and security it pledges to respecting the law in the region. This provision addresses two issues: First, the obligation of the Occupation Force to restore and guarantee public order and security; and second, the obligation to abide by laws in the country.[44] According to Article 43 and the other cardinal principles of the laws of occupation, whether it is prolonged occupation is a temporary situation[45] and the protraction of the occupation for an indefinite

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40 Guy Harpaz, Yuval Shany, Eyal Benvenisti, Amichai Cohen, Yael Ronen, Barak Medina, Orna Ben-Naftali Expert Legal Opinion, HCJ 2164/09 Yesh Din-Volunteers for Human Rights v Commander of IDF Forces in West Bank (December 26, 2011) 19-20.

41 Yesh Din v. Commander of IDF Forces (n 36) section 10.

42 Eyal Benvenisti, *The International Law of Occupation* (Princeton University Press, Princeton 1993) 9.

43 Yesh Din v. Commander of IDF Forces (n 36) section 8.

44 Kretzmer, 'The Law of Belligerent Occupation' (n 17) 218.

45 Davis P. Goodman, 'The Need for Fundamental Change in the Law of Belligerent Occupation' (1985) vol. 37 Stanford Law Review, 1581; Antonio Cassese, *The Human Dimension Of International Law (*Oxford University Press, Oxford 2008) 254; Benvenisti (n 41) 9; Marco Sassoli, 'Article 43 of The Hague Regulations And Peace Operations In The Twenty-First Century' (2004) International Humanitarian Law Research Initiative, 11. <http://www.

period of time may harm the protected population. Thusly, the protraction of the occupation forces expanded and extended obligations on the Occupying Power to protect the interests of the protected persons.[46]

On the other hand, some scholars argue that it must be seen that pressures for departures from the legal status quo in occupied territories proliferate over time, and there comes a moment when they cannot be postponed. If the consistent changes in technology and social life are disregarded by the legislator, the inactivity is at risk to bring about egregious social misfortunes. It is claimed that the military government must be given more initiative in the utilization of its lawmaking power if there is a prolonged occupation and under these conditions, legal status is not a feasible alternative.[47] The prolongation of military occupation makes it increasingly necessary to take into consideration the social and economic needs of the local population.[48] Moreover, it is argued that prolonged occupation should be regarded as a distinct and special category within the law of belligerent occupation.[49]

Finally, it should be emphasized that the protracted nature of the occupation does comprehensively affect the plausible explanation of Article 43 and consequently the powers of the military authority according to the laws of occupation as a whole, yet this broad effect is subject to two absolute and fundamental restrictions: firstly, such expansion does not permit the Military Commander to factor in considerations that are denied under Article 43 or to act outside of alternate arrangements that apply to his powers and the second is that the expansion must be exercised for the interests of the local population and not against it.[50]

V. CONCLUSION

The Israeli occupation of the area is in its fifth decade and seems to continue even further. Hence, there is no doubt that Israel's occupation has unique characteristics as the Israeli Supreme Court emphasizes. Since the 1990s, the Court has been expanding the two categories under the laws of belligerent occupation. The narrow security interests of the occupying forces have been changed into the broader security interests of Israel, while the category of protected person has been expanded to include Israeli settlers residing in

hpcrresearch.org/sites/default/files/publications/sassoli.pdf> accessed 13 September 2017

46 Adam Roberts, 'Prolonged Military Occupation: The Israeli-Occupied Territories since 1967' (1990) vol. 84, The American Journal of International Law, 96; Dinstein (n 2) 116.

47 Dinstein (n 2) 120.

48 Cassese (n 44) 257.

49 Roberts (n 45) 51.

50 Expert Legal Opinion (n 39) 30.

the Occupied Territories.[51] On the one hand, in the Elon Moreh Case (1979) and the Jam'iyat Iskan Case (1983), while the term of military necessity was narrowly interpreted by the HCJ; on the other hand, the Court contributed to the gradual expansion of the discretionary authority exercised by the military authorities in the occupied territories in the Bargil Case (1991), the Abu Safiya Case (2009) and the Quarries Case (2011). It can be seen that following the outbreak of the first Intifada in 1987 and the second Intifada in 2000, security concerns in the region have increased and the Court's approach to events has shaped accordingly.

In almost all of its judgments relating to the Occupied Territories, particularly those dealing with questions of principle, the Court has decided in favor of the authorities, often on the basis of dubious legal arguments. Therefore, it may be argued that the main function of the Court has been to legitimize and rationalize government actions in the territories. Even if this has not produced legitimization in the eyes of residents of the Occupied Territories themselves, it has done so both for the Israeli public, in whose name the military authorities are acting, and for foreign observers sympathetic to Israel's basic position.[52]

It is understandable that the Court cannot be neutral on the social and political realities of the region as a domestic court and it might make broad and dynamic interpretations to adapt the law to reality as long as it is not in contravention of international law. In other words, the interpretation given to the influence of the duration of the occupation on the discretion of the occupying forces should not contradict the international law of belligerent occupation and their main objective. The concept of occupation has a temporary and limited nature, which continues until the equal sovereign order is restored. The indefinite occupation period under the international law does not change the fact that the nature of occupation is temporary.

Undoubtedly, whilst the Court continues to make controversial decisions in the duration of the occupation, discussions about the decisions will contribute to the law of belligerent occupation.

[51] Harpaz and Shany (n 32) 528.
[52] Kretzmer, *The Occupation of Justice* (n 13) 2-3.

BIBLIOGRAPHY

Cases

Advisory Opinion: Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 09 July 2004, ICJ reports

HCJ 337/71, Christian Society for the Holy Places v. Minister of Defense (1972)

HCJ 256/72, Electricity Company for Jerusalem District v. Minister of Defence (1972)

HCJ 1661/05, Gaza Beach Regional Council v. Knesset of Israel (21 June 2005)

HCJ 2056/04, Beit Sourik Village Council v. The Government of Israel (30 June 2004)

HCJ 2690/09, Yesh Din v. Commander of IDF Forces in the Judea and Samaria (28 March 2010)

HCJ 769/02, Public Committee against Torture in Israel v. Government of Israel (13 December 2006)

HCJ 3239/02, Marab v. The IDF Commander in Judea and Samaria (05 February 2003)

HCJ 390/79, Duweikat v. Government Of Israel (22 October 1979)

HCJ 4481/91, Bargil v. Government of Israel (25 August 1993)

HCJ 2150/07, Abu Safiya v. The Minister of Defense (29 December 2009)

HCJ 2164/09, Yesh Din v. Commander of IDF Forces in Judea and Samaria (26 December 2011)

HCJ 393/82, Jam'iyat Iskan v. IDF Commander in Judea and Samaria (28 December 1983)

International Military Tribunal (Nuremberg), (1 October 1946)

Books

Arai-Takahashi Y, The Law of Occupation: Continuity and Change of International Humanitarian Law, and Its Interaction With International Human Rights Law (Martinus Nijhoff Publishers, Leiden 2009)

Benvenisti E, The International Law of Occupation (Princeton University Press 1993)

Cassese A, The Human Dimension Of International Law (Oxford University Press 2008)

Dinstein Y, The Law of Belligerent Occupation (Cambridge University Press 2009)

Kretzmer D, The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories (State University New York Press, New York 2002)

Pazarcı H, Uluslararası Hukuk (8. Bası, Turhan Kitabevi Yayınları, Ankara 2009)

Articles

Barak-Erez D, 'Israel: The security barrier-between international law, constitutional law, and domestic judicial review' (2006) 4, International Journal of Constitutional Law

Ben-Naftali O. and Shany Y, 'Living in Denial: The Application of Human Rights in the Occupied Territories' (2003 – 2004) 37, Israel Law Review

Butovsky Y, 'Law of Belligerent Occupation: Israeli Practice and Judicial Decisions Affecting the West Bank' (1983) 21, Canadian Yearbook of International Law

Goodman D, 'The Need for Fundamental Change in the Law of Belligerent Occupation' (1985) 37, Stanford Law Review

Gross A, 'Human Proportions: Are Human Rights the Emperor New Clothes of the International Law of Occupation?' (2007) 18, The European Journal of International Law

Harpaz G. and Shany Y, 'The Israeli Supreme Court And The Incremental Expansion Of The Scope Of Discretion Under Belligerent Occupation Law' (2010) 43, Israel Law Review

Harpaz G, Shany Y, Benvenisti E, Cohen A, Ronen Y, Medina B, and Ben-Naftali O, Expert Legal Opinion, HCJ 2164/09 Yesh Din-Volunteers for Human Rights v Commander of IDF Forces in West Bank (2011)

Kretzmer D, 'The Law of Belligerent Occupation in the Supreme Court of Israel' (2012) 94, International Review of the Red Cross

Roberts A, 'Prolonged Military Occupation: The Israeli-Occupied Territories since 1967' (1990) 84, The American Journal of International Law

Sassoli M, 'Article 43 of The Hague Regulations And Peace Operations In The Twenty-First Century' (2004) International Humanitarian Law Research Initiative

Shamgar M, 'The Observance of International Law in the Administered Territories' (1971) 1, Israel Yearbook on Human Rights

DIRECTORS' DISCRETION AGAINST HOSTILE TAKEOVER BIDS: SUGGESTIONS FOR TURKISH LAW

Saldırgan Devralma Tekliflerine Karşı Yönetim Kurulunun Takdir Yetkisi: Türk Hukuku İçin Öneriler

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ABSTRACT

The discussion of directors' role against hostile takeover bids has always been an important topic in the company law. Especially in common law countries, there is a remarkable divergence in this issue. The United States and the United Kingdom have been the pioneers of two substantially different approaches which derived from their different background in this particular topic. Apart from them, the European Union is another essential legislative actor, especially for Turkey as a candidate country. However, there is a legal gap in Turkey as there is not any explicit policy in Turkish law regarding directors' role against hostile takeover bids. This article scrutinises the fundamental approaches about directors' discretion against hostile takeover bids, and in light of this, it suggests a proposal for the Turkish law.

Keywords: separation of ownership and control, directors' role against hostile bids, the UK-US divergence, The US takeover law, the UK takeover law, the Directive 2004/25 of 21 April 2004 on takeover bids, the Turkish takeover law.

ÖZET

Saldırgan devralma girişimlerine karşı yönetim kurulu üyelerinin takdir yetkisi geçmişten bugüne tartışmalı bir konu olagelmiştir. Özellikle anglo-sakson hukuk sistemini (common law) benimseyen ülkelerde dikkat çekici bir ayrışma söz konusudur. Birleşik Devletler ve Birleşik Krallık, bu konuda farklı tarihsel arka planlarından kaynaklanan, temelden farklı iki yaklaşımın öncülerindendir. Bunların yanı sıra Avrupa Birliği de, özellikle aday ülke olan Türkiye için önemli bir yasa koyucu aktördür. Ancak Türkiye'de, saldırgan devralma girişimlerine karşı yönetim kurulu üyelerinin takdir yetkisine ilişkin açıkça düzenlenmiş bir kural yer almamaktadır. Bu nedenle, bahsedilen konuda Türkiye'de bir yasal boşluk olduğu görülmektedir. Bu makale ilgili konudaki temel yaklaşımları incelemekte ve bu inceleme ışığında Türk hukuku için önerilerde bulunmaktadır.

Anahtar Kelimeler: hissedarlık ve yönetimin ayrılığı, saldırgan devralma girişimlerine karşı yönetim kurulunun takdir yetkisi, İngiltere-ABD ayrışması, ingiliz devralma hukuku, Amerikan devralma hukuku devralma tekliflerine ilişkin AB direktifi, Türk hukukunda birleşme ve devralmalar.

1.0 Introduction

The notion of 'limited liability' as a fundamental principle of the company law acted as a catalyst in the development of the huge corporations with dispersed ownership,[1] on the basis that this principle served a foreseeable

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1 George O. Barboutis, 'Takeover Defence Tactics: Part I: The General Legal Framework

atmosphere for ventures in terms of financial risk which is clearly certain and limited with the venture capital. Highly dispersed ownership structure brought about a necessity of professional management. Thereupon, it can be observed that the power of directors has increased whereas the authority of shareholders has gradually and relatively lost its importance throughout the evaluation of the company law.[2] Today, especially the Anglo-American model of corporations has generally a dispersed ownership structure.[3] This situation causes some consequences, i.e. the conduct of the daily business and the most of the important decisions for the company's future are made by the directors, rather than the shareholders themselves.[4] In this respect, it can be alleged that there must be a balance between the will of the shareholders and directors for the sake of the company's own benefit as a separate entity. Therefore, one of the most important discussions within this scope is determining which interest should be fundamentally protected. Should the interests and wills of the shareholders or long-term presence and benefits of the company be protected? The main divergence and conflict derive from this discussion.

In general, there are some duties of the directors to conduct short-term and long-term businesses of the corporation so as to increase its financial performance by deciding in favour of the future interest of the company as a whole.[5] Besides, some specific duties can be stated as more crucial to implement, for instance, discretion regarding the fate of hostile takeover[6] bids.

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on Takeovers' (1999) 20 Company Lawyer 14, 15; However, there are some challenging approaches for the principle of limited liability. See detailed information at Marc Moore, "A Temple Built on Faulty Foundations": Piercing the Corporate Veil and the Legacy of Salomon v Salomon' (2006) Journal of Business Law 180.

2 Victor Brudney, 'Corporate Governance, Agency Costs, and the Rhetoric of Contract' (1985) 85 Columbia Law Review, 1403, 1410, 1417-20.

3 John Armour and David A. Skeel, 'Who Writes the Rules for Hostile Takeovers, and Why?—The Peculiar Divergence of U.S. and U.K. Takeover Regulation' (2007) 95 The Georgetown Law Journal 1727, 1728.

4 Stephen M. Bainbridge, *Bainbridge's Mergers and Acquisitions, 3D (Concepts and Insights Series)* (3rd edn, Foundation Press Thomson/West 2012), 12.

5 Blanaid J. Clarke, 'Directors' Duties During an Offer Period – Lessons from the Cadbury PLC Takeover' (February, 11 2011) UCD Working Papers in Law, Criminology & Socio-Legal Studies Research Paper No. 44/2011.

6 The notion of 'takeover' is conventionally defined as *"the acquisition by one company (the bidder) of sufficient shares in another company (the target) to give the bidder control of the target company."* See at Brenda Hannigan, *Company Law*, (4th edn, Oxford: Oxford UP 2016), 716. As it can be seen, the main characteristic of takeovers is gaining the control of the target company. Therefore the notion consists of not only mergers and acquisitions but also purchasing the target shares which are enough to control the target company.
As regards the notion of 'hostile takeovers', it is defined like that *"Hostile acquisitions are those in which the target company's board of directors is unwilling to be acquired. Here the*

The policy question about whether to let the directors implement defensive tactics against hostile takeover bids can be regarded as highly significant from the point of both the fate of the bid and the company itself.[7] At this point, discussions arise about the directors' role during hostile takeovers. 'What are the duties of directors during hostile takeover bids?' and 'How should their duties be?' are two of the most fundamental questions regarding the discussion of directors' role in the case of hostile takeover bids.[8]

The scope of the directors' power is not monotype in all jurisdictions, i.e. whereas some of them give powers to directors to enact defensive tactics against hostile takeovers, others do not; e.g. the defensive tactics are explicitly banned in the United Kingdom (UK) although in the United States (US)[9], there are a number of tools which are ready to serve managers in order to hinder hostile takeover bids.[10]

Armour and Skeel state the reason for this divergence that;

> *"In the United Kingdom, self-regulation of takeovers has led to a regime largely driven by the interests of institutional investors, whereas the dynamics of judicial law-making in the United States have benefited managers by making it relatively difficult for shareholders to influence the rules."*[11]

In Turkey, corporations are dominantly owned by *family business groups,* which have generally more than 50% of the shares, thus they also control the board of directors directly.[12] Today, it can be said that this environment is not

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focus will be on how the target can defend itself against the bidder and what the bidder can do to defeat those defences." See at Bainbridge, n. 4, 17. The main feature of the hostile takeovers is the resistance of the target board. In here, there is a need of determining the power and discretion of directors when resisting against the hostile takeover bids. This paper will mainly investigate this.

7 Matteo Gatti, 'It's My Stock and I'll Vote If I Want To: Conflicted Voting by Shareholders in (Hostile) M&A Deals' (February 27, 2016) 47(1) University of Memphis Law Review, 183.

8 Janice Dean, 'Directors' Duties in Response to Hostile Takeover Bids' (2003) International Company and Commercial Law Review 370, 371.

9 The State of Delaware law will be investigated as the US law as *"The State of Delaware is a leading domicile for U.S. and international corporations. More than 1,000,000 business entities have made Delaware their legal home. More than 66% of all publicly-traded companies in the United States including 66% of the Fortune 500 have chosen Delaware as their legal home."* 'State of Delaware - Division of Corporations - List Of Authorized Vendors With Direct Web Access' <http://corp.delaware.gov/aboutagency.shtml> accessed 18 March 2017.

10 Armour and Skeel, n. 3, in abstract, 1727.

11 Ibid.

12 Sibel Yamak and Bengi Ertuna, 'Corporate Governance and Initial Public Offerings in Turkey' in Alessandro Zattoni and William Judge (eds), *Corporate Governance and Initial Public Offerings: An International Perspective* (Cambridge University Press (Virtual Publishing)

suitable to conduct a hostile takeover, but this does not mean that the current dominant corporate structure in Turkey will be the same forever. Accordingly, hand, as regards the legal framework in Turkey, the shareholders have the ultimate right to confirm restructuring agreements and this power cannot be transferred to the directors on the basis that mergers, acquisitions and other restructuring activities require amendment of the articles of incorporation, and the right of amendment of the articles of incorporation is explicitly and only given to general assembly according to the Turkish Commercial Code (TCC),[13] and it is forbidden to transfer it to the board of directors.[14] However, this does not mean that there is an explicit board neutrality rule[15] in the Turkish takeover law. On the other hand, this is not valid for the publicly traded shares. As it will be expressed in detail, there is seemingly a legal gap in Turkey regarding this particular topic.

This study will argue that although both approaches have some significant benefits and drawbacks, the 'director primacy' might be regarded as a crucial necessity for highly dispersed companies.[16] However, this does not mean 'director primacy' in the takeover law is an inevitable option for all jurisdictions from the point of fostering the corporations' long-term performance. From this point of view, it will be argued that although jurisdictions, which have emerging economies such as Turkey, do not have to adopt the 'director primacy' in their takeover laws immediately; they should adopt a more flexible approach in order to balance current and possible future necessities in case of emerging highly dispersed conglomerates throughout the process. The aforementioned approach might play a significant role specifically in the

2012), 470.

13 Turkish Commercial Code (No: 6102) 2011, Article 408.

14 See detailed general information at Hülya Çoştan, *Yeni Türk Ticaret Kanunu'na Göre Birleşme, Bölünme ve Tür Değiştirme Kararları (According to the New Commercial Code Decisions of Mergers, Divisions (Spin-Off/Split-Up) and Restructuring Activities)* (3rd edn, Seçkin 2013), 22-23; Ferna İpekel Kayalı, *Türk Ticaret Kanunu'na Göre Birleşmeler (Mergers According to the Turkish Commercial Code)* (Vedat Kitapçılık 2014), 189-222; and See general at Ali Paslı, *Anonim Ortaklığın Devralınması (Takeover of Corporation)* (Vedat Kitapçılık 2009).; However, there is an exception in the simplified mergers. See more detailed information at the chapter '*4.0 Turkey's Current Position and Suggestions for Turkish Takeover Law'.*

15 See the chapter '*3.0 Directors Role against Hostile Takeover Bids'*.

16 It must be acknowledged that in Turkey (and in most of the emerging economies) ownership of firms is a lot more concentrated than in the UK and the US ,which may also have implications of the suitability of UK/US law as a model for emerging economies. However, the UK and US are well known jurisdictions in this issue as they are significantly divergent, and in this study, they are used as contrasting elements so as to reach a better understanding of their essential differences and their positive and negative aspects. On the other hand, this paper makes a suggestion for Turkey in case of the dawn of the dispersed companies in the future. From this point of view, the comparison elements (the UK and US) might be seen appropriate.

transition process of jurisdictions from the family dominated companies to the companies having a dispersed ownership characteristic.

To realise this, the paper is structured as follows: first, the grounds of the separation of ownership and control will be expressed briefly to understand the background of this discussion. Second, the directors' role against hostile takeover bids in the UK and the US will be conveyed to demonstrate the different approaches and their rationales given that one of the most striking divergences in this issue is between the UK and the US (though they are both common law jurisdictions as a legislative tradition). The approach of the European Union (the EU) will also be explained in order to provide a comprehensive suggestion for Turkey as a candidate country and to demonstrate the pre-Brexit UK-EU relations from this particular aspect. Third, the current situation in Turkish law will be discussed to show the deficiencies, and proposed suggestions will be presented in this section in accordance with the conclusions of the previous chapters as it is the main purpose of this article.

2.0 The Separation of Ownership and Control

The separation of ownership and control is a highly important issue in company law, and the main discussion in this article is a consequence of this fundamental principle. In this respect, investigating the separated ownership and control with its main lines might be highly beneficial with regard to a better understanding of the background of today's discussions regarding the roles of directors against hostile takeover bids.

In the nineteenth century, nearly all the large corporations were owned and managed by the same actors who founded the company. However, when founders or owners of these corporations attempted to grow their enterprise in various ways; firstly they thought to reinvest to their companies with the accumulations from their business, yet they also realised that their own money was not sufficient to make a sustainable investment. For this reason, as a second thought, they preferred to approach loan capital, which did not displace their management domination and shareholder concentration, but this also was not a sustainable growth mechanism for them due to various reasons including its cost. Finally, they adopted the way of new share issuing which was a costless approach to increase the company's capital by issuing and selling new shares in the capital market. Thus, new shareholders joined the companies and shareholder concentrations gradually diluted, though the management of the company stayed in the hands of founders unless new shareholders pass the 50% of all shares. This was the first step of dispersed ownership and the notion of the separation of ownership and control.[17]

[17] Robert T. Wearing, *Cases in Corporate Governance* (1st edn, SAGE Publications 2005), 5;

In principle, the control and ownership of the company are separated from each other. In terms of control, shareholders have no right apart from determining the directors and some exceptional corporate issues. The board of directors is assigned to run the business on a daily basis and is eligible to express some of its duties to employees. At this point, conflicts of interest emerge between owners and directors, thus, fiduciary duties of the directors and other officials come into prominence. Therefore, this concept of separation of ownership and control has always been controversial.[18]

This discussion has its roots in the theories of Berle and Means.[19] Their book categorised the control of corporation into three different types;[20] i) *majority control* which means there is a majority shareholder(s) who has more than 50% of all the shares; therefore, there is a partial separation of control and ownership in this type of corporations. ii) *minority control* which means although influential shareholder(s) who has less than 50% of all the shares, they have still an effective voting control. It is also regarded as partial separation. iii) *managerial control,* in this category, there is no one who has enough share which enables him/her to decide about the company. Therefore, it is considered that there is an exact separation of ownership and management in this category. The main thesis about the separation of ownership and control in the Berle and Means' study is that even though the board of directors is appointed by the shareholders, shareholders do not have any active position from the point of management over the directors because of the separation of ownership and control theory.[21]

However, there have been some criticisms about the consequences of this separation. Some argued that the separation of the management from ownership inherently brings about a significant conflict of interests between shareholders and managers.[22]

See the general evaluation regarding the separation of ownership and control at Paslı, n.14, 28-34.

18 Bainbridge, n. 4, 11-12.

19 Adolf Augustus Berle and Gardiner C Means, *The Modern Corporation and Private Property* (Transaction Publishers 1932).

20 Bainbridge, n. 4, 12.

21 Horace Yeung, 'Managing Corporate Risks by Regulating Executive Pay: A Legal and Economc Analysis' (2012) 2 Durham Law Review 43, 45.

22 See some early discussions related to this issue at R. A. Gordon, 'Ownership and Compensation as Incentives to Corporation Executives' (1940) 54 The Quarterly Journal of Economics 455.; Edward S. Mason, 'The Apologetics of "Managerialism"' (1958) 31 The Journal of Business 1.; Armen A. Alchian and Oliver E. Williamson, 'The Economics of Discretionary Behavior: Managerial Objectives in a Theory of the Firm' (1965) 33 Econometrica 881.; R. Joseph Monsen, Jr. and Anthony Downs, 'A Theory of Large Managerial Firms' (1965) 73 Journal of Political Economy 221.

This discussion goes back a long way, even to the famous Scottish philosopher, Adam Smith. In 1776, he stated that;

> *"The directors of such companies, however, being the managers rather of other people's money than of their own, it cannot well be expected that they should watch over it with the same anxious vigilance with which the partners in a private copartnery frequently watch over their own."*[23]

Monsen and Downs argue that there is a difference between managers of dispersed companies and managers of 'blockholder-oriented companies'[24] because there is an *asymmetry between failure and success,* and the reason for this difference is motivation of managers, i.e. managers in dispersed companies are more likely to act in favour of their self-interests (to increase their long-term income).[25] Today, it is also argued that this situation has some drawbacks such as principle-agent problem. The managers may tend to act in favour of their own interest rather than acting in favour of shareholders when they have to choose either of them.[26] Kräkel states that current academic debates, which are related to drawbacks of this phenomenon, focus on three main titles:[27] i) managers' choices are generally different than shareholders' options (i.e. conflict of interests), ii) directors' compensations depend on business performance of corporation, and this may cause *agency costs*, iii) managers may act inefficiently when making takeover decisions on the basis that they may prevent the takeover only because of avoiding replacement or they may target economically unattractive companies to take over just because to reach cash flow.

The principal-agent problem is one of the most significant consequences of this issue. The principal-agent relationship might cause some problems because agents may not always act in favour of the principal, and thus agency costs may arise.[28] The agency costs can be defined as organisational costs such

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23 Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776), 606-607.

24 This notion is used in this paper to define the companies which are owned by a shareholder (blockholder) who is the owner of a large amount of shares or block of a company. These owners are often able to influence the company with the voting rights thanks to their owerwhelming percentage of shares.

25 Monsen, Jr. and Downs, n. 22, 226-227.

26 Bainbridge, n. 4, 13.

27 Matthias Kräkel, 'Managerial versus Entrepreneurial Firms: The Benefits of Separating Ownership and Control' (2004) 56 Schmalenbach Business Review 2, 2-3.

28 Wearing, n. 17, 7; Therefore, some scholars, for example, Bebchuk supports shareholders regarding the principle agent problem and argues that *"Increasing shareholder power would much benefit shareholders and improve corporate performance"* as well as reduce the agency costs. See at Lucian Arye Bebchuk, 'The Case For Increasing Shareholder Power' (2005) 118 Harvard Law Review 833, 913.

as monitoring, boarding costs and additionally anti-shirking measures coasts.[29]

The essential one is agents' shirking discussions. Bainbridge states that:

> *"Shirking includes not only culpable cheating, but also negligence, oversight, incapacity and even honest mistakes. In other words, shirking is simply the inevitable consequence of bounded rationality and opportunism within agency relationships."* [30]

Another issue regarding the principal-agent problem is that there is a significant *'information asymmetry'*, i.e. agents inherently have more information than principal regarding the corporation. Therefore there is a need to fill this gap in favour of the principal by creating disclosure mechanisms.[31]

Moreover, it is argued that elimination of all the negative consequences of principle-agent relationship might not be possible. There are three main reasons, which derive from contracts between principals and agents, for this argument; i) at the beginning of the contractual relationship, all the happenstances cannot be foreseen by the owners and agents, ii) previous experiences might not be an useful base every time when they negotiate the details of contracts, iii) interpretation and implementation of the provisions in the contract might be ambiguous sometimes, especially, when applying the third authority such as courts to solve the conflicts of principal and agent.[32]

In light of this negative overview, it is argued that agency cost cannot be removed completely, but reducing the discretion-based power of agents might play a key role to decrease the agent costs and to make managers more accountable.[33] However, this approach might not be appropriate that much with respect to the long-term success of the company. Professional management with full discretion, as it will be argued with evidence onwards, might be more efficient in terms of the financial success of highly dispersed modern corporations. Therefore, focussing on alternative formulas, which retain broad discretion of managers and also create efficient accountability for them rather than eliminating all the discretional powers, might be more preferable.

Before expressing the other dimension of the discussion, it might be beneficial to state the divergence of the corporate structure. During the twentieth century, two different fundamental corporate governance models have arisen as a consequence of the separation of ownership and management:

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29 Bainbridge, n. 4, 31.
30 Ibid.
31 Wearing, n. 17, 8.
32 Ibid, 7.
33 Bainbridge, n. 4, 33.

i) *Dispersed Ownership System*[34] and ii) *Concentrated Ownership System.*[35]

However, there is the other side of the medallion. Given the fact that dispersed shares caused the growth of the *managerial control,* and inherent result of the corporate system is dispersed shareholding per se. Thus, this separation brings about achievement in corporate governance because it is highly efficient in terms of making decisions properly by professional management in dispersed ownership structures. There is another achievement in professional management, i.e. some shareholders who may prefer to be passive and this structure gives them this opportunity.[36]

Despite the aforementioned approaches which concern 'directors' negative effect', Kräkel argues that giving discretional power (as an example, about takeovers) to managers creates "*positive welfare effects."*[37] Accordingly, 'Director primacy' is regarded as the best model for the modern company law by the growing number of academics,[38] for example, Delaware law is considered as a successful sample with its balance between a broad managerial power to manoeuvre and managers' motivation to increase the shareholders' wealth.[39] Ribstein states that highly dispersed corporations cannot make a proper decision in favour of the company itself because dispersed shareholder structure inherently brings about a broad range of interests of these shareholders.[40]

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34 This system has the distinct features such as "*strong securities markets, rigorous disclosure standards, and high market transparency, in which the market for corporate control constitutes the ultimate disciplinary mechanism."* See at John C Coffee, 'The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control' (2001) 111 The Yale Law Journal 1, 3.

35 Which has the dominant features of "*controlling blockholders, weak securities markets, high private benefits of control, and low disclosure and market transparency standards, with only a modest role played by the market for corporate control, but with a possible substitutionary monitoring role played by large banks."* See at Ibid.

36 Bainbridge, n. 4, 12-13.

37 See detailed information at Kräkel, n. 27.

38 See, Larry E. Ribstein, 'Why Corporations?' (2004) 1 Berkeley Business Law Journal 185, 196-197; See general at Jean Jacques du Plessis, Anil Hargovan, Mirko Bagaric and Jason Harris, *Principles of Contemporary Corporate Governance* (2nd edn, Cambridge University Press 2011); Seth W. Ashby, 'Strengthening the Public Company Board of Directors: Limited Shareholder Access to the Corporate Ballot vs. Required Majority Board Independence' (2005) University of Illinois Law Review 521, 533; James McConvill and Mirko Bagaric, 'Towards Mandatory Shareholder Committees in Australian Companies' (2004) 28 Melbourne University Law Review 125, 128; See Bainbridge, n.4, 5.

39 Stephen M. Bainbridge, 'Director Versus Shareholder Primacy in New Zealand Company Law as Compared to U.S.A. Corporate Law' (2014) Law-Econ Research Paper No. 14-05 1, 5.

40 Ribstein, n. 38, 197.

In this context, Marks states three main rationales as the benefits of the separation of ownership and control:[41] i) "*hierarchical decision making",* i.e. separated professional management, might be more beneficial comparing to the dispersed shareholder based decision making with regard to the corporate efficiency, ii) the second rationale is also quite related with the first one; corporations' size is highly large in terms of both production and managerial dimensions and this requires professional management, iii) modern market conditions force the investors to be more flexible in investment allocation, and for this reason shareholders may need to "*diversify and pool to be able to change their allocations in response to changing market conditions.".* This also necessitates a more sustainable managerial environment with professional managers (regardless of the companies' shareholder circulation) for the fate of the company as a separate entity itself.

The perfect balance of managerial discretion and their accountability is one of the most substantial questions in corporate governance policy.[42] Discussions regarding between the shareholder primacy and the director primacy could be regarded as one of the most significant and explicit examples of conflict of interests. In this discussion, in general, giving more discretion for directors is seen as more beneficial for the company itself and all stakeholders of the company including shareholders although this approach also has some drawbacks. Although there are significant inconveniences in 'director primacy' which are the inherent consequences of the separation of ownership and management, reducing the discretional power of the directors might not be the best possible option to minimise these inherent shortcomings.

I support the view that instead of making the directors powerless, developing the accountability mechanisms might be more efficient to mitigate these problems without creating new weaknesses in the company management. This approach is crucial, especially for the companies which have the dispersed ownership structure, because decision making is highly difficult in these kinds of companies based upon various interests of dispersed shareholders. In general comparison, director primacy seems to have slightly more beneficial consequences in dispersed corporations. Therefore, director primacy should be the main principle in the jurisdictions which have highly dispersed conglomerates as a characteristic and jurisdictional tradition. However, it cannot be alleged that director primacy is ultimately the best and trouble-free approach. Therefore, these problems need to be mitigated by enhanced accountability and transparency.

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41 Stephen G. Marks, 'The Separation of Ownership and Control' (2000) 3 Encyclopedia of Law and Economics, 694-695.

42 Bainbridge, n. 4, 33.

As regards to the jurisdictions which have the more concentrated ownership system, the problem regarding proper decision making might not be a significant rationale for the director primacy. Additionally, it is expected that the interest of the blockholders is nearly same with the interest of the corporation itself in this kind of countries. Blockholders own the corporation dominantly, and thus, their main concern is not separate from the company's interest unlike the shareholders in dispersed companies. In this respect, it can be argued that whereas director primacy is more suitable for the dispersed corporations, there is no significant problem to implement shareholder primacy in corporations which have concentrated ownership as a characteristic.

Discussion of managerial discretion against hostile takeover bids can be regarded as one of the sub-titles of this general company law problem. Who should have the final word in the case of any hostile takeover bid? Shareholders or directors? What are the rationales of these approaches? The answers to these questions are the main focus of this study and the next chapter will be more specific about this issue.

3.0 Directors Role against Hostile Takeover Bids

The discussion of determining directors' discretion against hostile bids could be regarded as the sub-topic of the general discussions regarding separation of ownership and control. However, it might be argued that the decision about the fate of the takeover bid is one of the most fundamental issues for the interests of the shareholders and the future of the company itself. Therefore, it is worth to investigate this specific matter deeply.

Mainly, there are two different approaches in this discussion which are fundamentally represented by the US and the UK although they are both regarded as common law countries.[43] This chapter will attempt to scrutinise the discussion of directors' discretion against hostile takeover bids by expressing and evaluating the UK-US divergence in this matter with its reasons and consequences. The EU and US laws regarding directors' role against hostile takeovers are also considered as highly divergent.[44] The European Union approach will also be expressed on the grounds that Turkey is a candidate country of the European Union as the intellectual property and company law chapters were opened.[45]

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43 Armour and Skeel, n. 3, see general.

44 Celia R. Taylor, 'The European Takeover Directive: A US Comparison' (August 30, 2016) University of Oslo Faculty of Law Research Paper No. 2016-14, 50.

45 'European Commission - Enlargement - Turkey - Relations' (23 November 2006) <https://ec.europa.eu/neighbourhood-enlargement/countries/detailed-country-information/turkey_en > accessed 18 March 2017.

In the UK, the norm is the 'shareholder primacy'.[46] On the other hand, directors have more discretion to manoeuvre against hostile takeovers in the United States comparing to the United Kingdom.[47] The main approach in the EU is the `board neutrality rule` which means directors cannot implement any defensive action against hostile bids without any explicit prior approval by the shareholders.[48]

In light of the scrutiny of aforementioned jurisdictions, this chapter will attempt to determine the benefits and drawbacks of all approaches and suggest different models for different jurisdictions according to their distinct characteristics.

3.1 UK-US Divergence

3.1.1 UK Company and Takeover Law

The main rule in the UK is that shareholders have the ultimate right to decide the fate of the takeover bids, i.e. any defensive actions, which can be implemented by the directors against hostile takeover bids, are strictly prohibited.[49] Although shareholder primacy is the main rule in the UK,[50] directors should aim to develop the company for the benefit of its members as a whole in a good faith, and they "*need to foster the company's business relationships with suppliers, customers and others"* according to Companies Act 2006.[51] However, this still does not mean directors have the discretion about the fate of the hostile bids.

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46 See Marc Moore, 'Shareholder Primacy, Labour and the Historic Ambivalence of UK Company Law' (September 7, 2016). University of Cambridge Faculty of Law Research Paper No. 40/2016; However, there are some criticisms about this notion in the English law. Mukwiri alleges that managers do not have any direct obligation to shareholders exclusively, and the conception of 'shreholder primacy' derives from the historical applications. See detailed information at Jonathan Mukwiri, 'Myth of Shareholder Primacy in English Law' (2013) 24 European Business Law Review 217.

47 Dean, n.8, 371.

48 Guido Ferrarini and Geoffrey P. Miller, 'A Simple Theory of Takeover Regulation in the United States and Europe' (2009) 42 Cornell International Law Journal 301, 313; see also Hannigan, n. 6, 742-745.

49 Armour and Skeel, n. 3, 1729.

50 See Moore, n. 46, 5-11. However, there are some new discussions about the validity of the shareholder primacy in UK for the future as the younger working generations have some concerns and as UK's North European counterparts have more employee-centric corporate governance approaches. The economic, demographic and socio-political effects of UK and its surrounding might have a role in the future of UK corporate governance. See in general to reach more detailed information and arguments at Moore, n. 46.

51 Companies Act 2006, Art. 172.

The European Union has significantly affected the company law of the UK,[52] for example, the Companies Act 2006 adopted sections 942-992 of the EU Takeover Directive[53] (the Directive). According to the Companies Act 2006,[54] related articles of the Directive are adopted by the Panel on Takeovers and Mergers (the Panel) "*by promulgating, modifying, and enforcing the City Code,*[55] *which sets out general principals and specific rules*."[56] These regulations were not directly affected by the Brexit on the basis that they were implemented by an Act of Parliament and they are all valid until they are explicitly repealed, amended or replaced by the same legislative body, and in the short term, there is not any tendency to reform current company law in the UK, i.e. abolishment of the European Communities Act 1972 will not bring about automatic invalidity for EU based UK regulations.[57] Therefore, in this chapter, the Directive will also be mentioned in the scope of the UK company and takeover law.

> *"The regulatory framework is found in the Takeover Code administered by the Takeover Panel and Companies Act 2006..., which together reflect the pre-existing domestic position and also the requirements of the Takeover Directive."*[58]

Apart from the regulatory situation, the precedential background of the UK in this issue might be beneficial to scrutinise. Without prejudice to the main approach of the UK in this matter; there was an exceptional situation that when there are two takeover bids are made at the same time, directors also have an eliminative role in choosing higher of them to present to shareholders.[59] This derives from the decision of Court of Appeal in *Heron International v Lord Grade*.[60] Three years later, this became a non-absolute liability, yet, some duties were highlighted by Hoffmann J in the *Re a Company*,[61] for example, regardless the directors' personal interests, shareholders must be informed

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52 Michael Schillig 'Corporate Law after Brexit', (2016) King's Law Journal, 27 3, 431-441, 431

53 Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids (Official Journal of the European Communities. L 142/12).

54 The Companies Act 2006, sections 942(1) and 943(1).

55 The City Code on Takeovers and Mergers. Footnote added to clarify the different usage of the City Code and the Takeover Code. This study uses 'the Takeover Code' to refer the City Code on Takeovers and Mergers.

56 Pablo Iglesias Rodriguez, 'Obligations of Directors in Takeovers' in David Cabrelli and Mathias M Siems (eds), *Comparative Company Law: A Case-Based Approach* (Intl Specialized Book Service 2013), 109.

57 Schillig, n. 52, 435.

58 Hannigan, n. 6, 719.

59 Dean, n. 8, 371.

60 *Heron International v Lord Grade* (1983) BCLC 244, (1982) Com LR 108 (Court of Appeal).

61 *Re a Company* (1986) B.C.L.C. 382.

properly about the bid without deceptive information to prevent higher bid.[62] In another significant case, namely, *Dawson International Plc v Coats Paton Plc,*[63] Lord Cullen stated that the main objective of the directors must be the future success of the company as a whole, rather than current interests of the current shareholders.[64]

The general liability of the board derives from the articles of the corporation, and directors must act properly only within the scope of the company's constitution. Accordingly, in the case of a takeover bid, the board must act in good faith to provide the best possible decision for the corporation itself without any manipulation which may derive from directors' personal interests.[65] However, the discretion of the board was restricted by the High Court in *Hogg v Cramphorn Ltd.*[66] According to this case, the actions of the board without shareholder consent (to prevent hostile takeover bid) can be considered as a breach of fiduciary duties and breach of proper purposes principle even though directors act in good faith.[67] Similarly, any managerial action (to help a friendly bid) is also prohibited by the *Howard Smith Ltd v Ampol Petroleum Lt.*[68] This situation is also compatible with the *Hogg v Cramphorn Ltd* and it is regarded as the other aspect of the doctrine of the proper purpose.[69] Both precedents serve to keep directors impartial during takeover bids and give the discretion to the shareholders.

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62 Dean, n. 8, 371.

63 *Dawson International Plc v Coats Paton Plc* (1988) 4 BCC 305.

64 *"the alleged fiduciary duty of directors to current shareholders as sellers of those shares must not be confused with their duty to consider the interests of shareholders in their discharge of their duty to the company. What is in the interests of current shareholders who are sellers of those shares may not necessarily coincide with what is in the interests of the company. The creation of parallel duties could lead to conflict. Directors have got one master, the company"* (Lord Cullen). See at Joanna Morris 'The Glazer Bid: In Whose Interests?' (*Practical Law*).

65 Dean, n. 8, 371-372.

66 *Hogg v Cramphorn Ltd* (1967) Ch. 254.

67 "*The Rule requires directors to exercise their powers only for the purposes for which the powers are conferred, either by statutory documents or by corporate constitutional documents."* Chuanman You, 'The Proper Purpose Rule and the Exercise of Directors' Power in the Context of a Takeover Battle' (2017) 38 Business Law Review, Issue 1, pp. 2–8; See more information and discussion at Petri Mäntysaari, *Comparative Corporate Governance: Shareholders as a Rule-Maker* (1st edn, Springer-Verlag Berlin and Heidelberg GmbH & Co K 2005), 128; see also at Julie A. Cassidy, *Concise Corporations Law (Concise)* (5th edn, Federation Press 2006), 232.

68 *Howard Smith Ltd v Ampol Petroleum Ltd* (1974) A.C. 821

69 Alan J. Dignam, *Hicks & Goo's Cases and Materials on Company Law* (7th edn, Oxford University Press 2011), 381-383.

As it has been mentioned, the Companies Act 2006 and the City Code on Takeovers and Mergers are two fundamental sources of the takeover regulations in the UK apart from several supplementary regulations.[70] The Takeover Panel is an independent body, which was constituted in 1968 "*to issue and administer the City Code on Takeovers and Mergers (the "Code") and to supervise and regulate takeovers and other matters to which the Code applies in accordance with the rules set out in the Code."*[71] The Takeover Code has a broader application area than the Directive, i.e. whereas the Directive only comprises the takeover bids in which the securities of the companies are registered in a regulated market in one or more Member States, the Takeover Code has broader coverage, i.e. apart from registered securities, it also comprises the alternative exchange markets and "*analogous transactions",* for example, Alternative Investment Market (AIM) is one of them.[72]

The board of the target company is liable to acquire competent independent advice as to any offer and it must inform the shareholders about it substantially.[73] If there is any different opinion about the offer into the board, that members of the board should also express their thoughts separately to the shareholders to leave a proper decision to the shareholders.[74] However, without explicit permission of the shareholders, any frustrating action against hostile bids is strictly prohibited by the Code.[75] It can be seen that the shareholder primacy is the main pillar in the UK takeover decision-making process. However, there are some criticisms against this approach from various different perspectives, for example, it is argued that this approach may cause lack of motivation for directors or this prevents long-term managerial plans.[76]

Although takeover regulations in the UK derive from both company law and securities law, the specific regulations are located in the company law pillar; especially the Part 28 of the Companies Act 2006 regulates the takeovers. Additionally, self-regulation, which is conducted by the Panel, is another strong pillar of the takeover law in the UK in accordance with the sections 942-965 of the Companies Act 2006.[77] It is considered that the reason of this self-regulatory environment in the UK derived from two situations; i) strong influence of the institutional investors, and ii) decisive approach of the

70 Barboutis, n. 1, 17.
71 The City Code on Takeovers and Mergers, Introduction, 1. Overview
72 Rodriguez, n. 56, 109.
73 The City Code on Takeovers and Mergers, r. 3.1.
74 Dean, n. 8, 372.
75 The City Code on Takeovers and Mergers, Introduction, r. 21.
76 Dean, n. 8, 372.
77 Rodriguez, n. 56, 110.

commercial community in favour of the self-regulation.[78] However, this self-regulation has changed slightly because of the adoption of the Directive, i.e. the Panel and the Takeover Code had a statutory power after this adoption[79] because the Directive states that "*The authorities thus designated shall be either public authorities, associations or private bodies recognised by national law."*[80]

In the United Kingdom, offerors have an unlimited right to make a takeover bid because of the fact that even though they cannot convince the board of directors, they always can reach the shareholders directly and the ultimate decision is made by the shareholders.[81] Therefore, the only managerial choice to prevent takeover is the persuasion attempt to the shareholders,[82] and it is regarded as a drawback for directors in the UK when comparing to other significant jurisdictions.[83]

However, the equal treatment[84] and mandatory bid[85] requirements of the Takeover Code in the UK prevents any possible coercive bids.[86] From this point of view, it can be alleged that although there is not any possibility which allows directors to prevent hostile takeover bids with their own discretion to protect the company's own welfare for a long-term, these two requirements (at least) play an essential role to prevent coercive bids. Thus the main discretional power in the UK ultimately belongs to shareholders. This can be regarded as a model implementation and an alternative preventive mechanism for countries which have adopted the shareholder primacy in their takeover

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78 John Armour, Jack B. Jacobs and Curtis J. Milhaupt, 'The Evolution of Hostile Takeover Regimes in Developed and Emerging Markets: An Analytical Framework' (2011) 52 Harvard International Law Journal 219, 243-244.

79 Ibid. 237-238.

80 EU Takeover Directive, art. 4.

81 Dean, n. 8, 372.

82 Paul L. Davies, *Gower's Principles of Modern Company Law* (6th ed., Sweet & Maxwell, 1997), p.784.

83 Dean, n. 8, 373.

84 Takeover Code, r. 11.1-11.2; *"It is a fundamental principle that bidders must treat all shareholders of the same class of a target company similarly...This principle is supplemented by a number of specific rules, including requirements that the offer price match the best price paid by the bidder for the target's shares during the three months before the offer ... that comparable offers must be made with all classes of equity share capital, ... and that no "special deals with favourable conditions" be made with any shareholders..."* See footnote 28 in Armour and Skeel, n. 3, 1737.

85 Takeover Code, r. 9; Mandatory bid rule brings about the requirement that bidders, who acquire a certain block of shares from the target company, have to make an additional offer for the rest of the shares of the target. See more detail at Armour and Skeel, n. 3, 1734-1735 and Hannigan, n. 6, 749-750.

86 Armour and Skeel, n. 3, 1729.

regulations. Thus, although the hostile takeover attempts cannot be prevented by directors in these countries, at least the coercive bids are rendered more difficult by these requirements.[87]

3.1.2 US Corporate and Takeover Law

The State of Delaware law will be scrutinised in this section as the United States law because of the fact that Delaware is the company law centre of the US, and it is a centre even for international corporations.[88]

The takeover regulations in the US are located in the sections 13 and 14 of the Securities Exchange Act of 1934 (the Exchange Act), which were amended by the Williams Act in 1968.[89] The Securities and Exchange Commission (SEC), which was constituted by the Exchange Act, has the right to issue and amend rules.[90] Apart from these federal regulations, the US states also have their own takeover laws unless they contradict with the purposes of the Williams Act.[91]

Although the main discussion on the agency problem between shareholders and non-owner professional managers has long been an important topic in the US as well, the Delaware courts have attached distinct value to the takeover decisions of the boards as they might bring about some essential consequences for the company's future itself.[92] In the US, directors have significant discretion not only regarding general management of the company but also their right to hinder hostile takeover bids[93] which will be scrutinised here specifically.

Directors' power against hostile bids is based on the precedential background to a large extent in Delaware.[94] Delaware law lets the directors apply some defensive tactics against hostile takeover bids.[95] Accordingly, even though Delaware did not explicitly declare the 'director primacy' as a legal

87 See footnotes 84 and 85.

88 See note 9, above.

89 Taylor, n. 44, p. 51,52; Andreas Cahn and David C Donald, *Comparative Company Law: Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA* (1st edn, Cambridge University Press 2010), 769.

90 Cahn and Donald, n. 89, p. 769.

91 See more detailed information at Taylor, n. 44, 53-71.

92 Christine Hurt, 'The Hostile Poison Pill' (2016) UC Davis Law Review, Vol. 50, No. 1, 2016; BYU Law Research Paper No. 16-04, 139-140.

93 Taylor, n. 44, 50. However, the veto right of the board of directors against takeover bids is seen inappropriate by some scholars in the US. For example, see at Lucian Arye Bebchuk, 'The Case Against Board Veto in Corporate Takeovers' (2002) 69 The University of Chicago Law Review 973, 1029.

94 Armour and Skeel, n. 3, 1730.

95 Bainbridge, n. 4, 236.

policy, the implementation of law reflects the 'director primacy' in a large extent for US companies in their decision-making process during takeovers.[96] In Delaware, directors have some tools to hinder hostile takeover attempts such as the shareholder rights plan, or poison pill.[97] It is obvious that there is a risk of conflict of interests as directors may act in favour of their personal interests when implementing some defensive actions against hostile bids to avoid replacement of the board after the takeover.[98] Therefore, courts determined some rules to prevent potential abuses of this discretion. In *Unocal Corp v Mesa Petroleum Corp*[99]*,* the Supreme Court of Delaware states that if the directors implement any type of defensive actions to prevent a hostile bid, these actions will be *subject to heightened scrutiny*.[100] Apart from the court scrutiny, shareholders always have the power of changing the board of directors when they do not like their approach to the hostile bids. This is known as *ballot box route.*[101] However, it must be acknowledged that this is not an easy way in highly dispersed companies in terms of ownership.

The business judgement rule[102] is the essential tool when evaluating the directors' defensive actions.[103] Instead of complete prohibition of the defensive tactics like the UK, Delaware courts determined that the *"reasonableness"* and *"proportionality"* tests will be applied when any defensive action is

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96 Stephen M. Bainbridge, 'Director Primacy in Corporate Takeovers: Preliminary Reflections' (2002) 55 Stanford Law Review 1, 21.

97 Hurt, n. 92, 141; The shareholder rights plan or poison pill is defined as "*a takeover defense giving target company shareholders the right to purchase additional target or bidder stock, at a discount, if change in control takes place. The deterrent effect of the poison pill comes from resulting increase in the bidder's acquisition costs and/or dilution of the bidders's existing shareholdings. The target's board of directors typically can cancel its defensive effects by resolution to permit an acquisition to go forward."* see at Bainbridge, n. 4, 29; See more detailed information about target defences at Chapter 7 of the Bainbridge, n. 4, 236.

98 Roberta Romano, 'The Future of Hostile Takeovers: Legislation and Public Opinion' (1988) 57 Cincinnati Law Review 457, 457.

99 *Unocal Corp v Mesa Petroleum Corp* 493 A2d 946, 9554 (Del, 1995)

100 Mark J. Loewenstein, 'Unocal Revisited: No Tiger in the Tank' (2001) The Journal of Corporation Law, 1.

101 Gatti, n. 7, 185.

102 This rule is defined as *" In suits alleging a corporation's director* violated his duty of care to the company, courts will evaluate the case based on the business judgment rule. Under this standard, a court will not second guess the decisions of a director as long as they are made (1) in *good faith, (2) with the care that a reasonably prudent person would use, and (3) with the reasonable belief that they are acting in the best interests of the corporation. "* at the website of the Cornell University. 'Business Judgment Rule' <https://www.law.cornell.edu/wex/business_judgment_rule> accessed 18 March 2017.

103 Frank Cara and Peter F. Lane, 'The Business Judgment Rule and Unocal: Twin Barriers to Shareholder Welfare' (1989) 5 Journal of Civil Rights and Economic Development, 4.

implemented by the directors against hostile bids.[104] *Unitrin Inc v American Gen. Corp*[105] is one of the sources of this situation. As the court states, the only situation in which directors will be liable for their defensive actions is that acting *"draconian"* way or deciding out of the *"range of reasonableness"*.[106] However, in Delaware, in the case of *"inevitable"* sell-off with multiple bidders, like the UK, the highest bid should be chosen by the directors rather than deciding freely with their discretion within the aforementioned structure.[107]

Preventing hostile bids is considered beneficial for the corporation and its stakeholders because some scholars argue that hostile takeovers are detrimental for the entire economy.[108] Dean claims that if directors are found capable of conducting the daily business of the company, they should have also discretionary rights about hostile takeover bids to provide a better future for the company as a whole.[109] Accordingly, Gatti states that directors have better knowledge and insight regarding the company and facing hostile takeover comparing to shareholders.[110] This could be counted as another rationale for the discretion of the directors against hostile takeovers.

On the other hand, the Enron and WorldCom scandals were the first step of awareness about the detrimental effects of the artificial financial manipulations in "*cash flows"* and "*debts"* rather than real "*commercial value",* and, at the end of that environment, Sarbanes-Oxley Act 2002 "*overhauled"* the directors' duties and the quality of accounting and reporting standards. [111] This development brought about some beneficial consequences, for example, directors will pay more attention to their investments' *real*

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104 Patrick A. Gaughan, *Mergers, Acquisitions, and Corporate Restructurings* (Wiley 2015), 99.

105 *Unitrin Inc v American Gen. Corp* 651 A.2d 1361 (Del., 1995).

106 James D. Cox and Thomas Lee Hazen, *Corporations: Including Unincorporated Forms of Doing Business* (2nd edn, Aspen, Wolters Kluwer 2003), 1425.

107 *Revlon v McAndrews & Forbes Holdings Inc* 506 A.2d 173 (Del., 1986): "*…when bidders make relatively similar offers, or dissolution of the company becomes inevitable, the directors cannot fulfill their enhanced Unocal duties by playing favorites with the contending factions. Market forces must be allowed to operate freely to bring the target's shareholders the best price available for their equity*." See detailed information at http://www.law.illinois.edu/aviram/Revlon.pdf accessed 18 March 2017.

108 Julian Franks and Colin Mayer, 'Hostile Takeovers and the Correction of Managerial Failure' (1996) 40 Journal of Financial Economics 163, 164.

109 Dean, n. 8, 373. She also subsequently cited that *"The goal (in allowing takeover defences) has been not so much the protection of management, but the protection of companies and industries from the threat of out-of-state asset strippers whose victory would lead to the dismantling of companies upon which local economies have become dependent."* C. Munoz Slaughter, 'Rights Offerings, Takeovers and US Shareholders: Part 2' (2000) 23(3) *Company Lawyer* 72, 78.

110 Gatti, n. 7, 185.

111 Dean, n.8, 373.

value, and, transparency of accounts and reports is highly important for the shareholders and the market although this situation may have some negative effects on the directors' discretion, for example, reporting obligations of immature negotiations might not be appropriate from the point of directors' discretion.[112]

The hostile takeover bids in the U.S. are regarded as highly costly and hazardous because of the fact that there are strict requirements of the U.S. Securities and Exchange Commission (SEC) and longer (comparing to the UK) possible litigation processes. Additionally, there is no any mandatory bid rule in the U.S. unlike the UK as it is regulated by the Rule 9 of the Takeover Code.[113]

Armour and Skeel state that whereas the Takeover Code in the UK serves the shareholder primacy, the takeover law is highly flexible in favour of the directors' defensive actions which can be implemented in the scope of directors' fiduciary duties in the US.[114]

In the UK, institutional investors dominate the market share, and thus they could reach the opportunity of self-regulation to implement principally '*reputational sanctions'* to avoid court intervention. However, there is not any self-regulatory environment in the US because of the fact that the significant proportion of the shares is owned by retail investors, unlike the UK, therefore, the self-regulation opportunity has never arisen in the US.[115] Detailed evaluation related to this will be made in the next chapters.

3.1.3 Historical Background of the UK-US Divergence

The divergence between the UK and US did not emerge *ex nihilo* and can be traced back to distinct historical foundations. Before evaluating the consequences of these different approaches in detail, it might be beneficial to look their historical background as well to understand the main motives of them. Thus, forthcoming evaluations will be more comprehensive in light of this information and evaluation.

The shareholder-oriented preference in the UK derives from the self-regulation which is conducted by the Takeover Panel whereas the model in the US, which gives the directors broad discretion against hostile bids, is rooted in the judicial background of the takeover regulations in Delaware because

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112 See general at Jeffrey N. Gordon, 'Governance Failures of the Enron Board and the New Information Order of Sarbanes-Oxley' (March 2003) Columbia Law and Economics Working Paper No. 216 - Harvard Law and Economics Discussion Paper No. 416.

113 Dean, n.8, 373.

114 Armour and Skeel, n. 3, 1729.

115 Ibid., 1731.

the Takeover Panel in the UK has always been dominated by the investment bankers and institutional investors which shaped the law in favour of their ultimate discretion whereas in the US the takeover law has derived from the court decisions and the structure of these disputes has shaped the law in favour of directors.[116]

In light of this historical background, it can be claimed that the laws actually have shaped by the lawmakers' position. In the UK, huge institutional investors, which have massive financial power in the market and regulatory authority in the Takeover Panel, have influenced the takeover regulations in favour of their ultimate discretion about takeover bids. It can be regarded as an inherent consequence of their regulatory influence, yet it cannot be alleged that this approach is the best regulatory system for corporations' long-term success and their long-term viability. As it has been stated, dispersed shareholders might tend to focus on their short-term interest when they decide about selling and buying shares. Institutional shareholders also may behave in the same way. However, as it has been discussed before, this kind of approaches might be detrimental for the corporation, and managers' main duty is acting in favour of the corporation with its whole stakeholders, including shareholders but it does not mean that they should only focus on the maximisation of shareholder value in the short term, i.e. directors should evaluate comprehensively all the aspects of the hostile takeover bids for the company. This historical fact (institutional investors' role in regulations of takeover law in the UK) is open to criticism from the point of self-interest oriented influences of these huge actors. It can be alleged that prior concern of institutional investors is the predictability in terms of decision making against hostile bids so as to maximise their financial success and to maintain their investment flexibility in the market. Therefore, regulations are an inherent result of this approach.

On the other hand, in the US, the takeover regulations have been shaped by the court decisions gradually. This also indicates that takeover law in the US has not been regulated to serve in favour of any interest group. It has been regulated by solving individual and separate disputes throughout the process. From this point of view, overall, the US law can be regarded as more independent from any interest group and less biased. This can be considered presumptive evidence of better law which derives from real and separate necessities by solving the disputes in the courts, unlike the UK takeover law. The autonomously developed law might be preferable comparing to the dependent regulation which serves institutional investors' ultimate discretion requirement.

116 Ibid., 1730.

Armour and Skeel States that the case law in the UK was almost the same with the US law in the sense of the directors' discretion against hostile takeover bids until the takeover regulations were '*privatised*' at the end of the 1960's due to the creation of the Takeover Code. They emphasise that *"several of the cases sound as if they might have been written by Delaware judges."*[117] The case laws both in the US and UK were considered nearly identical in terms of the directors' discretion against hostile takeover bids until the advent of the Takeover Code in the UK. This also supports the previous arguments about the problematic aspect of the self-regulation, i.e. this "private" intervention to the UK takeover regulation is not natural. It can be seen an abnormal intervention so as to provide a flexible and more secure environment in favour of the institutional investors in the UK.

3.1.4 Evaluation of UK-US Divergence

As an overall evaluation, despite criticism about directors' defensive discretion as they are restricting the free market, there are a number of counter-arguments which promotes the other side. The *professional management* is regarded as "*the most powerful corporate constituency"* in the U.S.[118] In addition to the main arguments, there are some secondary ones. For instance, statistics about mergers and acquisitions in the UK and the US demonstrate that both total M&As and hostile takeover attempts are far more in the US than the UK, however, completed hostile takeovers are slightly less in the US than in the UK.[119] It must be acknowledged that the occurrence of takeovers (and differences between countries) also may depend on many non-legal aspects, but just presuming that all other things being equal: in light of this information, it can be claimed that giving significant discretion to the directors against hostile bids, has beneficial outcomes to protect companies. Despite the abundance of hostile takeover attempts in the US, the percentage of successful hostile takeovers are significantly less than the UK. This can also be regarded as an indicator of the relatively more efficient approach of the US against hostile approaches. On the other hand, some argue that corporations in the US have performed more productive than the European counterparts with regard to the wealth and the rate of growth.[120] However, it must be stated that there might be various different reasons which may affect the statistics regarding the corporations' wealth and growth rates. Therefore, this cannot be used as one of the main arguments to defend the 'directors' primacy' although it might be mentioned when listing the related arguments.

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117 Ibid. 1729-1730.

118 Reinier Kraakman, Paul Davies, Henry Hansmann, Gerard Hertig, Klaus J Hopt, Hideki Kanda and Edward B. Rock, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (Oxford University Press 2004), 67.

119 See Armour and Skeel, n. 3, 1738.

120 Ibid.

When all aforementioned approaches are evaluated, it could be argued that the professional managers might be able to decide about hostile takeovers better than dispersed shareholders from the point of their professional knowledge and experience about the corporation.

3.2 EU Takeover Law

The hostile takeover risk for the corporations in the European countries has never been more than Anglo-American companies because companies are regarded as "*social institutions"* in the European jurisdictions contrary to the Anglo-American type of company conception which is based on share purchasing and selling principle.[121] However, there was still a significant need for regulation related to hostile takeover bids. As a response to this necessity in the European Union, the Directive 2004/25 of 21 April 2004 on takeover bids[122] has been announced. The main purpose of the Takeover Directive is creating a fundamental framework in terms of regulation to protect *securities holders* sufficiently in the European Union and the European Economic Area.[123] Although there are a significant amount of jurisdictions which may differ each other in the EU as in the US, the Directive has an inclusive character in terms of determining essential issues regarding tender offers across the EU.[124]

> *"The Directive … takes as its starting point many aspects of the British model of takeover regulation, both as to substance (the board neutrality rule and the mandatory bid rule) and as to procedure (oversight of takeovers to be through a regulator rather than courts)."*[125]

Shareholders have the ultimate right to say the final word about the fate of any takeover bid,[126] i.e. the board neutrality rule serves to the shareholder primacy in the EU. The root of this ultimate authority derives from one of the two principles from the Final Report[127] of the High-Level Group of Company Law Experts on issues related to takeover bids.[128] The board of directors needs to take prior authorization from the shareholders before they implement

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121 Dean, n. 8, 374.

122 Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids (*Official Journal of the European Communities*. L 142/12). hereinafter 'the Takeover Directive'.

123 Dirk Van Gerven, *Common Legal Framework for Takeover Bids in Europe* (Cambridge University Press 2008), 4.

124 William Magnuson, 'Takeover Regulation In The United States And Europe: An Institutional Approach' (2009) 21 Pace International Law Review, p. 219.

125 Armour and Skeel, n. 3, 1787-1788.

126 The Takeover Directive, Art. 9(2).

127 Jaap Winter, Jan Schans Christensen, José Maria Garrido Garcia, Klaus J. Hopt, Jonathan Rickford, Guido Rossi and Joëlle Simon, 'Final Report of the High Level Group of Company Law Experts on issues related to takeover bids' (2002). Hereinafter 'the Final Report'.

128 Van Gerven, n. 123, 27.

any kind of frustrating action against hostile takeover bids, and in countries which adopt the two-tier management, the notion of 'board' consists of both management and supervisory board.[129] This principle (the board neutrality rule) increases the possibility of takeovers by providing the direct access to the shareholders for the bidder company.[130] However, the other significant pillar of the EU takeover law is the mandatory bid rule as it is regulated under the Article 5 of the Takeover Directive. According to this rule, if an acquirer exceeds the threshold percentage of shares that bring about the control of the target company, then a bid must be made for the rest of the shares of the target at an equitable price.[131] This may play a restraining role like in the UK.

The Final Report also mentions the positive effects of the directors' discretion by expressing that the discretion *"help alleviate the pressure to tender that shareholders face, to increase the premium paid to them and to take into consideration the interests of other stakeholders in the company, notably the employees."* However, it rejects these benefits and argues that *"any regime which confers discretion on a board to impede or facilitate a bid inevitably involves unacceptable cost and risk."*[132] There is no any other base apart from the aforementioned statement to reject the advantages of the discretional approach in the Final Report. As Sjåfjell states, this approach fails to notice the shareholders' *""blind' decision-making"* drawback.[133]

However, this restriction for the directors' discretion against hostile takeover bids does not automatically bring about the restriction for seeking alternative-better bids for the shareholders' interests.[134] This is also compatible with the Art. 3(1)(c) of the Takeover Directive. The Takeover Directive, Art. 3(1)(c);

> *"the board of an offeree company must act in the interests of the company as a whole and must not deny the holders of securities the opportunity to decide on the merits of the bid."*

These two obligations may seem conflicting each other. The shareholders may find the bid acceptable from the point of their short-term interest, but the same bid may be regarded as detrimental to the company itself by the board of directors. However, it must be acknowledged that the shareholders'

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129 The Takeover Directive, Art. 9(6).

130 Beate Sjåfjell, *Towards a Sustainable European Company Law: A Normative Analysis of the Objectives of EU Law, with the Takeover Directive as a Test Case* (Aspen Publishers 2009), 367.

131 Magnuson, n. 124, p. 220.

132 The Final Report, n. 127, 21.

133 Sjåfjell, n. 130, 370.

134 Van Gerven, n. 123, 28.

discretion on any takeover bid is explicitly stated and presented in this article. It must be evaluated with the rest of the articles in the Takeover Directive.

On the other hand, the member states have the right to stay out of this shareholder primacy principle.[135] The member states, which choose to opt out of the main principle of the Directive, can also allow their companies to decide about whether to opt in the principle.[136] This is known as the opt-in - opt-out mechanism. Companies can decide whether to apply the shareholder primacy, and they can always change their implementation later on.[137] This flexibility might provide precious chance to manoeuvre for the emerging economies because of the fact that they may face different situations during their path of commercial development. Shareholder primacy may not cause significant problems in the blockholder dominated companies and countries which have traditionally blockholder oriented corporations because inherently, they can easily decide the fate of the company as same decision-making actors decide or one dominant blockholder says the final word. As the main point of this study suggests, directors' discretion against hostile takeover bids can be considered vital, especially in dispersed corporations. As it is mentioned, management of the conglomerates is highly difficult because of too many shareholders (that might tend to aim their short-term personal interests) unless management is conducted by powerful professional managers. In this respect, for the countries which evolve from the blockholder share ownership traditions to the dispersed ownership structure during the process in the continental Europe, this flexibility of the Takeover Directive might play a significant role in the EU to ease the adaptation opportunity of aforementioned possible necessities in the future.

According to Sjåfjell;

> *"Further, opt-out Member States must decide whether they wish to give their potentially opting-in companies the opportunity not to bound by the neutrality and breakthrough rules where takeover attempts are made by bidders who are not themselves bound by these rules: the reciprocity twist. The interpretation of the reciprocity clause leaves a number of questions unanswered."*[138]

On the other hand, there is no any rule which allows the opt-in Member States' companies to stay out of the Directive, i.e. whereas the companies,

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135 "*Member States may reserve the right not to require companies as referred to in Article 1(1) which have their registered offices within their territories to apply Article 9(2) and (3) and/or Article 11.*" The Takeover Directive, Art. 12(1)

136 The Takeover Directive, Art. 12(2)

137 Van Gerven, n. 123, 28.

138 Sjåfjell, n. 130, 303-304.

which are located in the opt-out Member States, can choose to opt in; companies, which are located in the opt-in Member States, cannot prefer to stay out of the Directive. In this respect, this is in favour of the general approach of the directive. As it has been mentioned before, flexibility on this issue might be more beneficial from the point of the emerging markets and possible future necessities. Therefore, this one-sided flexibility should be extended to both sides of opt-in – opt-out mechanism.

3.3 Comparative Evaluation

As discussed, there are fundamentally two main approaches in this issue. The UK and EU approaches give the final word to the shareholders ultimately[139] (though the EU has more flexible approach) whereas the US embraces the directors' primacy in response to the hostile takeovers which suggests that directors should have some discretionary powers to prevent the company from hostile attempts in order to protect interests of the whole corporation with all its components.[140]

As regards to the main arguments of the related discussion, the rationale of the shareholder primacy approach in takeovers is mainly based on the conflict of interest between the shareholders and managers, i.e. managers might behave in order to protect their personal positions in the company and their *reputation* rather than focussing the companies' interest to increase value of the shares.[141] However, this argument might not be regarded as sufficient because i) company's own interest sometimes is not compatible with the interests of shareholders, and ii) the same situation (fear of removal) is also valid for the bidder's board, i.e. the risk of removal after the takeover might also create a conflict of interest for the bidders' managers.[142] Although some

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139 Some notions are used in this paper to define this approach such as "shareholder primacy" or "board neutrality rule" (see the definition at chapter *'3.0 Directors Role against Hostile Takeover Bids'*). However, there is a slight difference between these notions: shareholder primacy is a general concept of company law while the board neutrality rule is specific about takeovers.

140 Similarly, director primacy is a generic notion for all company law, but it has been used in takeover regulations as well specifically.

141 *"Most importantly, managers are faced with a significant conflict of interests if a takeover bid is made. Often their own performance and plans are brought into question and their own jobs are in jeopardy. Their interest is in saving their jobs and reputation instead of maximising the value of the company for shareholders. Their claims to represent the interests of shareholders or other stakeholders are likely to be tainted by selfinterest. Shareholders should be able to decide for themselves and stakeholders should be protected by specific rules (e.g. on labour law or environmental law)."* The Final Report, n. 127, p. 21.

142 Ross Cranston, 'The Rise and Rise of the Hostile Takeover' in Klaus J Hopt and Eddy Wymeersch (eds), *European Takeovers: Law and Practice*(Butterworths Law 1992), 88, cited in Sjåfjell, n. 130, 372-373.

argue that hostile takeovers are a kind of inherent cure against managerial failure because of the free market, Franks and Mayer state that there is no sufficient evidence which indicates the main impetus in hostile bids is a lack of efficient management.[143] Additionally, it can be assumed that it is expected that raiders may attempt to take over well-conducted corporations. Why do they acquire a corporation which is managed poorly and in bad condition? On the other hand, there are some other significant determinants in the occurrence of hostile takeovers, such as cultural tendencies, for example, in Germany and Spain, *domestic takeovers* are occasional.[144] It can be deduced that in this kind of traditions, actors do not tend to attempt to acquire corporations even though managerial failure makes the target company vulnerable. Therefore, this criticism might not be equally valid for all the jurisdictions. From this point of view, aforementioned criticism against managerial discretion might not be considered adequate alone to forsake the "directors' primacy" completely. Finding some supervisory mechanisms (in order to mitigate managerial abuses) might be more beneficial for the jurisdictions, especially which has dispersed corporations, rather than completely leaving the managerial discretion.

On the other hand, corporations are a separate entity from the shareholders as it has been discussed in the previous chapter. Therefore, the interests of the companies and shareholders might not be same sometimes. From this point of view, directors should have discretional power against hostile bids to prevent the companies' long-term interest when there is a conflict of interest between shareholders' short-term expectations and companies' long-term requirements. The case laws of these two jurisdictions (the UK and US) also promote this point of view.

There is no doubt that the board neutrality rule serves to the shareholders. However, as this paper argues, ultimate shareholder primacy might be detrimental in some cases. In addition to the background oriented evaluations about this divergence, there are a number of deficiencies in the ultimate shareholder primacy approach in takeovers as they were expressed in previous chapters.[145]

Accordingly, there are a number of criticisms about shareholder primacy approach from the point of its detrimental consequences for the company as a whole;

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143 See general, Franks and Mayer, n. 108.

144 David J. Berger, 'A Comparative Analysis of Takeover Regulation in the European Community' (1992) 55 Law and Contemporary Problems 53, 55.

145 See also Sjåfjell, n. 130, 374.

First, it is argued that the main detrimental effect of the board neutrality is that it focuses on the short term share prices and short-term interests of shareholders. However, the long-term commercial plans of the company might be badly affected due to lack of managerial discretion.[146]

Second, it may cause the shareholders' blind decision-making which means shareholders might tend to focus on the short-term personal interests. However, directors, normally (*at least normatively*), are supposed to align various interests of the various actors in the company.[147] Accordingly, the Netherlands adopted the approach which allows directors to implement some defensive tactics against hostile bids, and the rationale of this approach has significant factors about this point. It is determined that i) shareholders primarily focus on the share prices, ii) directors consider all related interests, and shareholders are regarded as one of these interest groups, iii) defensive discretion for the directors also gives the directors better position to evaluate all the interests.[148]

Third, the ultimate shareholder primacy inherently brings about the lack of negotiating power because of the fact that bidders can reach directly to the dispersed shareholders without any previous bargaining with directors.[149]

On the other hand, giving the discretion to the directors (about whether to implement defensive tactics or not) cannot be regarded as ultimate 'director primacy' because this discretion just allow directors to prevent some hostile bids when necessary, i.e. this does not necessarily mean the directors will use their discretionary power in every circumstances. Therefore, the final word and discretion regarding the fate of mergers and takeovers is still belongs to the shareholders if there is no any necessity of implementing defensive tactics. Additionally, directors cannot implement any defensive tactics with the impetus of personal interests because of their liabilities. The business judgement rule is one of these tools as it has been mentioned before.[150] Directors can always be found liable because of their defensive actions if they breach any of the three pillars of the business judgement rule.[151]

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146 Paulo Câmara, 'Defensive Measures Adopted by the Board: Current European Trends' (2000) Company Law Reform in OECD Countries, 11; Kraakman and others, n. 118, 172; Sjåfjell, n. 130, 374.

147 Sjåfjell, n. 130, 375.

148 Jan Roelof Schaafsma, 'Hostile Takeover Bids and Defances: The Netherlands' in Klaus J Hopt and Eddy Wymeersch (eds), *European takeovers: law and practice* (Butterworths Law 1992), 226-227, cited in Sjåfjell, n. 130, 375.

149 Sanjai Bhagat and Roberta Romano, 'Emprical Study of Corporate Law' in Mitchell A. Polinsky and Steven Shavell (eds), *Handbook of Law and Economics* (Amsterdam Elsevier 2007), 998-999.

150 See the chapter *'3.1.2 US Corporate and Takeover Law'* in this paper.

151 Barboutis, n. 1, 20.

Armour and Skeel argue that the UK system is preferable on the grounds that procedural issues in the UK system are "*quicker, cheaper and more certain than a system that relies upon litigation*." As regards the substance they prefer the *'no frustrating action'* rule, but they acknowledge that there is a need of empirical study regarding this issue.[152] However, they evaluate the whole system with other balance mechanisms in the UK such as the equal treatment and mandatory bid requirements as it has been stated before, yet this paper specifically and solely focuses on the discretion of the shareholders and its effects. Therefore, as it has been argued, giving the discretion to directors might be regarded as more beneficial from the point of separate wellbeing and the long-term existence of companies. This approach also positively affects the value of the company and so the shareholders as well.

On top of aforementioned discussions, most recently, fifty-five company law scholars from all around the world have stated a list which has ten item and signed this as the 'The Modern Corporation Statement on Company Law'.[153] According to the article 10 of this statement;

> *"Contrary to widespread belief, corporate directors generally are not under a legal obligation to maximise profits for their shareholders. This is reflected in the acceptance in nearly all jurisdictions of some version of the business judgment rule, under which disinterested and informed directors have the discretion to act in what they believe to be in the best long term interests of the company as a separate entity, even if this does not entail seeking to maximise short-term shareholder value. Where directors pursue the latter goal, it is usually a product not of legal obligation, but of the pressures imposed on them by financial markets, activist shareholders, the threat of a hostile takeover and/or stock-based compensation schemes."*

In light of this, it can be claimed that some discretional rights of the directors might create a safer environment for the company's long-term welfare. However, different traditions and different jurisdictions may have different necessities and these necessities might change throughout the development of company law of these jurisdictions. Therefore, the flexibility to choose one of them and change it later (if it is necessary) may be preferable. A threshold can be determined in terms of the shareholder number, and companies which have more shareholders than the threshold might be bound by the 'directors primacy' rule principally. At this point, it is acknowledged that empirical study might be necessary to understand the proper threshold, i.e. up to how many shareholders can make a competent decision together. Thus, after having

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152 Armour and Skeel, n. 3, 1731-1732.

153 Lynn A. Stout and others, 'The Modern Corporation Statement on Company Law' (October 6, 2016).

determined a threshold, it could be implemented different approaches to different companies according to their shareholder concentration. However, this should not be the strict implementation. It should be flexible with a shifting mechanism albeit the general principle (directors primacy). This shifting mechanism, which is according to the threshold based on shareholder concentration, may be more efficient such as adapting the system of opt in – opt out as the main rule. However, in the EU, this flexibility is limited for the benefit of the main principle, i.e. shareholder primacy. Therefore, the full flexibility is preferable. This might bring about more efficiency to enhance companies' separate existence from the shareholders and welfare of the company for a long term.

4.0 Turkey's Current Position and Suggestions for Turkish Takeover Law

The general regulatory framework about corporate governance and (specifically) takeovers in Turkey consists of the Code of Obligations,[154] Turkish Commercial Code (TCC),[155] the Capital Market Code[156] and the regulations by the Capital Markets Board (CMB) of Turkey which has several powers of regulating the market.[157] In the scope of Turkey's candidacy process to the European Union, the TCC contains several issues such as board member's qualifications, protection of minority rights, proxy and electronic voting rules, online general meetings, determining informational principles concerning annual reports and company websites, independent auditing and public accountants, letting companies to have one shareholder and one director as well as new regulations for the liability of group companies.[158] However, in Turkish law, there is not any explicit legal notion, which covers the whole meaning of takeovers.[159] Similarly, there is not any specific provision about the hostile takeover bids or the opt-in opt-out system of the Takeover Directive. Therefore, rules which regulate 'takeovers', in general, are also valid for hostile takeovers.[160] Directors do not have any explicit right to prevent hostile takeovers, yet there is no any explicit 'board neutrality rule' to forbid defensive actions of directors against hostile takeover bids.

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154 Türk Borçlar Kanunu (The Code of Obligations) (No: 6098) 2011.

155 Türk Ticaret Kanunu (The Turkish Commercial Code) (No: 6102) 2011.

156 Sermaye Piyasası Kanunu (The Capital Market Code) (No: 6362) 2012.

157 Tunç Lokmanhekim and Nazlı Nil Yukaruç, 'Turkey' in Mark Zerdin (ed), *The Mergers & Acquisitions Review* (Law Business Research Ltd 2014), 782; see also Yamak and Ertuna,n. 12, 471.

158 See detailed information at Yamak and Ertuna,n. 12, 471.

159 Paslı, n. 14, 143.

160 Tuna **Çakırca** and Gamze **Çiğdemtekin**, 'Public Mergers and Acquisitions in Turkey: Overview' (2016, *Practical Law*).

There are several types of companies in the new Turkish Commercial Code, but merely the regulations of the joint-stock companies will be scrutinised in this section because of the fact that only they have the right to be traded at the Istanbul Stock Exchange (recently named as the Borsa Istanbul).[161]

According to the new Turkish Commercial Code[162] (TCC), shareholders have the ultimate power regarding confirmation of the restructuring agreements, and this power cannot be transferred to the directors as a general rule.[163]

On the other hand, the TCC contains some limited circumstances regarding the share transfer restrictions between articles 491 and 498. According to Article 495, for example, if there is a limit on the acquisition of registered shares according to articles of the association and if the acquisition of registered shares goes over the determined limit, then the board of directors can reject to approve the share transfer. Additionally, the board can refuse to register the shares in the book of shares unless the acquirer declares explicitly that he has taken the shares in his name and account. However, according to the article 6 of the Communiqué on Shares (Serial VII, No. 128.1),[164] initial public offerings cannot include any restriction on the transfer of shares. Therefore, even in aforementioned limited situations, which could be counted as a directors' discretion against takeover bids (though there is a limited legal frame) in general, it cannot be mentioned about the applicable discretion of directors against hostile takeover bids due to the article 6 of the Communiqué on Shares in this particular situation.

The principles of tender offers were regulated by the Communiqué Serial IV, No. 44 on Principles Regarding the Collection of Corporation Shares through Takeover Bid which was issued by the Capital Markets Board, in Turkey.[165] However, this was repealed by the Communiqué Serial II, No. 26.1 on Takeover Bids in 2014 by the same enforcement body.[166] Communiqué Serial II, No. 26.1 on Takeover Bids currently regulates the takeovers of publicly held companies.

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161 The Capital Market Code (No: 6362) 2012, art. 2-3.

162 Türk Ticaret Kanunu (Turkish Commercial Code) (No: 6102) 2011, art. 145, 151 and 408.

163 Çoştan, n. 14, 22-23; İpekel-Kayalı, n, 14, 189-197. However, there is one exception to bypass the general assembly. According to the Articles 155-156 of the Turkish Commercial Code (No: 6102) 2011, there is no need for a general assembly approval in the case of simplified mergers. See at İpekel-Kayalı, n, 14, 215-223. English version of related provisions (Articles 155-156 of the Turkish Commercial Code) are available at Ünal Tekinalp and Cansen Başaran Symes, 'New Turkish Commercial Code A blueprint for the future' (*pwc Turkey*) <https://www.pwc.com.tr/en/publications/ttk-assets/pages/ttk-a_blueprint_for_the_future.pdf> accessed June 16, 2017.

164 The Communiqué Serial VII, No. 128.1 on Shares (numbered 28685), 2013.

165 İlhan Dinç, 'Mandatory Takeover Bids in Turkey: An Overview of The New Legal Regime' (2013) IV Law & Justice Review 201, 206.

166 See art. 24 of the Communiqué Serial II, No. 26.1 on Takeover Bids (numbered 28891), 2014.

Just like the UK and EU, there are regulations regarding mandatory takeover bids in Turkish Law. The Article 5 of the Communiqué;

> *"In the event that a person or persons acting in concert with that person acquire the control by fully or partially acquiring the shares representing the capital of the target corporation, it is required to make a takeover bid in such manner to protect the rights of all shareholders holding other shares representing the capital of the target corporation. In a takeover bid, all shares included in the same group representing the capital of the target corporation are subject to equal treatment."*

The general evaluation regarding the role of mandatory bids requirement is also valid for the Turkish law. This requirement might play a role to restrain some hostile attempts. However, this is not related to the directors' role regarding the fate of the hostile bids, this is a general regulatory struggle for offerors.

The only situation regarding the directors' frustrating behaviours is considered as not cooperating with the offeror during due diligence process, and thus acquirer has to gather information related to companies financial and legal risks from open sources.[167] However, it cannot be regarded as a takeover defence mechanism. On the other hand, directors may face legal consequences due to the breaching of their liabilities.

From this point of view, it could be alleged that there is a legal gap in directors' discretion against hostile takeover bids in Turkey. Although there are some provisions, they do not cover in this particular topic properly. There is neither any rule to explicitly prevent directors from frustrating any takeover attempt, nor an explicit right for directors, which allows them to implement defensive actions. It cannot be evaluated as a conscious silence of the law-maker because of various reasons which will be stated briefly.

The legal situation is expressed. However, answering the question of "How are the corporate governance tendencies in Turkey?" might play a key role to reach a better understanding of the Turkish commercial activities. Thus it might serve to provide a more insightful evaluation of the Turkish takeover law. According to Paslı, proper corporate governance is not just a preference for the companies, it is an inevitable necessity for all the companies in the modern age.[168] In light of this approach, the situation in Turkey in terms of

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167 Moroğlu Arseven 'M&A In Turkey: Lexology Navigator Q&A | Lexology' (*Lexology.com*, 2017) <http://www.lexology.com/library/detail.aspx?g=54dd3fdd-a202-4e03-a03c-b513b1109128> accessed 19 April 2017.

168 Ali Paslı, *Anonim Ortaklık Kurumsal Yönetimi (Corporate Governance)* (Çağa Hukuk Vakfı Yayınları 2005), 336.

corporate governance will be expressed briefly in the scope of this particular study.

The main reason for the alleged legal gap in this matter is that there was no previous necessity for the regulation because of the corporate governance tendencies in Turkey;

> *"There have been almost no hostile takeovers in Turkey, mainly because most companies have floated less than majority shares, or controlling shares have been privately held. The TCC*[169] *does not foresee specific provisions regarding the hostile takeovers."*[170]

As a civil law country, Turkey has the characteristic that corporations are dominantly owned by *family business groups,* which have generally more than 50% of the shares, thus they also generally control the board of directors directly.[171] The main characteristic of the Turkish corporate governance might be expressed briefly like that; i) the board structure is the one-tier system, ii) CEO duality is a highly exceptional situation, iii) the owners of the companies play a dominant role on the board of directors.[172]

Although the previous commercial code[173] regulated the two-tier system with the additional supervisory board, there are two main bodies (i.e. general assembly and the board of directors) in the Turkish Commercial Code (TCC).[174] Yamak and Ertuna define the board of directors' role in the Turkish company structure as *"rubber stamp"* because it is under the ultimate control of shareholders. Therefore the characteristic of the Turkish corporate governance can be regarded as "*insider controlled*"[175] because the family-oriented business environment is the characteristic of Turkey, and families dominantly control the board.[176]

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169 Türk Ticaret Kanunu – Mülga (Turkish Commercial Code - Abrogated) (No: 6762) 1956; The TCC also does not have any spesific regulation regarding hostile takeovers.

170 M. Togan Turan and Ömer Çollak, 'Mergers and Acquisitions on the Rise, Co-Published Section: Turkey' (2006) International Financial Law Review 42, 45.

171 Sevin Gurarda, Emre Ozsoz and Abidin Ates, 'Corporate Governance Rating And Ownership Structure In The Case Of Turkey' (2016) 4 International Journal of Financial Studies, p. 2; Yamak and Ertuna, n. 12, 470.

172 Yamak and Ertuna,n. 12, 470.

173 Türk Ticaret Kanunu – Mülga (Turkish Commercial Code - Abrogated) (No: 6762) 1956, art. 347-359.

174 Fatih Bilgili and Ertan Demirkapı, *Şirketler Hukuku Dersleri (Commercial Law Lessons)* (3rd edn, Dora 2014), 184.

175 Yamak and Ertuna,n. 12, 473.

176 Beyza Oba, Elvin Tigrel and Pinar Sener, 'Board Structure in Listed Firms: Evidence from an Emerging Economy' (2014) 14 Corporate Governance 382, 384-385.

In this kind of Turkish companies, management is strictly conducted by the dominant shareholder(s) (founder of the corporation, generally), i.e. the significant positions of the board consist of the founder of the corporation or children of the founder, and on top of that conglomerates are not the exception to this phenomenon.[177]

> *"This concentrated ownership structure eliminates takeover risks. It is usually not possible to acquire a firm without the consent of the controlling shareholder. Given the limited openness and the concentrated ownership of the firms, there is not an active market for corporate control…"*[178]

It is considered that there is a correlation between the family domination in the ownership of the corporations and state-based economic environment, and the state plays a superior role by regulating the market in Turkey,[179] i.e. the state control of the economy is stronger rather than the free market. Additionally, the characteristic of the economy is based on banking sector rather than the capital market. Therefore, the invisible hand of the free market is relatively limited in Turkey. As a result of this or the reason of this at the same time, even the conglomerates are not too eager to issue shares to the public, and proportion of the listed companies are relatively low compared to the developed countries.[180]

However, it can be observed that there was an attempt to make corporate governance more professional. According to the previous code,[181] the board of directors should only consist of the shareholders (i.e. mostly there was no separation of ownership and control), but there is no such a requirement in the TCC.[182] Accordingly, there was an educational requirement which obliges that one-quarter of the board consists of university graduates when the TCC promulgated.[183] However, this requirement has been annulled by the amendment.[184] This indicates that there was a significant attempt to let the management of the corporations become more professional in the initial form of the TCC, yet these provisions are not currently valid. It can be assumed that the reason for this regression derives from the dominant family oriented

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177 B Burçin Yurtoğlu, 'Ownership, Control and Performance of Turkish Listed Firms' (2000) 27 Empirica 193, 213.

178 Yamak and Ertuna, n. 12, 479.

179 Oba and others, n. 176, 386.

180 Yamak and Ertuna, n. 12, 476.

181 Türk Ticaret Kanunu – Mülga (Turkish Commercial Code - Abrogated) (No: 6762) 1956, art. 312.

182 Bilgili and Demirkapı, n. 174, 228-230.

183 Turkish Commercial Code (No: 6102) 2011, repealed art. 359 para 3.

184 The Amendment, namely, 'Türk Ticaret Kanunu ile Türk Ticaret Kanununun Yürürlüğü ve Uygulama Şekli Hakkında Kanunda Değişiklik Yapılmasına Dair Kanun' (No: 6335) 2012.

ownership structure of the companies and their influence on the lawmakers in Turkey. Nonetheless, it can be seen that unlike the previous code, the TCC attempted to provide more independent and professional environment for the board of directors.[185]

Despite all, corporate governance in Turkey is getting more professional even though the pace is not too fast. The number of professional managers is increasing day by day even in the holdings of the family groups because family members prefer to hold the shares of holding company rather than shares of affiliates separately and this makes the boards of affiliates more professional but not more independent in the current context.[186]

On the other hand, there are other companies with different structure in terms of ownership in Turkey. The Türkiye İş Bankası and OYAK group's affiliated companies can be regarded as remarkable examples from the point of ownership and control. It can be said that they are under professional managerial control because of their ownership structure.[187] For example, the shareholding structure of the Türkiye İş Bankası is as follows: Isbank Pension Fund (40.15%), Free Float (31.76%), Ataturk's Shares, (28.09%) which are currently owned by the Republican People's Party (CHP) as a testamentary heir.[188] As regards OYAK, it is the pension fund of the Turkish Armed Forces with more than 305,000 members from the date of 2015.[189] Because of this dispersed ownership or distinct structure, management of these firms is conducted by by professional directors.[190] Therefore, they are relatively professional corporations in terms of management.[191] Additionally, multinational conglomerates such as Ford and Fiat invested in Turkey by purchasing the shares of the financially embarrassed Turkish companies after the economic crisis in 2001, and they made alliances with the family business groups in Turkey. It is expected that this kind of companies might also need

185 Yamak and Ertuna, n. 12, 471.

186 Ibid., 481.

187 Yurtoğlu, n. 177, 220.

188 'Ownership Structure | Türkiye İş Bankası A.Ş.' <http://www.isbank.com.tr/EN/about-isbank/investor-relations/corporate-overview/corporate-information/ownership-structure/Pages/ownership-structure.aspx> accessed 1 April 2017.

189 'Corporate History - 2011-2015' <http://www.oyak.com.tr/EN/corporate/history/2011-2015.html > accessed 2 April 2017.

190 'Board of Directors | Türkiye İş Bankası A.Ş.' <http://www.isbank.com.tr/EN/about-isbank/investor-relations/corporate-overview/corporate-information/board-of-directors/Pages/board-of-directors.aspx> accessed 2 April 2017; 'Governance Structure OYAK' < http://www.oyak.com.tr/EN/corporate/what-oyak-is/managing-bodies.html > accessed 2 April 2017.

191 However, the Ministry of National Defence still play a key role in corporate governance of OYAK. Ibid.

professional management on the basis that the new global partners of the family business groups might require this in their partnership. [192]

Additionally, the initial public offerings (IPO) also played a key role in the dilution of the concentrated shares of the family business groups in Turkish corporations. The average percentage of family members' shares in listed companies and government ownership in state banks decreased after the proliferation of the IPOs.[193] This information shows that issuing shares to the public dilutes concentrated shareholder structures in Turkey.

In conclusion, it can be seen that there is a direct proportion between the increase in the number of shareholders and the difficulties in the co-decision-making mechanism in companies. In highly dispersed companies, shareholders might not have managerial power and their main motivation might be their short-term interests rather than the company's long-term ones. As in the UK, institutional shareholders desire to hold their discretional power regarding the fate of the takeover bids because their main motivation is making a profit by buying and selling shares rather than fostering the companies' persistence and stability for the long term. However, this approach might be detrimental for the companies as separate entities.

In Turkey, there is no such an atmosphere today because of the traditional structure of the companies. However, there is a trend that the percentage of publicly traded shares is increasing and the dominance of family business groups in the management is decreasing specifically in the subsidiaries of the holding companies. Taking account of steady increase in the number of publicly listed companies in Turkey,[194] it can be predicted that there will be more dispersed corporations which might bring about significant vulnerability against hostile takeover attempts, in the future. This environment might bring about the need for professional management, which is completely separated from ownership, for some highly dispersed companies in terms of ownership in the long term. Additionally, even now, there are different corporate governance structures in Turkey and management of some of them is completely separated from ownership. They may prefer to implement director primacy in takeovers. From this point of view, the aforementioned legal gap regarding the role of directors against hostile bids should be filled in favour of the discretion of professional managers.

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192 Yamak and Ertuna, n. 12, 482.

193 Ibid., 488.

194 See the "Number of Traded Companies on the Borsa İstanbul Markets" file at 'Consolidated Data' (Borsaistanbul.com, 2017) <http://www.borsaistanbul.com/en/data/data/consolidated-data> accessed 21 April 2017.

In light of this, Turkey should adopt the Directive in the short term, yet it should opt out, however, the option to opt-in should be allowed for all the companies. Thus, family-oriented and concentrated companies will not be affected by this development. At the same time, corporations, which need professional management, will be able to defend themselves against possible future hostile attacks without shareholder approval. The general suggestion, which has been argued in the previous chapter, is also valid for Turkey in the long term. An empirical study might also be beneficial to determine the proper threshold for Turkey.

5.0 Conclusion

This paper has attempted to determine a better legal framework in terms of corporate governance for the Turkish corporations by considering the role of directors against hostile takeover attempts. In addition to chapter conclusions, following general findings might be significant and they deserve to be stated.

As a general conclusion (not restricted for Turkey), restraining the discretion of the directors might not be an efficient and effective measure to eliminate the conflict of interests. Instead of this approach, developing fiduciary duties of the directors to minimise their abusive behaviours might be relatively more beneficial solution for both shareholders and the corporations as a separate entity. This general approach should be implemented into the takeover regulations by giving discretionary power to the directors so as to implement defensive tactics against hostile approaches when it is necessary for the welfare of the company. This study suggests that although both approaches have some benefits and drawbacks, the 'director primacy' might be regarded as a crucial necessity for highly dispersed companies, given that the highly dispersed discretionary power is not inherently suitable to make a competent decision from the point of the long-term existence and welfare of the company. However, this does not mean 'director primacy' in the takeover law is an inevitable option for all jurisdictions from the point of fostering the corporations' long-term performance because the shareholder density in the corporations may differ jurisdiction to jurisdiction.

From this point of view, it could be argued that even though emerging economies such as Turkey do not have to adopt the 'director primacy' in the takeover law immediately, they might adopt a more flexible approach in order to balance current and possible future necessities in case of emerging highly dispersed conglomerates throughout the process. Therefore, providing a proper shifting mechanism (in order to allow corporations to choose the most appropriate approach according to their necessities) might be more efficient

and more flexible legislative environment for the corporations in Turkey. In this respect, this paper proposes the need for an empirical study to determine a threshold with respect to the shareholder numbers in the companies to find out the limit of efficient co-decision making environment. It also argues that the main rule should be the "directors primacy" for the corporations, which are above the determined threshold, so as to make the decision-making mechanism more efficient with professional directors for the sake of the company itself rather than its shareholders.

In the short term, Turkey should adopt but opt-out the EU Takeover Directive[195] in favour of the directors' primacy as a more practical approach, and it should allow the corporations to opt-in as the Directive permits.[196] Thus, dispersed corporations would automatically stay in the director primacy against any possible future hostile takeover attempts whereas family dominated corporations would have the option to opt-in if they prefer to continue their dominance in determining their corporations' future by retrieving their ultimate right about the fate of any takeover bids.

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Bibliography

Alchian A A and Williamson O E, 'The Economics of Discretionary Behavior: Managerial Objectives in a Theory of the Firm' (1965) 33 Econometrica

Armour J, Jacobs J B and Milhaupt C J, 'The Evolution of Hostile Takeover Regimes in Developed and Emerging Markets: An Analytical Framework' (2011) 52 Harvard International Law Journal

— —, and Skeel D A, 'Who Writes the Rules for Hostile Takeovers, and Why?—The Peculiar Divergence of U.S. and U.K. Takeover Regulation' (2007) 95 The Georgetown Law Journal

Ashby S, 'Strengthening The Public Company Board Of Directors: Limited Shareholder Access To The Corporate Ballot Vs. Required Majority Board Independence' (2005) University of Illinois Law Review

Bainbridge S, *Bainbridge's Mergers And Acquisitions, 3D (Concepts And Insights Series)* (3rd edn, Foundation Press Thomson/West 2012)

— —, 'Director Primacy In Corporate Takeovers: Preliminary Reflections' 55 Stanford Law Review

[195] Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids (Official Journal of the European Communities. L 142/12).

[196] Ibid. Art. 12.

— —, 'Director Versus Shareholder Primacy In New Zealand Company Law As Compared To U.S.A. Corporate Law' (2014) Law-Econ Research Paper No. 14-05

Barboutis G O, 'Takeover Defence Tactics: Part I: The General Legal Framework On Takeovers' (1999) 20 Company Lawyer

Bebchuk L A, 'The Case For Increasing Shareholder Power' (2005) 118 Harvard Law Review

— —, 'The Case Against Board Veto in Corporate Takeovers' (2002) 69 The University of Chicago Law Review

Berger D J, 'A Comparative Analysis of Takeover Regulation in the European Community' (1992) 55 Law and Contemporary Problems

Berle A A and Means G C, *The Modern Corporation and Private Property* (Transaction Publishers 1932)

Bhagat S and Romano R, 'Emprical Study of Corporate Law' in Mitchell A Polinsky and Steven Shavell (eds), *Handbook of Law and Economics* (Amsterdam Elsevier 2007)

Bilgili F and Demirkapı E, Şirketler *Hukuku Dersleri (Commercial Law Lessons)* (3rd edn, Dora 2014)

Brudney V, 'Corporate Governance, Agency Costs, And The Rhetoric Of Contract' (1985) 85 Columbia Law Review

Cahn A and Donald D C, *Comparative Company Law: Text And Cases On The Laws Governing Corporations In Germany, The UK And The USA* (1st edn, Cambridge University Press 2010)

Câmara P, 'Defensive Measures Adopted by the Board: Current European Trends' (2000) Company Law Reform in OECD Countries <http://www.oecd.org/daf/ca/corporategovernanceprinciples/1931854.pdf> accessed 18 March 2017

Cara F and Lane P F, 'The Business Judgment Rule and Unocal: Twin Barriers to Shareholder Welfare' (1989) 5 Journal of Civil Rights and Economic Development

Cassidy J, *Concise Corporations Law (Concise)* (5th edn, Federation Press 2006)

Clarke B, 'Directors' Duties During An Offer Period – Lessons From The Cadbury PLC Takeover' (2011) UCD Working Papers in Law, Criminology & Socio-Legal Studies Available at SSRN: https://ssrn.com/abstract=1759953 or http://dx.doi.org/10.2139/ssrn.1759953 accessed 17 March 2017.

Cranston R, 'The Rise and Rise of the Hostile Takeover' in Klaus J Hopt and Eddy Wymeersch (eds), European Takeovers: Law and Practice (Butterworths Law 1992)

Coffee J C, 'The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control' (2001) 111 The Yale Law Journal

Cox J D and Hazen T L, *Corporations: Including Unincorporated Forms Of Doing Business* (2nd edn, Aspen, Wolters Kluwer 2003)

Çakırca T and Çiğdemtekin G, 'Public Mergers and Acquisitions in Turkey: Overview' (2016, *Practical Law*) <http://uk.practicallaw.com/7-502-1013?service=crossborder#a326899> accessed 29 March 2017.

Çoştan H, *Yeni Türk Ticaret Kanunu'na Göre Birleşme, Bölünme Ve Tür Değiştirme Kararları (According To The New Commercial Code Decisions Of Mergers, Divisions (Spin-Off/Split-Up) And Restructuring Activities)* (3rd edn, Seçkin 2013)

Dean J, 'Directors' Duties In Response To Hostile Takeover Bids' (2003) International Company and Commercial Law Review

Davies P L, *Gower's Principles of Modern Company Law* (6th ed., Sweet & Maxwell, 1997)

Dignam A, *Hicks & Goo's Cases And Materials On Company Law* (7th edn, Oxford University Press 2011)

Dinç İ, 'Mandatory Takeover Bids In Turkey: An Overview Of The New Legal Regime' (2013) IV Law & Justice Review

Ferrarini G and Miller G P, 'A Simple Theory of Takeover Regulation in the United States and Europe' (2009) 42 Cornell International Law Journal

Franks J and Mayer C, 'Hostile Takeovers and the Correction of Managerial Failure' (1996) 40 Journal of Financial Economics

Gatti, M, 'It's My Stock and I'll Vote If I Want To: Conflicted Voting by Shareholders in (Hostile) M&A Deals' (February 27, 2016) 47(1) University of Memphis Law Review

Gaughan P, *Mergers, Acquisitions, And Corporate Restructurings* (Wiley 2015)

Gordon J N, 'Governance Failures Of The Enron Board And The New Information Order Of Sarbanes-Oxley' Columbia Law School Working Paper No.216 - Harvard Law and Economics Discussion Paper No. 416.

Gordon R A, 'Ownership and Compensation as Incentives to Corporation Executives' (1940) 54 The Quarterly Journal of Economics

Gurarda S, Ozsoz E and Ates A, 'Corporate Governance Rating and Ownership Structure in the Case of Turkey' (2016) 4 International Journal of Financial Studies

Hannigan B, *Company Law*, (4th edn, Oxford: Oxford UP 2016)

Hurt C, 'The Hostile Poison Pill' (2016) UC Davis Law Review, Vol. 50, No. 1, 2016; BYU Law Research Paper No. 16-04.

İpekel-Kayalı F, *Türk Ticaret Kanunu'na Göre Birleşmeler (Mergers According to the Turkish Commercial Code)* (Vedat Kitapçılık 2014)

Kraakman R, Davies P, Hansmann H, Hertig G, Hopt K J, Kanda H and Rock E B, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (Oxford University Press 2004)

Kräkel M, 'Managerial Versus Entrepreneurial Firms: The Benefits of Separating Ownership and Control' (2004) 56 Schmalenbach Business Review

Loewenstein M, 'Unocal Revisited: No Tiger In The Tank' (2001) The Journal of Corporation Law

Lokmanhekim T and Yukaruç N N, 'Turkey' in Mark Zerdin (ed), *The Mergers & Acquisitions Review* (Law Business Research Ltd 2014)

Marks S G, 'The Separation of Ownership and Control' (2000) 3 Encyclopedia of Law and Economics <http://encyclo.findlaw.com/5630book.pdf> accessed 18 March 2017.

Magnuson W, 'Takeover Regulation In The United States And Europe: An Institutional Approach' (2009) 21 Pace International Law Review

Mäntysaari P, *Comparative Corporate Governance: Shareholders As A Rule-Maker* (1st edn, Springer-Verlag Berlin and Heidelberg GmbH & Co K 2005)

Mason E S, 'The Apologetics Of "Managerialism"' (1958) 31 The Journal of Business

McConvill J and Bagaric M, 'Towards Mandatory Shareholder Committees in Australian Companies' (2004) 28 Melbourne University Law Review

Monsen-Jr., R J and Downs A, 'A Theory of Large Managerial Firms' (1965) 73 Journal of Political Economy 221.

Moore M, 'A Temple Built on Faulty Foundations: Piercing The Corporate Veil and the Legacy of Salomon V Salomon' (2006) Journal of Business Law

— —, 'Shareholder Primacy, Labour and the Historic Ambivalence of UK Company Law' (September 7, 2016). University of Cambridge Faculty of Law Research Paper No. 40/2016. Available at SSRN: https://ssrn.com/abstract=2835990 or http://dx.doi.org/10.2139/ssrn.2835990 accessed 18 March 2017

Morris J, 'The Glazer Bid: In Whose Interests?' (*Practical Law*) <http://uk.practicallaw.com/0-200-8297?service=crossborder#a1013693> accessed 18 March 2017.

Moroğlu Arseven 'M&A In Turkey: Lexology Navigator Q&A | Lexology' (*Lexology.com*, 2017) <http://www.lexology.com/library/detail.aspx?g=54dd3fdd-a202-4e03-a03c-b513b1109128> accessed 19 April 2017.

Mukwiri J, 'Myth Of Shareholder Primacy In English Law' (2013) 24 European Business Law Review

Du Plessis J J, Hargovan A, Bagaric M and Harris J, *Principles of Contemporary Corporate Governance* (2nd edn, Cambridge University Press 2011)

Oba B, Tigrel B and Sener P, 'Board Structure in Listed Firms: Evidence from an Emerging Economy' (2014) 14 Corporate Governance 382, 384-385 <http://www.emeraldinsight.com/doi/abs/10.1108/CG-05-2012-0044> accessed 29 March 2017.

Paslı A, *Anonim Ortaklığın Devralınması (Takeover of Corporation)* (Vedat Kitapçılık 2009)

— —, *Anonim Ortaklık Kurumsal Yönetimi (Corporate Governance)* (Çağa Hukuk Vakfı Yayınları 2005)

Ribstein L, 'Why Corporations?' (2004) 1 Berkeley Business Law Journal

Rodriguez P I, 'Obligations of Directors in Takeovers' in David Cabrelli and Mathias M Siems (eds), *Comparative Company Law: A Case-Based Approach* (Intl Specialized Book Service 2013)

Romano R, 'The Future Of Hostile Takeovers: Legislation And Public Opinion' (1988) 57 Cincinnati Law Review

Schaafsma J R, 'Hostile Takeover Bids and Defances: The Netherlands' in Klaus J Hopt and Eddy Wymeersch (eds), *European takeovers: law and practice* (Butterworths Law 1992)

Schillig M, 'Corporate Law after Brexit' (2016) 27(3) King's Law Journal DOI:10.1080/09615768.2016.1250481

Sjåfjell B, *Towards a Sustainable European Company Law: A Normative Analysis of the Objectives of EU Law, with the Takeover Directive as a Test Case* (Aspen Publishers 2009)

Slaughter C M, 'Rights Offerings, Takeovers and US Shareholders: Part 2' (2000) 23(3) *Company Lawyer*

Smith A, *An Inquiry Into The Nature And Causes Of The Wealth Of Nations* (1776) <http://eet.pixel-online.org/files/etranslation/original/The%20Wealth%20of%20Nations.pdf> accessed 17 March 2017.

Stout L A and others, 'The Modern Corporation Statement on Company Law' (October 6, 2016). Available at SSRN: https://ssrn.com/abstract=2848833 Accessed on 23.03.2017.

Taylor C R, 'The European Takeover Directive: A US Comparison' (August 30, 2016) University of Oslo Faculty of Law Research Paper No. 2016-14

Tekinalp Ü and Başaran-Symes C, 'New Turkish Commercial Code A blueprint for the future' (*pwc Turkey*) <https://www.pwc.com.tr/en/publications/ttk-assets/pages/ttk-a_blueprint_for_the_future.pdf> accessed June 16, 2017

Turan M T and Çollak Ö, 'Mergers and Acquisitions on the Rise, Co-Published Section: Turkey' (2006) International Financial Law Review

Van Gerven D, *Common Legal Framework For Takeover Bids In Europe* (Cambridge University Press 2008)

Wearing R T, *Cases in Corporate Governance* (1st edn, SAGE Publications 2005)

Winter J, Schans Christensen J, Garrido Garcia J M, Hopt K J, Rickford J, Rossi G, Simon J, 'Final Report of the High Level Group of Company Law Experts on issues related to takeover bids' (2002) <http://ec.europa.eu/internal_market/company/docs/takeoverbids/2002-01-hlg-report_en.pdf> accessed 23 March 2017

Yamak S and Ertuna B, 'Corporate Governance and Initial Public Offerings in Turkey' in Alessandro Zattoni and William Judge (eds), *Corporate Governance and Initial Public Offerings: An International Perspective* (Cambridge University Press (Virtual Publishing) 2012)

Yeung H, 'Managing Corporate Risks by Regulating Executive Pay: A Legal And Economic Analysis' (2012) 2 Durham Law Review

You C, 'The Proper Purpose Rule and the Exercise of Directors' Power in the Context of a Takeover Battle' (2017) 38 Business Law Review, Issue 1.

Yurtoğlu B, 'Ownership, Control and Performance of Turkish Listed Firms' (2000) 27 Empirica <http://homes.ieu.edu.tr/~aduman/econ424/controlandperformance.pdf> accessed 29 March 2017

Websites:

'Board of Directors | Türkiye İş Bankası A.Ş.' <http://www.isbank.com.tr/EN/about-isbank/investor-relations/corporate-overview/corporate-information/board-of-directors/Pages/board-of-directors.aspx> accessed 2 April 2017

'Business Judgment Rule' <https://www.law.cornell.edu/wex/business_judgment_rule> accessed 18 March 2017

'Consolidated Data' (*Borsaistanbul.com*, 2017) <http://www.borsaistanbul.com/en/data/data/consolidated-data> accessed 21 April 2017

'Corporate History - 2011-2015' <http://www.oyak.com.tr/EN/corporate/history/2011-2015.html > Accessed 2 April 2017

'European Commission - Enlargement - Turkey - Relations' (23 November 2006) <https://ec.europa.eu/neighbourhood-enlargement/countries/detailed-country-information/turkey_en > accessed 18 March 2017.

'Governance Structure - OYAK' < http://www.oyak.com.tr/EN/corporate/what-oyak-is/managing-bodies.html > accessed 2 April 2017.

'Ownership Structure | Türkiye İş Bankası A.Ş.' <http://www.isbank.com.tr/EN/about-isbank/investor-relations/corporate-overview/corporate-information/ownership-structure/Pages/ownership-structure.aspx> accessed 1 April 2017.

'State Of Delaware - Division Of Corporations - List Of Authorized Vendors With Direct Web Access' <http://corp.delaware.gov/aboutagency.shtml> accessed 18 March 2017

Cases:

Dawson International Plc v Coats Paton Plc (1988) 4 BCC 305 (UK)

Heron International v Lord Grade (1983) BCLC 244, (1982) Com LR 108 (UK Court of Appeal)

Hogg v Cramphorn Ltd (1967) Ch. 254 (UK)

Howard Smith Ltd v Ampol Petroleum Ltd (1974) A.C. 821 (UK)

Re a Company (1986) B.C.L.C. 382 (UK)

Revlon v McAndrews & Forbes Holdings Inc 506 A.2d 173 (Del., 1986)

Unocal Corp v Mesa Petroleum Corp 493 A2d 946, 9554 (Del, 1995)

Unitrin Inc v American Gen. Corp 651 A.2d 1361 (Del., 1995).

CRITICALLY ASSESS THE RELATIONSHIP BETWEEN GLOBAL DEVELOPMENT AND JUSTICE

Küresel Kalkınma ve Adalet İlişkisinin Eleştirel Değerlendirmesi

Mehmet Sercan ERCAN[1]

ABSTRACT

This article discusses the relationship between the legal institutions of international economic law and justice and development. The international economic law institutions such as the World Bank, the International Monetary Fund, the World Trade Organization and the International Labour Organization and their main aims will be discussed briefly. Then, it will be questioned that what is the target of these legal institutions that is human rights or justice and development. Do the effects of these legal systems spread fairly all over the world? Additionally, global capitalism having been strengthened by neoliberalism deepens the economic gap between the developed world countries and the rest of the globe. Hence, it will be indicated to what extent the neoliberalism effects on development. Further, these institutions serve a quite successful mechanism for ensuring justified economic development within the first world countries. They directly show weakening relationship between development and justice, because international law has always served for the interests and concerns of the first world countries not for the developing countries.

Keywords: Global development, global justice, international economic law institutions, neoliberalism

ÖZET

Bu makalede Dünya Bankası, Uluslararası Para Fonu, Dünya Ticaret Örgütü, Uluslararası Çalışma Örgütü gibi uluslararararası ekonomi hukuku kurumları ile adalet ve kalkınma arasındaki ilişki ele alınmaktadır. Bahsedilen bu kurumların temel amaçları ve bilhassa bu amaçlara hizmet edip edemedikleri, dünyada adil bir düzen sunabilme yönünde faaliyetleri olup olmadıkları tartışılmaktadır. Neoliberalism ile birlikte güçlenen küresel kapitalizmin etkisiyle gelişmiş dünya ülkeleri ile diğer ülkeler arasındaki ekonomik uçurum gün geçtikçe derinleşmektedir. Dolayısıyla, bu makalede neoliberalizmin kalkınmayı nasıl etkilediği de değerlendirilmektedir. Kalkınma ve adalet arasındaki gün geçtikçe zayıflayan ilişki de gösteriyor ki uluslararası ekonomi hukuku da sadece birinci dünya ülkelerinin çıkarlarına hizmet etmektedir.

Anahtar Kelimeler: Küresel kalkınma, küresel adalet, uluslararası ekonomi hukuku kurumları, neoliberalism

A. Introduction

Global development and justice are both quite broad and complex phenomena that may be opened in many different ways. Governing human lives and being touchstones of today`s transforming world, these terms are usually related to each other. Before proceeding to analyse the link between

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these major terms critically and in-depth, the initial requirement is to review and internalise them independent from each other. Global development, although it does not have a clear definition, with its simplest explanation, is a concept that is often related to human development and global strives for reducing injustice as well as enhancing the opportunities for humanity across the world. Human rights and improving global prosperity are mostly referred as among the substantial components of global development, in essence. When it comes to the notion of justice, its definition is similarly complex and its precise definition is still matter of discussion among philosophers, sociologists and jurist. By justice, it is meant the branch of political theory concerning with the allocative fairness of social institutions. With simpler explanations, it can be basically described as a social phenomenon governing human rights and based on moral rightness, fairness, ethics and equity. From this point of simple definitions, to explore the close relationship between them should not be so difficult. As it can be deduced, they are interrelated in their essence and providing justice is one of the aims to be realised while deeply contested, constantly evolving, notion of global development is taking place, particularly the development of global economy.

The clearest way to prove the close relationship of development of global economy and justice is actually to address the issue of global economy`s effects on justice. Indeed, it is apparent that the global crisis of injustice is to a great extent triggered by what happens in economic contexts around the world. If needed to be more direct and clear, it is undeniable that one of the major causes of global injustice is actually financial issues appearing in different parts of the world. Unfortunately, money is what dominates today`s world and the ones who possess it naturally the ones who have the power figuratively, which no doubt gives rise to showing up of the phenomenon of injustice more harshly.

Relatedly, this is actually why each year Law, Justice and Development (LJD) week brings together World Bank and other international financial institutions, judges, representatives from civil society communities serving as global justice supporter to discuss the role of economic development on justice. This point should be touched upon in detail in that it refers to the fact that how the operations of the legal institutions of international law affect the relationship between development and justice. In that point, the actions of the World Bank, the International Monetary Fund, the World Trade Organization and the International Labour Organization need to be mentioned in bringing out the close link between these two major terms.

B. Mission of International Law and its Institutions

International economic law and the institutions (World Bank, the International Monetary Fund, the World Trade Organisation, the International Labour Organisation) existing for applying these economic law across the world are increasingly recognized as very important systems of resource allocation. To allocate the resources between or within the states to different groups, communities or individuals equally, the International economic law serves as the regulatory force in a sense. Besides, international economic law, with its institutions founded to realise its mission, intends to play a crucial role in staking out global economy`s general frame covering its resources, facilities and responsibilities by centering itself and its institutions at the global justice notion. It means, these international institutions do not present just for regulating the financial issues across the world, but also to pursue goals of global justice by being responsible for remedying the imbalances in global wealth distribution. Accordingly, the fundamental principle seems to ensure global justice at the heart of the global development in economy. For these institutions, the questions of whether the rules, institutions, applications, and consequences in the process of global economic development are fair or not matter to a great extent as stated by them. The following questions and the answers given in return by these institutions on the basis of the international economic law aim to create a general consensus among individuals that their mission is to strengthen the relation between global development and justice.

When we take a look at the following questions, it is actually not that much hard to discern the function of the international economic law and its institutions to empower the relationship between the sense of justice and development, especially in the context of economy.

What are the main missions of the international economic law?

- Regulating the international financial issues relation with the principles of the law.
- Providing fairness in the process of global economy development within or between the states.

Should these institutions take the points of human rights and justice consideration in managing the economic development?

- Human rights and justice are ranked among the missions of international economic law and its institutions.

When looking at these questions and the main objectives of the international economic law which are going to be specified in the following content, with its institutions, IEL plays rather significant and crucial role in ensuring the justice in the process of global development in economy. Although it is not so likely to generalise this fact for the whole globe, especially among its states, the global institutions aim to strengthen the direct proportion between global development and global justice through their operations based on their foundation mission. To be more specific and clearer, the operations and the aim of the International Bank for Reconstruction and Development what is commonly referred as the World Bank can be touched upon. In its definition, it is simply described as an international financial institution which holds the mission of assisting the development within its member countries, ensuring and improving private foreign investment and maintaining balanced growth in these countries by providing equal resources for them. In addition to that, maintaining balanced amount of payment equilibrium and balanced development of international trade occupy a substantial place in the operations of these institutions. Basically, thanks to the financial operations conducted in the member states, international economic law and its institutions intend to bring equal development with equal resources provided by them.

The consensus underlined by these international institutions is that international economic procedures and operations essentially have come into the existence in order to increase the high direct relation between two basic concepts: development and justice because these procedures and operations give rise to increases in both individual and national wealth via comparative advantage and principles of efficiency in essence. However, it would be unrealistic to say that these institutions and laws present the same performance when it comes to transnational wealth distribution, which is mostly referred as the third dimension of the global justice debate. Even though they perform quite successful in wealth and resource distribution in a domestic context and strengthen the relation between economic development and justice, shifting the debate to a transnational distribution in non-member countries, several complex issues appear.

If needed to briefly talk about these institutions` point of view about the relation between economic growth and justice, economic growth is seen as the main means for bringing a greater and more persisting justice to the world.[2] Development around globe is a substitute for equity and justice. International law proposes that these international institutions which are responsible for regulating the economy of the world should at least guide the nations

[2] Esteva, Gustavo (1992). *Development' in W. Sachs ed. The Development Dictionary*: a guide to knowledge as power London: Zed Books, pp. 6-25.

to consider the `effective development` as the balance between economic efficiency and social justice in a development-targeted and equitable society. Through his meticulous analysis of the way international law, Eslava intends to grab the attentions to the role of expansive and intertwined operations of international law in maintenance of development by underlying the current international attempt for fostering local jurisdictions. On the account for Eslava, since the 1980s` mid when the idea of neoliberalism began to increase its power over the world and decentralisation idea became widely recognised, the cities in emerging and developing nations have become preferred regions in which promoting global ideals of human was referred as a goal by international law.[3] By illuminating the case of Bogota that is attributed as a transforming city through the operations of international institutions, Eslava indicates the account of how that international law and the institutions may turn developing cities. In this regard, he represents detailed interactions between international law and the development projects on developing countries and how this interaction operates and shapes the national level.

C. The Effects of IEL`s Operations across the World on the Relation of Justice and Development

When seen from the point of justice within the developed countries themself, first impressions reveal that the operations of these international institutions work to a great extent in strengthening the relationship between development and justice. Related to this assumption, recent empirical research studies conducted in the developing countries have reported that it is quite clear that there is a positive sided correlation between justice, political right and economic development within the state. Furthermore, according to another study conducted in out almost 450 states during 1980s, it was revealed that as development speeds up, the basic preconditions for justice and democracy are fulfilled more efficiently and equal distribution of resources among the various layers of the population can be carried out with less effort. This point obviously addresses the close and direct relation of development and justice within a developed state.

Development and Neoliberalism

The aforementioned points are actually what these institutions in the light of the international economic law intend to realise and what they manage within their member states which are its members. However, the operations and applications, unfortunately, does not seem to be parallel, with these

[3] Eslava, Luis (2015) Local Space, Global Life: The Everyday Operation of International Law and Development.

objectives when the current global situation is taken into consideration rather than just emphasising the developed countries. Unlike what is intended, the relation between justice and development is not direct, but instead, they show an inverse proportion in developing and third world countries. Indeed, as underlined by Esteva invoking the right to develop for the sake of greater equity or justice remains as an untrustworthy claim.[4] By contrast, it deepens the existing inequality between the first world and third world countries. As a consequence of development, particularly in the economy of First World countries, these terms turn to a phenomenon meaning the formation of middle and lower classes in globe alongside the transnational economic complex instead of a national middle class alongside the integration of a national economy as pointed out by Esteva.[5] At this point, it becomes no doubt necessary to address to the grim reality of 21st century: Neoliberalism. Most of the time being referred as the phenomenon which opened the doors of states to one another, neoliberalism simply puts forward the ideal world where there is no restrictions for manufacturing, no limit for trade, no border to commerce and no tariff. According to this school of thought, the best way of development for countries is limitless commercial applications without much control of governments. In a sense, it seems to promote the idea of no control. Needless to say, this practice of free commerce fostered free `enterprise` and free `competition`, which actually bring us the milestone of everything, to encouragement of capitalist ideas to make huge and permanent profits all across the world.[6] As understood, the new world of developed countries` economies has been appearing with a new school called neoliberalism by using that philosophy for legitimising and justifying their exploitation actions over the second and third world countries. Indeed, as the competition among developed countries hot up in order to find more country to import their good and neoliberalism fact prevails globally, it is the second and third world countries which feel the impact most adversely. The reason is that the globalisation in economy which has been fostered through free trade paves the way for developed countries to easily import their products with less amount of tariff. Having met with much super-premium products for developed countries, the consumers have begun to increase tendencies to prefer these goods instead of local products. Definitely, this derangement and decrease in demand for local products had given a way to developing countries

4 Esteva, Gustavo (1992). *Development' in W. Sachs ed. The Development Dictionary*: a guide to knowledge as power London: Zed Books, pp. 6-25.

5 Esteva, Gustavo (1992). *Development' in W. Sachs ed. The Development Dictionary*: a guide to knowledge as power London: Zed Books, pp. 6-25.

6 Marois, Thomas & Pradella, Lucia (2015) 'Polarising Development' in L Pradella & T Marois (eds) *Polarising Development: Alternatives to Neoliberalism and the Crisis* London: Pluto, chapter 1.

to face up with economic problems resulting in stagnation or even recession. In that scope, global capitalism having been strengthened by neoliberalism deepened the economic gap between developed world countries and the rest of the globe. Obviously, the inequalities and injustice have come into the existence sharper and more marked due to economic inequalities. In relation to that, Marois & Pradella denote that the global economic competition which resulted from neoliberalism has dramatically deepened the imbalances across the world in many senses. In spite of increasing social resistance and opposition to this phenomenon in developing countries, it continues to expose its power and deepen the social polarisation around the world. Marois & Pradella also underline that these radical alternatives and changes are rarely put to tender.[7] Consequently, the world remains fail to address existing and ever-mounting class divisions and imperialist relations of domination of the developed countries, which no doubt refers to the negative results of development on the phenomenon of justice.

In this point of view, it is not become surprising that the age of globalisation which we live in has given rise to appearance of transnational class of winners and consequently a class of losers, which directly leads to injustice. Relatedly, it still remains unclear whether this point of globalisation and development has resulted in an overall reduction in the amount of inequality and injustice between developed and undeveloped countries around the world when it comes to deal with poverty.[8]

In relation to this point, Fuandez remarks that one of the most striking features of international economic law is to some extent to impose discipline only developing countries.[9] It is not these developing or third world countries which take an active role or have a voice in regulating the international economic law, but it is the developed countries which tightly keep the power in themselves. That shows even in the process of coming up with an international law, it is not likely to come across with the sense of complete justice.

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7 Marois, Thomas & Pradella, Lucia (2015) 'Polarising Development' in L Pradella & T Marois (eds) *Polarising Development: Alternatives to Neoliberalism and the Crisis* London: Pluto, chapter 1

8 Wade, Robert (2004). *Globalization, Poverty and Income Distribution*: Does the Liberal Argument Hold? No:02-33, Development Studies Institute London School of Economics and Political Science Houghton Street, London

9 Faundez, Julio (2010) '*International Economic Law and Development*: Before and After Neo-Liberalism' in J. Faundez and C. Tan eds International Economic Law, Globalization and Developing Countries Cheltenham: Edward Elgar, pp.10-33.

Being one of the countries that refusing the investor-state arbitration clause, Australian government gets the attention to the one-sided nature of the international economic law. This clearly means that while the developed countries are the ones who retain a huge discretion to agree on whether or how to consort and impose the rules, it is the developing or third world countries which are considered as rule takers. In that sense, there emerges a problem with coherence of the international economic law rules in the sense that they are not capable of directing and sustaining the process of globalisation in economy. Rather, they serve as introducers of massive structural changes through institutions, like the International Money Fund and the World Bank, which have a huge legitimacy deficit and institutions, such as World Trade Organization, which do not function as genuine multilateral organizations existing to provide justice coming along economic development in the world.[10] The main reason is that developed countries are not completely devoted to the principle of multilateralism due to their anxiety resulting from the necessity of protecting their own national economic interests. Therefore, they do not want to endanger economic advantageous over third world countries by making them involved in the process of law regulation.

There is another substantial point about this issue that needs to be touched upon. It is most of the time underlined that the emergence of colonialism which is linked to development of first world countries has triggered the deterioration of justice to a great extent. In fact, the recent postcolonial approaches in the studies of development covered the material inequalities as well as global power relations as matter.[11] The focus of the studies points out that although the desire for equity is largely fixed on development as growth, the situation caused by development and relatedly colonialism led to reductions in justice to a great extent.

The background of the issue is actually broader than it is thought. By global development in economy, what is basically intended by international finance community is to promote cross cultural universals like social justice, equality in reaching the resources as the process of development continues. However, the effects of the implantation of Western legal regimes on developing countries do not seem as favorable as it is claimed. As the phenomenon of globalisation gets more power, these unfavorable effects get quite more profound on developing countries. The theorists of globalisation are in disarray. For a

[10] Faundez, Julio (2010) '*International Economic Law and Development*: Before and After Neo-Liberalism' in J. Faundez and C. Tan eds International Economic Law, Globalization and Developing Countries Cheltenham: Edward Elgar, pp.10-33

[11] Osterhammel, Jürgen (2002) 'Colonialist ideology' in *Colonialism: a theoretical overview* Marcus Reiner& Ian Randle (eds), Chapter IX, pp. 105-12.

couple of years, it has been discussed that the world economy in relation to the implantation of western legal regimes has changed substantially. It is argued that these implications have brought a system which is integrated by market and regulated by capitalist energies. This process or era called Global Era was supposed to bring new chances and opportunities for the whole globe in essence but in practice, they remained not that effective. Moreover, it has deepened the division between developed and developing and under developed countries. In the face of harsh evidence of deepening injustice among these countries, these implantations have been counter-effected. The reason is basically attributed to unsuccessful practice of these international economic institutions in delivering development within the realistic frames of justice. As an illustration, according to records (Human Journey), the western world has spent almost 2.5 trillion dollars for foreign aid over for children a couple of years.[12] Although the amount seems astronomical, because of inefficient implantations of economic institutions, it has not been still managed to overcome child deaths causing by malaria. On the other hand, it was not that hard for the western countries, specifically American and British economies to deliver nine million copies of the new volume of Harry Potter to its fans. Although it was difficult to supply one of the most crucial facility, that is health care to the children across the world, delivering the sixth book (Harry Potter and the Half-Blood Prince (UK & US) of a book series to the children of western world was hurdled with a great performance Andrews, 2016).[13] At just that point, the need of questioning the power of development and western countries for ensuring justice around globe arises out of this disappointing reality. In that regard, the development and delivering justice do not seem go hand in hand under every condition.

The fundamental logic behind that situation is the general consensus which is common is the whole western world. This notion implies that non-westerners are essentially different from the western people, which form the milestone of this colonialist idea. This difference is shown as an excuse by the western world to implement unfair practices on the developing and underdeveloped countries since those people are considered as dependent and not mature enough by nature. Hence, they are in need of guidance and help which is ensured by western world and their international economic law. But when looking the current situation of colonialized regions of the world, it should not be so impossible to realise the dismal situation. This uncovered

[12] Human Journey, (2015). Creating a Sustainable Future. Retrieved from http://www.humanjourney.us/aid-Introduction.html , online 25.12.2016

[13] Andrews, James. (2016). Could your old Harry Potter books make you thousands? This is how to find out. Retrieved from http://www.mirror.co.uk/money/could-your-old harry-potter-7464484, online 19.12.2016

chaotic situation on which the western-rooted international economic law bases one of the reasons for their existence, is the most prominent indicator of injustice between these countries and western world. However, unfortunately, the current situations of these colonised parts of the world clearly displays that western economic implantations have not realised a considerable profound effect in the development of second and third world. In this regard, western legal regimes seems to been unsuccessful in the process of fostering justice in developing and under developed countries. Accordingly, as it is emphasised by Osterhammel it cannot be disproved that the primary function of colonialism for coloniser countries is to gain economic advantages, which will bring political power to them.[14] These economic and political powers are considered as two important motives in colonial ideal. Osterhammel underlines the point that it is not a coincidence that the idea of colonialism gaining more power concurs with empowerment of the western world. As these countries set in colonise the weaker and poor pat of the world, which turn dependent states to colonialist, the economic and political power they gain over these poorer parts become desirably inevitable for the western world. In this sense, colonialism could be characterized by the search for economic and political advantage without concomitant real economic or political gains from the point of Osterhammel.[15] Obviously, strengthening of colonialism is often attributed as one of the darkest period in the history stage for humanity in that it paved the ways to deepening of inequalities to a great extent. Injustice in economic world has become a direct contributor to injustice in every phase of individuals` life across globe.

As Chimni especially underlines in his article, the economic and political independence of the third world is unfortunately restricted and deteriorated by implantations and policies of international economic institutions.[16] In that regard, it can easily be inferred that the sense of development or in other words, the developed western world and the law of economy on which it bases its implications prevent global justice in the sense of preventing economic and political independence of the non-western countries. Besides, international law seems always to have served the interests and concerns of the first world countries which have financial power bringing the real power to them in international relations. In reciprocal relationships concerning the economic issues, the colonial period has witnessed the complete invalidity

[14] Osterhammel, Jürgen (2002) 'Colonialist ideology' in *Colonialism: a theoretical overview* Marcus Reiner& Ian Randle (eds), Chapter IX, pp. 105-12.

[15] Osterhammel, Jürgen (2002) 'Colonialist ideology' in *Colonialism: a theoretical overview* Marcus Reiner& Ian Randle (eds), Chapter IX, pp. 105-12.

[16] Chimni, B.S (2006). *Third World Approaches to International Law:* A Manifesto. International Community Law Review 8: 3–27, The Netherlands.

of these colonise and exploited countries. Within the progressively growing structure of the international economy and its institutions, the economic independence of those colonized countries are deteriorated in power.

Concordantly, it would not be wrong to assert that the ruling first world or the western world has been unsuccessful to sustain the sense of justice among themselves and the other countries when analysed from the economic context. Indeed, they remained unwilling to protect the interests of third world countries in that it might have collide with their interests. Especially during 1960s and 1970s, the first world countries were at the attempt of manipulating the international economic law to maintain their development process more efficiently and persistently. Thus, development failed to bring justice with it to these parts of world, which directly shows weakening relation between development and justice.

D. Conclusion

To summarise, development and justice are two general terms whose relation often questioned. With its simplest definition, global development is a concept that is often related to human development and global strives for reducing injustice as well as enhancing the opportunities for humanity across the world. In that scope, human rights and improving global prosperity are attributed as two of the most substantial components of global development. The other term is justice that is often described as the branch of political theory concerning the allocative fairness of social institutions. Nevertheless, it can be basically described as a social phenomenon governing human rights and based on moral rightness, fairness, ethics, and equity. Through these explanations, understanding the close relationship between them should not be so difficult. As it can be deduced, they are interrelated in their essence and providing justice is one of the aims to be realised while deeply contested, constantly evolving, notion of global development is taking place, particularly the development of global economy. Regulating the global economy with its institutions, the international economic law defines its objective as to regulate the international financial issues by regarding fairness in the process of global economic development within or between the states. Although it serves as a quite successful regulator for ensuring justified economic development within the first world countries, it failed to bring justice to developing and under developed parts of the world, which directly shows weakening relation between development and justice because international law has always served for the interests and concerns of the first world countries not for the other countries, which clearly shows the reduction of justice in globe.

BIBLIOGRAPHY

Andrews, James (2016). Could your old Harry Potter books make you thousands? This is how to find out. Retrieved from http://www.mirror.co.uk/money/could-your-old harry-potter-7464484

Chimni, B.S (2006). *Third World Approaches to International Law:* A Manifesto. International Community Law Review 8: 3–27, The Netherlands.

Esteva, Gustavo (1992). *Development' in W. Sachs ed. The Development Dictionary*: a guide to knowledge as power London: Zed Books.

Human Journey (2015). Creating a Sustainable Future. Retrieved from http://www.humanjourney.us/aid-Introduction.html

Faundez, Julio (2010) '*International Economic Law and Development*: Before and After Neo-Liberalism' in J. Faundez and C. Tan eds International Economic Law, Globalization and Developing Countries Cheltenham: Edward Elgar.

Osterhammel, Jürgen (2002) 'Colonialist ideology' in *Colonialism: a theoretical overview* Marcus Reiner& Ian Randle (eds).

Eslava, Luis (2015) Local Space, Global Life: The Everyday Operation of International Law and Development

Marois, Thomas & Pradella, Lucia (2015) 'Polarising Development' in L Pradella & T Marois (eds) *Polarising Development: Alternatives to Neoliberalism and the Crisis* London: Pluto.

Wade, Robert (2004). *Globalization, Poverty and Income Distribution*: Does the Liberal Argument Hold? No:02-33, Development Studies Institute London School of Economics and Political Science Houghton Street, London