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THE FUTURE OF INTERNATIONAL ARBITRATION

Uluslararası Tahkimin Geleceği

Assist. Prof. Dr. Nazlı TÖRE*

Abstract

This Article aims at examining the future of international arbitration with a special focus on the development of arbitral institutions. Arbitral institutions will play a key role in the future of international arbitration with all the services they have already started to provide. Even though the competition among these institutions is high, the cooperation among them is even higher. At the end, they all serve to arbitration. One can argue here what the arbitration really is. Can arbitration be deemed as a real alternative to national systems? Or, is it just trying to replace them? The prediction on the future of international arbitration will change according to answers given to these questions. As a result, the future of international arbitration depends on its acceptance as an autonomous system.

Keywords: The Future of International Arbitration, The Development of Arbitral Institutions, Arbitration, A Real Alternative to National Systems, An Autonomous System.

Özet

Bu makale, özel olarak tahkim kurumlarının gelişimine odaklanarak, uluslararası tahkimin geleceğini incelemeyi hedeflemektedir. Tahkim kurumları, şimdiden sağlamaya başladıkları hizmetlerle uluslararası tahkimin geleceğinde anahtar rol oynayacaklardır. Her ne kadar, tahkim kurumları arasında rekabet fazla olsa da, bunlar arasındaki işbirliği daha fazladır. En nihayetinde, bunların hepsi tahkime hizmet etmektedir. Burada tahkimin aslında ne olduğu tartışmaya açılabilir. Tahkim ulusal sistemlere gerçek bir alternatif sayılabilir mi? Yoksa aslında ulusal sistemlerin yerini mi almaya çalışmaktadır? Uluslararası tahkimin geleceğine yönelik tahminler bu sorulara verilecek yanıtlara göre değişecektir. Sonuçta uluslararası tahkimin geleceği onun özerk bir sistem olarak kabulüne bağlıdır.

Anahtar Kelimeler: Uluslararası Tahkimin Geleceği, Tahkim Kurumlarının Gelişimi, Tahkim, Ulusal Sistemlere Gerçek Bir Alternatif, Özerk Bir Sistem.

Introduction

Modern arbitration is something relatively quite new. Yet it roots back ancient times. Arbitration is of a universal nature and that is for all time. Besides its understanding is above all the prerogative of the Western world. Surprisingly, some people from West claimed that Islam had adopted it a very long time ago and even had given it a very wide scope. They jumped to that conclusion based on some surah of the Koran regarding women[1]. However, it can be said that the use of international arbitration has steadily grown lately, since it has conquered new territories in different parts of the world. Competition in the field is now very high and new players offer a variety of options. Recent developments make old players face new challenges[2]. This doesn't mean that

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1 BOUYSSONIE, Jean-Pierre: "Commentary" in International Arbitration, 60 Years of ICC Arbitration, A Look at the Future, Paris 1984, pp. 48-49.

2 RAOUF, Mohamed Abdel: Emergence of New Arbitral Centres in Asia and Africa:

they never cooperate among each other. On the contrary, all the relations in arbitration world seem to be solely cooperative one which aims at developping the best conditions for international arbitration and its legitimacy.

A. Definition

Arbitration can be defined as a mechanism for the settlement of disputes between at least two parties, either by a person or persons appointed by the parties themselves or by relying upon procedures or institutions chosen by the parties[3]. That being arbitration is based on mutual acceptance[4] of the parties to a dispute. Accordingly, people are free to send their dispute to arbitration. In the field of commerce and investment, this kind of disputes usually arise in such a manner that the outcome is mostly seen as disrupting good relations between partners. Arbitration firstly aims to preserve efficient commercial relations and confident communication between business partners. The key word to achieve this aim is: trust. It is crutial that once parties trust each others, and then together they trust the persons to whom they commission so as to settle the issue which keeps them divided. To provide that we need trustworthy persons who act impartially while the arbitration process. In other words, an arbitrator should treat all parties equally. Other than that, arbitrators are generally selected according to their competence in the subject-matter. Also, their knowledge plays important role in their assignment. Not only their legal knowledge, but also their knowledge on the intricacies of the law and the practices of international trade are important.

B. Advantages and Disadvantages of the Arbitration

I. Advantages

International arbitration has gained worldwide acceptance as one of the preferred means of international dispute resolution especially in the area of commerce. With the globalization of the economy, most multinational corporations prefer arbitration as the effective way to settle their disputes[5]. That has several reasons. First of all, arbitration is supposed to be more expedient and economical than litigation in courts. Secondly, it is informal,

Competition, Cooperation and Contribution to the Rule of Law in the Evolution and Future of International Arbitration (eds. Stavros BREKOULAKIS, Julian D.M. LEW, Loukas MISTELIS), 2016 Kluwer Law International BV, the Netherlands, p. 321.

3 van den HOVEN, H. Frans: Commercial Disputes and their Settlement A factor in Business Planning in International Arbitration, 60 Years of ICC Arbitration, A Look at the Future, Paris 1984, p. 35.

4 MUSTAFAYEVA, Ayten: Doctrine of Separability in International Commercial Arbitration (2015), Baku State University Law Review, Vol. No.1, p.93.

5 XU, Donggen/ SHI, Huiyuan: Dilemma of Confidentiality in International Commercial Arbitration (2011), Front. Law China, Vol.6, No.3, p.404.

that offers parties a sense of comfort. Thirdly, it is relatively more equitable. Fourthly, it absorbs less management time. Fifthly, it provides avoidance from unfavourable publicity. Sixthly, it seems to be conciliatory. Finally, another advantage in the part of arbitration is the expectation that the awards issued by international arbitral tribunal will receive worldwide recognition by countries that are signatories to the international conventions on the enforcement of arbitral awards, notably the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the "New York Convention" adopted by diplomatic conference on June 10, 1958.

II. Disadvantages

There are also some disadvantages of arbitration as a method of resolving a dispute. First of all, if the subject matter is complicated but the amount of money involved is modest, then the arbitrator's fee may make arbitration uneconomical. Secondly, when arbitration become binding, then both sides are deemed to give up their right to an appeal. Thirdly, rules of evidence may prevent some evidence from being considered by a judge or a jury, but an arbitrator may consider that evidence. Accordingly, an arbitrator's decision may be based on some information that a judge or jury would not consider at trial. As a result, such a result may undermine its equitability. And then, forthly, if certain information from a witness is presented by documents, there is no opportunity to cross-examine the testimony of that witness. Moreover, discovery may be more limited in arbitration than in litigation. In common law, discovery has a different meaning. It is defined as requiring usually the opposing party to provide certain information or documents before litigation process. In arbitration, discovery may only be done after the litigation is commenced. However, according to Turkish legal system, discovery before the litigation process is forbidden. So that, this kind of disadvantage is not seen in Turkish legal system. Fifthly, if arbitration is mandatory or required by a contract, then the parties do not have the flexibility to choose arbitration only when both parties agree. Mandatory arbitration allows one party to force the other to use arbitration. In situations where the arbitrator is reliant on one party for repeat business, then the potential for abuse is present and the advantage of impartiality is lost. Sixthly, the standards used by an arbitrator are not clear, although generally the arbitrator is required to follow the law. However, sometimes arbitrators may consider the apparent fairness of the respective parties' positions instead of obeying strictly the law, which sometimes leads to unfair situations[6].

[6] ALLEN, R. Clayton: Advantages and Disadvantages (October 2, 2009/Blog), https://www.allenandallen.com (access date: 8.7.2018)

C. The Features of International Arbitration

International arbitration is frequently growing as a dynamic dispute resolution process. It is for its distinct character, while interacting with the national law when it is required, the arbitration process operates on a different plane where the will of the parties dominates the process. International arbitration is a mixture of comparative law and private international law. This inevitably enables to expand its horizons beyond the aspects of national and avoid the lenghty procedures and adverse attitudes of national courts. The awards of the arbitration can easily be enforced in contrary to general national court judgements. Another important feature of international arbitration is that where the parties have an option to choose a neutral seat rather than submitting to any of the national law of the parties in dispute. The procedure of arbitration is relatively less complex than normal court proceedings and the parties are free to design the arbitral process. Therefore arbitration process is more fair for the parties coming from different legal systems. The arbitrators are selected by the parties according to their considerable expertise upon the subject-matter in dispute and familiarity with national laws and business rules which are to be applied. The cost of arbitration is lower than standard court fees and the parties may agree upon the fees and the other procedural issues.

D. The Development of International Arbitration

The concept of arbitration has existed even before actual national legal systems appeared. Arbitration has been viewed as the dispute resolution mechanism for a long while across the globe. One can argue that it is the oldest dispute resolution mechanism man has ever invented. Other can accentuate on its religious existence as aforementioned. The development of international arbitration as an autonomous legal order, even though connected to national systems, becomes one of the most remarkable stories of institution configuring at the global level over the past century. Efforts by representatives of transnational business to make arbitration a viable alternative to litigation in national courts started in the 1920's, then accelerated after Second World War, finally reached at its apex with the exposive increase in global trade and investment since the 1980's. The result has been the steady development of a network of arbitration centres that compete with each other for docket, resource, influence[7].

Each institution, now has its own set of rules which provides a framework for the arbitration and its own form of administration to assist in the process[8].

[7] SWEET, Alec S/GRISEL, Florian: The Evolution of International Arbitration, Judicialization Governance Legitamacy, Oxford University Press, Oxford 2017, p.1.

[8] LAW, Andrew: Arbitration 101, Different Types of Arbitration (May 15 2018), https://www.lexology.com (access date: 8.8.2018)

Common institutions include the International Chamber of Commerce (ICC), the Permanent Court of Arbitration (PCA), the London Court of International Arbitration (LCIA), the American Arbitration Association (AAA), the Swiss Arbitration Association (ASA), the Singapore International Arbitration Centre (SIAC), the Hong Kong International Arbitration Centre (HKIAC) and the Kuala Lumpur Regional Centre for Arbitration (KLRCA). Of these institutions, the International Chamber of Commerce is the premier institution of arbitration. It is not a court of law but it is definitely an administrative body for arbitrations occuring in ICC. The Permanent Court of Arbitration (PCA) established by treaty in 1899, is an intergovernmental organization providing a variety of dispute resolution services to the international community[9]. The London Court of International Arbitration (LCIA) is one of the world's leading international institutions for commercial dispute resolution. The LCIA provides efficient, flexible, and impartial administration of arbitration and other ADR proceedings, regardless of location, and under any system of law[10]. The Swiss Arbitration Association (ASA) is the long standing host in Switzerland for arbitration proceedings under the ICC Rules. It is not an arbitral institution and it follows no specific rules. It is a non-profit organisation[11]. The Singapore International Arbitration Centre (SIAC) which commenced operations in 1991 as an independant, not-for-profit organisation, has a proven track record in providing quality, neutral arbitration services to the global business community[12]. The Hong Kong International Arbitration Centre (HKIAC) is a company limited by guarantee and a non-profit organisation established under Hong Kong law. It is one of the world's dispute resolution organisations, specialising in arbitration, mediation, adjudication and domain name dispute resolution[13]. The Kuala Lumpur Regional Centre for Arbitration (KLRCA)[14] is established in 1978 and is been supported by Malaysian government and it is not an agency or branch of the government. It is a consultative organisation to provide a forum for dispute-resolving through arbitration in the Asia-pasific region.

These institutions are generally classified, based on their respective dates of creation, as old (traditional) and new. They can also be classified, based on their geographical outreach, into global, regional and local institutions. According

9 See at https://pca-cpa.org (access date: 8.9.2018)
10 See at https://www.lcia.org (access date: 8.9.2018)
11 See at https://www.arbitration-ch.org (access date: 8.9.2018)
12 See at https://www.siac.org.sg (access date: 8.9.2018)
13 See at https://www.hkiac.org (access date: 8.9.2018)
14 The Kuala Lumpur Regional Centre for Arbitration (KLRCA) has officially changed its name to the Asian International Arbitration Centre (AIAC). The name change was formally announced on February 7, 2018, during a signing ceremony in Kuala Lumpur, Malaysia. (https://www.mondaq.com (access date: 8.9.2018)

to statistics of major arbitral institutions, there has been a constant annual increase in their caseload. The total number of cases filed under their auspices is therefore on the rise. Statistics also confirm that the international arbitration is increasingly growing like the preferred dispute settlement means in the area of commerce and investment. Despite some centres' relative increase being higher, the fact that most if not all show an increasing caseload[15] demonstrates that recourse to international arbitration is still growing and that one centre's gain doesn't necessarily mean another's loss[16].

E. The Emergence of an Arbitration Centre in Istanbul

Nowadays every major trading city has at least one, if not multiple institutions that, for a fee, will provide services to parties that wish to avoid national courts. Istanbul is not an exception. The Istanbul Arbitration Centre (shortly ISTAC) has provided dispute resolution services to Turkish and foreign entities through arbitration and other alternative dispute resolution processes since the introduction of ISTAC Arbitration and Mediation Rules on October 26, 2015. On November 17, 2017, approximately two years after it became operational, the Global Arbitration Review listed ISTAC among the "institutions worth a closer look" in its Guide to Regional Arbitration. This kind remark has strengthened ISTAC's aspiration to become a regional hub to settle dispute resolutions for both companies and individuals coming from different parts of world[17].

"As an independent, neutral and impartial institution, the Istanbul Arbitration Centre (ISTAC) is proceeding its activities providing dispute

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15 "*The evolution of the number of new cases registered in year by the major arbitral institutions around the world is telling:*

- *The International Chamber of Commerce (ICC): from 593 in 2006 to 794 in 2010. (791 new filings for International Arbitration registered in 2014)*
- *The London Court of International Arbitration (LCIA): from 137 in 2007 to 224 in 2011.(290 in 2013)*
- *The International Centre for Dispute Resolution (the international division of the American Arbitration Association "AAA"): from 580 in 2005 to 888 in 2010. (1165 in 2013)*
- *The Singapore International Arbitration Centre (SIAC): from 90 in 2006 to 198 in 2010. (222 in 2014)*
- *The Hong Kong International Arbitration Centre (HKIAC): from 394 in 2006 to 624 in 2010."*

These figures (the years between 2006 and 2010) are excerpted from GAILLARD, Emmanuel: The Emerging System of International Arbitration: Defining "System", "Proceedings of the Annual Meeting", American Society of International Law, Vol.106, Confronting Complexity (2012), pp. 287-292.

16 RAOUF, ibid, p. 321-322.

17 DEMİRKAN, Okan/MERCAN, Cihan: Istanbul Arbitration Centre goes from strength to strength (April 19 2018), https://www.lexology.com (access date: 8.6.2018)

resolution services for both international and domestic parties. The ISTAC's dispute resolution services are available to all contracting parties, without any membership requirements.

The ISTAC Arbitration and Mediation Rules, prepared by the Centre itself, with regard to modern institutional rules, entered into force on October 26, 2015, as aforementioned. Introducing innovative and efficient provisions, the Rules meet the current needs of arbitration and mediation proceedings. Within the scope of arbitration, the ISTAC offers services such as Fast Track Procedure, Emergency Arbitrator and appointments of arbitrators in ad-hoc procedures. The ISTAC's arbitral awards are binding and subject to enforcement anywhere in the world.

The ISTAC consists of a Board and a Secretariat, comprised of internationally prominent and leading experts in the area of arbitration law. The role of Board is to assist parties and arbitrators in ensuring that disputes are resolved as efficiently as possible. The Secretariat is available to provide its services under the Rules and to answer questions from parties, their counsels, arbitrators, and any other actors involved in the ISTAC dispute resolution services.

Providing the parties a neutral, flexible and confidential setting for dispute resolution on international scale, the ISTAC constitutes an exclusive alternative for the resolution of disputes with less expense and within the shortest amount of time possible.[18]*"*

F. The Present Phase of International Arbitration

In today's world, prudent bussinessmen rather prefer to apply to arbitration for its cost and time cutting ability and fair results. Besides, the international arbitration seems to be more sought for its flexibility to appoint an impartial person who is of some specific knowledge and expertise upon the subject matter in dispute unlike the traditional court practices where it takes ages for it to decide upon the specific commercial issues.

However, the reflection on the international arbitration as an effective alternative to the traditional court system is always in question. Even the most devoted practitioner of arbitration feels that the interests of the dispute-resolving activities will be better served if reforms are undertaken. Reforms which could change arbitration into a "real" alternative to the traditional court system and which could make the system speedy and inexpensive.

People all over the world are now asking why should a dispute between a Malaysian and an Indonesian be settled by someone in London or Paris, or Istanbul? Although foreign arbitrators adjudicating in distant soils try to settle

[18] See at https://www.istac.org.tr/en/about-us/ (access date: 8.9.2018)

such disputes to the best of their ability, it is sometimes doubtful whether their ignorance of local conditions can enable them to reach to the most equitable award. And how many awards are there, at the time being, floating around the world unsatisfied?

The present modes of conducting arbitration, the abuse of rules in delaying arbitration, the competition among the various administrating bodies, the scepticism and lack of cohesion among its users and practitioners, the varying approaches, different sets of rules and separate scales of fees, etc., these are some of the features of the present system which do not, in any case, cover the concepts of "supranational" and "transnational" disputes.

There is a lack of education for lawyers in this field. Very little attention has been paid by lawyer to the choice of *lex loci* and *lex arbitri*, leading to endless legal issues. All has to be changed and reforms are necessary. Ambiguities have to go away[19].

G. The Future of International Arbitration

It is no longer subject to serious reflection that, owing to the extension of international arbitration and the growth of its impotance in international commercial transactions, dispute resolution through arbitration has become an important factor in international business and trade[20]. Since by the end of twentieth century, as JUENGER puts it correctly, the tendency to keep international commercial disputes out of the courts and thereby beyond the reach of local laws nearly becomes universal[21].

However, the future of international arbitration may depend on its worldwide acceptance as an autonomous system. Indeed, international arbitration cannot solely be reduced to being a "part or parcel" of national legislations or national courts. Yet its being a system is not possible without a body of norms sufficiently organized, complete and effective to qualify it as a system. However some would go as far as saying that the international arbitration qualifies as a legal order in its own right[22]. They say so with regard to the Cour de Cassation 's (the French Supreme Court) reference the arbitrator as an international judge. To demostrate that this is not merely a Gallicism, we might quote from Lord WILBERFORCE who said during a debate before the passing of the new English Arbitration Act of 1996.

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19 HAMEED, Ajmal: "Commentary" in International Arbitration, 60 Years of ICC Arbitration, A Look at the Future, Paris 1984, pp. 103-104.

20 HASSAN, Mohamed M.: Commentary" in International Arbitration, 60 Years of ICC Arbitration, A Look at the Future, Paris 1984, p.107.

21 JUENGER, Friedrich: The Lex Mercatoria and the Conflict of Laws in Lex Mercatoria and Arbitration: A Discussion of the New Law Merchant (ed. T.E. CARBONNEAU), Juris, Huntington 1998, p.266.

22 GAILLARD, ibid, p. 287.

"*...I have always wished to see arbitration, as far as possible, and subject to statutory guidelines no doubt, regarded as a free-standing system, free to settle its own procedure and free to develop its own substantive law-yes, its substantive law...*" [23]

One can argue that Lord WILBERFORCE's wishes may reflect the reality[24]. Actually, arbitration has undeniably become a real system over the years. First of all, the fact that the existence of an extensive body of rules generated at an international level and governing various aspects of international arbitration proves it to us very vividly. Just to enumerate a few:

-The Geneva Protocol of 1923.

-The Geneva Convention of 1927.

-The New York Convention of 1958.

-The UNCITRAL Arbitration Rules (the UNCITRAL Rules) adopted by resolution of the General Assembly of the United Nations in December 1976.

-The Washigton Convention of 1965.

-The UNCITRAL Model Law (the Model Law) adopted by the United Nations Commission on International Trade Law in June 1985.

- Revisions to the Model Law (the Revised Model Law) adopted in December 2006.

- A new version of the UNCITRAL Arbitration Rules 2010 (UNCITRAL Rules 2010), has been issued, to update and replace the 1976 edition of the UNCITRAL Arbitration Rules[25].

The cornerstone of international arbitration regime remains the 1958 Convention on the Recognition and Enforcement of Foreign Awards, now binding for approximately 150 states. The UNCITRAL model suggest a pattern for law makers in both common law and civil law jurisdictions. It is well known to the followers from both legal traditions. The model includes fundamental legal aspects under its provisions which law makers are free to adopt and also follow them for international arbitration agreements. As a result, the UNCITRAL model law is firstly chosen for its flexibility. The law based on UNCITRAL model law accords special importance to party autonomy, severability of the arbitration clause and competence of arbitral tribunal.

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23 MOLINEAUX, Charles: Applicable Law in Arbitration, The Coming Covergence of Civil and Anglo-Saxon Law via Unidroit and Lex Mercatoria (2000), The Journal of World Investment&Trade, Vol.1, Issue 1, p.127.

24 GAILLARD, ibid, p. 288.

25 DHILLON, Dinesh/TONG, SC, Edwin: UNCITRAL Arbitration Rules updated to address changes in arbiral practice in Legal Bulletin (December 28, 2010), https://www.lexology.com (access date: 8.11.2018)

In general, the fact that both parties and arbitrators find the applicable rules in that extensive body of rules has two main features. Firstly, it shows us the increasing uniformization of arbitral proceedings. An arbitral proceeding will not be conducted any differently by the arbitrators since it occurs in Doha, Beijing, London, Paris or Istanbul. In all cases, both the parties and the arbitrators will rather refer to these international rules than to domestic rules followed locally in ordinary court proceedings.

Consequently, the debate over the preference between local procedural rules and transnational procedural rules seems to be completely outdated very longtime ago. The same is valid for the debate over the preference of which substantive law is going to be applied. In the absence of choice of the law by the parties, a solution may seldom be found with the application of the ordinary choice of law rules of the place of the arbitration (lex arbitri)[26].

Secondly, and maybe more importantly, all these normative activities carried on by both international organisations such as UNCITRAL and private codification shows the international character and source of rules that apply in international arbitration. In terms of legitimacy, it speaks volumes as to the fact that international arbitration becomes the normal means in international dispute resolution.

The second striking fact showing us that arbitration becomes a real system, is the continuing success of international arbitration as a dispute settlement mechanism. According to 2018 International Arbitration Survey, entitled "The Evolution of International Arbitration", which is conducted by the School of International Arbitration at Queen Mary University of London in partnership with White&Case LLP[27], 97% of respondents indicate that international arbitration is their preferred method of dispute resolution. Enforceability of awards continues to be perceived as arbitration's most valuable characteristic, followed by avoiding specific legal system/national courts, flexibility and ability of parties to select arbitrators. As a result, the Survey demonstrates that an overwhelming 99% of respondents would recommend international arbitration to resolve cross-border disputes in the future.

Conclusion

Arbitration, today, becomes the most preferred method of settling commercial disputes internationally. As Lord Justice KERR commented longtime ago:

"*International commercial arbitration appears to be eclipsing litigation in national courts in many parts of the world*"[28]

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[26] GAILLARD, ibid, p. 289.

[27] See 2018 International Arbitration Survey: The Evolution of International Arbitration, https://arbitration.qmul.ac.uk/research/2018/ (access date: 8.11.2018)

[28] See Lord Justice KERR: Commercial Dispute Resolution: The Changing Scene in

These words of Lord Justice KERR are proven right. International arbitration's preference over litigation in national courts regarding commercial disputes is an indisputable reality all over the world now, and will continue to be in the future from our point of view. That has several reasons off course. Firstly and more importantly, arbitration transcends all the national boundaries, language barriers and ideological differences. Moreover, international arbitration offers an efficient dispute resolution means, if necessary attention is paid in selecting an administrative agency, a convenient locale, and a legal system that meets the expectation of the parties. Arbitration also bestows parties the right to place their international business disputes in trustworthy hands for an appropriate, impartial determination[29]. While properly designed, arbitration can significantly reduce the risk of unanticipated loss of cost and time.

Yet, any discussion of the future of arbitration couldn't be completely done without any special focus on what the users are likely to want. Actually, arbitration basically must serve the users. Users include both individuals and companies throughout the world who choose willingly to settle their disputes by arbitration. When two international companies regularly do business together, conflicts will unavoidably arise in relation to a particular contract. The interest of these two companies is best serve by resolving the dispute as cheaply and quickly as possible, with a view to maintaining a stream of future business[30].

The role of arbitral institutions is crutial in this dispute resolution process. Since institutional arbitration has been widely criticized in terms of its effectiveness, speed, fees, and flexibility. Today, however, arbitration is globally facing serious problems about impartiality, availability, knowledge and expertise of the arbitrator(s). These kinds of factors are damaging arbitration's legitimate reputation as a dispute mechanism. In such a time being, the establishment of an independent and autonomous institutional arbitration centre in Istanbul, that is capable of competing internationally, is really courageous but necessary step. The Istanbul Arbitration Centre (ISTAC) is expected to be ahead of other arbitral institutions, because the new forum is intended to provide the necessary expertise, impartiality and independence, as well as to promote a culture and use of arbitration in Turkey. Despite its short background, the ISTAC offers:

Liber Amicorum for Lord WILBERFORCE (eds. Martin BOS and Ian BROWNLIE), Oxford 1987, pp.111-130, p.120; AL-BAHARNA, Husain M.: International Commercial Arbitration in a Changing World (1994), Arab L.Q., Vol. 9, p.144.

29 BRODERICK, John J.: The Future of Arbitration in the Settlement of International Commercial Disputes (1984), Notre Dame Int'l&Comp. L. J., Vol.2, p. 191.

30 CRESSWELL, Peter: The Future of Arbitration in the Changing World of Dispute Resolution, https://www.arbitratorscompany.org (access date: 8.12.2018)

-less bureaucratic institutional supervision system for arbitration.

-an effective Secretariat.

-fast track arbitration procedures.

-the appointment of emergency arbitrators.

-flexible and relatively low fee structure.

To sum up, we have the belief that international arbitration will continue to become the most preferred dispute settlement means especially for the conflicts arising from commercial transactions, with the help of international arbitral institutions.

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ESTABLISHMENT OF A CIVIL LAW MEDIATION CLINIC EXPERIENCE IN TURKEY

Türkiye'de Medeni Hukuk Arabuluculuk Kliniği Kurma Deneyimi

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Abstract

In Turkey, mediation clinics kill two birds with one stone since both mediation and legal clinics are newly developing concepts. In Turkey, mediation is an alternative dispute resolution system which is available for only certain civil law[1] disputes. Establishing mediation clinics is one of the best ways to improve awareness on both legal clinics and mediation as an alternative dispute resolution method. Turkish Government supports bothdevelopments of legal clinics and mediation. Turkish Ministry of Justice signed "Mediation Legal Clinics Protocol" that requires thees tablishment of mediation clinics with thirteen different law faculties in Turkey. According to this protocol, these legal clinics obligated to inform their students on mediation and send their students to courthouses to inform society about themediation process.These law faculties adopted the mediation clinics into their curriculum in different ways. This article presents our experiences in establishing civil law mediation legal clinics and our challenges in adopting it into our curriculum. This paper provides information on both mediation and legal clinics. This work also examines the relationships between clinicians and students and, it shares students comments on mediation clinics.This paper also points out the problems of the establishments of legal clinics in Turkey and recommends solutions for this problems.

Keywords: legal clinics, mediation clinics, mediation, clinicians role, clinicians, student learning.

Özet

Türkiye'de hem arabuluculuk hem de hukuk klinikleri yeni ve gelişen alanlar olduğundan, Hukuk sistemimiz için Arabuluculuk Hukuk Klinikleri bir taşla iki kuş vurmaktadır. Türkiye'de alternatif uyuşmazlık çözüm yöntemlerinden biri olan arabuluculuk sadecebelirli özel hukuk uyuşmazlıkları için uygulanabilmektedir. Arabuluculuk hukuk klinikleri kurmak hem hukuk klinikleri hem de alternatif çözüm yöntemlerinden olan arabuluculuk hakkında farkındalık yaratmak için en iyi yöntemlerden biridir. Adalet Bakanlığı hem hukuk kliniklerinin hem de arabuluculuğun geliştirilmesini ve yaygınlaşmasını desteklemektedir. Adalet Bakanlığı 13 farklı hukuk fakültesine ile arabuluculuk kliniklerinin kurulmasını gerektiren "Arabuluculuk Hukuk Kliniği Protokolü" nü imzalamıştır. Söz konusu protokol uyarınca hukuk klinikleri öğrencilerine arabuluculuk hukuku eğitimi verdikten sonra öğrencilerini Adliyelere gönderip kurdukları tanıtım masalarında halkı arabuluculuk konusunda bilgilendirmekle yükümlüdür. Protokolü imzalayan bir çok fakülte arabuluculuk kliniklerini kendi müfredatlarına farklı şekilde dâhil etmiştir. Bu makale, medeni hukuk alanında çalışan arabuluculuk hukuk klinikleri kurma konusundaki deneyimlerimizi ve müfredatımıza uyarlamadaki zorluklarımızı sunmaktadır. Bu makale ayrıca arabuluculuk ve hukuk kliniğine ilişkin genel bilgiler vermektedir. Bu çalışma aynı zamanda hukuk kliniği eğiticileri ve öğrenciler arasındaki ilişkileri incelemekte ve öğrencilerin arabuluculuk klinikleriyle ilgili yorumlarını paylaşmaktadır. Ayrıca bu çalışma Turkiye'de hukuk kliniği kurarken karşılaşılabilecek potansiyel problemleri belirleyip çözüm önerileri sunmaktadir.

Anahtar Kelimeler: medeni hukuk klinikleri, arabuluculuk kliniği, arabuluculuk, klinikçinin rolü, kilinikçiler, öğrencinin öğrenimi.

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1 Here civil law includes all private law context including family law, real proerty law, commercial law, labor relations, international private law, intellectual property law… exc.

INTRODUCTION

In Turkey, both mediation and clinical legal education are new and developing subjects. In 2013, mediation entered into Turkish legal system with Mediation Law in Civil Disputes. First formal legal clinical education initiated only a decade before this date. In 2003, Bilgi University Law Faculty adopted legal clinics into its curriculum[2]. Until Ministry of Justice Strategic Plan of 2015-2019[3]included establishment of legal clinics, only a few law faculties added law clinics into their curriculum[4].

The Ministry`s Strategic Plan comprised of eight objectives[5]. The second goal of the Strategic Plan is to improve access to justice and practices for victims and disadvantageous groups, and the sixth objective of the Strategic Plan is to enhance the effectiveness of alternative methods of dispute resolution[6].

Legal clinics are multifunctional. They teach students to think and act like lawyers, and at the same time, students have an opportunity to help disadvantaged groups[7]. Mediation is an alternative dispute resolution method[8] that is fast, easy, confidential, economical, flexible, and parties have more control over theoutcome[9].Although mediation has numerous advantages over litigation, people are skepticalon mediation[10]. People need to be informed

"Civil law is the law of civil or private rights, as opposed to criminal law or administrative law." Garner, A. Bryan: Black Law Dictionary 8th edit. Thomson West, St Paul, 2005, 203.

2 TC Adalet Bakanlığı Strateji Geliştirme Başkanlığı Uluslarası Hukuk Klinikleri Sempozyumu International Legal Clinics Symposium 2016, Melek Matbaacılık, Ankara, 2017, 343.

3 See, Strategic Plan of Turkish Ministry of Justice (2015-2019) at: http://www.judiciaryofturkey.gov.tr/pdfler/plan.pdf (last visited in 15.07.2017) (Here inafter Strategic Plan)

4 For instance, Bilgi University Law Faculty established their law clinics in 2003, Ankara University Law Faculty offered its first clinical education in 2006. In 2011, Anadolu University Law Faculty designed its clinical project with the support of Raul Wallenberg Institute and, they founded their Legal Clinics Unit in 2013. For further reading See, TC Adalet Bakanlığı Strateji Geliştirme Başkanlığı Uluslarası Hukuk Klinikleri Sempozyumu International Legal Clinics Symposium 2016, Melek Matbaacılık, Ankara, 2017, 337, 343, 371.

5 Strategic Plan, 61.

6 *Id.*

7 Stephen Wizner, The Law School Clinic: Legal Education in the Interests of Justice, 70 Fordham L. Rev. 1929 (2002). 1935, 1936.

8 Kuru Baki: Medenî Usûl Hukuku Ders Kitabı, legal,İstanbul, 2015,440 ; Kuru Baki: İstinaf Sistemine Göre Yazılmış Medenî Usûl Hukuku, legal 2016, 565.

9 For further reading, See, Postacıoğlu İlhan, Altay Sümer; Medenî Usûl Hukuku Dersleri vedat kitapçılık, İstanbul, 2015, 1056-1060; Süral Ceyda, Ömeroğlu Ekin: Türkiye'de Arabuluculuk Nasıl Etkin ve Başarılı Hale Gelir? İngiliz ve Portekiz Uygulamaları Işığında Öneriler, How Would Mediation Become Efficient and Successful in Turkey? Discussions in the Light of UK and Portugal Practice, Seçkin Yayınları Ankara, 2015, 24-29;

10 For further reading See Tanrıver, Süha: Alternati Çözüm Yolları Arabuluculuk Kurumuna

about mediation and its advantages by using all media, communication and education tools to get rid of their doubts about it. Mediation clinics inform society on mediation and they also provide law students experimental learning opportunity, transferable skills[11], and it disadvantaged low-income groups[12].

Mediation clinics improve awareness on both legal clinics and mediation. Therefore, mediation clinic is a very effective tool to reach two different goals at the same time. Accordingly, in 2016, Turkish Ministry of Justice signed legal clinics protocol with thirteen universities; this protocol required these universities law faculties to include mediation clinics in their curriculum[13]. These thirteen faculties adopted mediation clinics into their curriculum in various ways.

Mediation clinics improved clinicians skills, students learning in different ways. This article will consider the importance and advantages of mediation clinics. This article will also provide different approaches to developing and adopting mediation clinics into different law faculties curriculums. This work will mainly focus on our experiences as a new clinician working at Karadeniz Technical University Law Faculty and our challenges establishing Legal Clinics Department and adopting mediation clinics into ourcurriculum.

This article comprises four parts. Part one introduces the study sets the agenda and briefly gives information on mediation clinics in Turkey. The second part briefly presents civil mediation as an alternative dispute resolution method and, gives the history of legal clinics applications in Turkey. The third part examines our experiences and challenges while adopting the mediation clinics into our curriculum, education and supervision of clinicians and underlines the relationship between the clinicians and students. It also evaluates student learning and students experiences during the mediation clinics. The final section summarizes and concludes the study and includes recommendations.

Hukuki ve Sosyolojik Bir Bakış Prof Dr. Fikret Eren e Armağan, 2006 s. 821-824.

11 Waters Ben, Mediation and Experimental Learning - How a Mediation Clinic can Inform a Law-based Curriculum16 Int'l J. Clinical Legal Educ. 90 (2011), 92-94.

12 Stephen Wizner, The Law School Clinic: Legal Education in the Interests of Justice, 70 Fordham L. Rev. 1929 (2002). 1935, 1936.

13 Akdeniz University, Anadolu University, Ankara University, Atatürk University, Başkent University, Çukurova University, Dokuz Eylül University, İstanbul University İstanbul Bilgi University, İstanbul Şehir University, Karadeniz Teknik University, Selçuk University, and Yıldırım Beyazıt University signed the Protocol. See for the full text of the protocol (Last visited in 15.07.2017) http://www.sgb.adalet.gov.tr/faaliyetler/hukuk-klinikleri-protokolu-imza-toreni.html (Hereinafter Legal Clinics Protocol)

I. MEDIATION AND CLINICAL EDUCATION

A. MEDIATION

Mediation Law on Civil Disputes entered into force in 2013. Mediation is an alternative dispute resolution method, but it is not an alternative to the judicial system[14]. Alternative dispute resolutions don't compete with judicial system; they stand next to each other. Therefore, alternative dispute resolutions shouldbe called peaceful resolution methods[15].

Mediation is defined under the article two of the Law on Mediation in Civil Law Disputes. Özbek translated that article into English as follows: "Mediation shall mean the method used fort the resolution of disputes, employing systematic techniques, carried out voluntarily and with the participation of an impartial and independent third person with specialty training, bringing the parties together to discuss and negotiate, and establishing a communication process between the parties in order to help them to understand each other and thus enabling them to work out their own solutions"[16].

Mediation appeals litigation in various ways such as its easier, faster and cheaper. If the parties choose mediation, they will have the power to control the outcome. Therefore, both parties will WIN[17]. However, if the parties go to litigation judge will decide one party will lose, and another party will win. Sometimes in litigation, both parties may lose[18]. Litigation works for the justice but, mediation works for both parties future benefits.

Mediation is a very new method, and it's still developing. According to statistics from the Ministry of Justice 15655 people applied to mediation and 15234 dispute resolved their dispute through mediation between 02.01.2018 to 27.05.2018[19] These numbers are deficient compared to EU countries and the US numbers since Turkish society don't know what meditation is or how it works. It is not just the regular people also some of the

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14 For further reading See, Tanrıver Süha, Hukuk Uyuşmazlıkları Bağlamında Alternatif Uyuşmazlık Çözüm Yolları ve Özellikle Arabuluculuk Türkiye Barolar Birliği Dergisi 2006/64,s 151-177.

15 For further reading See, Tanrıver Süha, Hukuk Uyuşmazlıkları Bağlamında Alternatif Uyuşmazlık Çözüm Yolları ve Özellikle Arabuluculuk Türkiye Barolar Birliği Dergisi 2006/64,s 151-177.

16 Özbek, Serdar Mustafa, Law on Mediation in Civil Law Disputes no:6325 with Comparisons avaliable at : http://www.arabulucu.com/arabuluculuk-mevzuati/law-on-mediation-in-civil-disputes-no-6325-with-comparisons (Last visited in 18.07.2017).

17 Özekes, Pekcanıtez Usûl Medenî Usûl Hukuku,15. Bası, oniki levha, İstanbul,2017, 2083.

18 Id at 2084 vd.

19 Avaliable at http://www.adb.adalet.gov.tr/Sayfalar/istatistikler/istatistikler/ihtiyari.pdf (Last visited in 08.06.2018).

judges even lawyers have doubts about mediation[20]. Lawyers think that they will lose their clients. However, this idea is not entirely correct. According to article twenty of Mediation Law in Civil Disputes, only law faculty graduates with five years oflegal experience can apply to be a mediator[21]. Mediation will create a new profession for fresh law graduates. If we consider the growing size of the law faculties and law graduates, mediation will create more job opportunities for lawyers. Also during mediation process lawyers can still represent their clients. If the parties negotiations don't go well, they can always stop the negotiation sand litigate their dispute before thecourt. Judges also fear that they will lose control oftheir cases however mediation will also decrease the number of the cases that they have to deal with in the court.

Purpose and scope of the Mediation Law on Civil Disputes is determined under its first article; According to this article, only civil law disputes are suitable for mediation which means if the dispute is related to criminal law, tax law nor administrative law parties can`t apply to mediation. Even if the civil law dispute has an existence of aforeign element, mediation is still applicable. Turkish International Arbitration Law No: 4686 article two determines foreign element or arbitration contracts. Examples of the foreign element of arbitration may be adopted to theforeign element of mediation.[22]The examples of having a foreign element are; if one of the parties or both of them are foreigner, if one of the parties mediation agreement has their domiciles in a foreign country if the parties agreed to use a foreign law, etc.

Furthermore, mediation applied in private law disputes, arising solely from the affairs or actions on which the parties may freely have a disposal. For instance, under Turkish family law parents don't have free disposal right over their children. Therefore, child support is not within the scope of the mediation since the government has a duty to protect child's interest[23]. The first article also emphasizes that disputes containing domestic violence are not suitable for mediation.

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20 For further reading regarding to mediation process, See, Tanrıver Süha, Arabuluculuk ve Uzlaşma Kavramları, Aralarında Temel Farklılıklar ve Arabuluculuk Kurumuna Duyulan Tepkiler ya da Oluşturulan Dirençlerin Sosyolojik Açıdan İrdelenmesi ve Değerlendirilmesi, Prof. Dr. Fırat Öztan'a Armağan , Ankara 2010. s.2025-2036.

21 According to article of 20 Mediation Law on Civil Disputes in order to register as a mediator, 1. person should be a Turkish citizen. 2. S/he must have 5 years of working experience in law after graduating from law faculty. 3. S/he must have full capacity 4. S/he should not be convicted because of deliberately commited felony 5. S/he should complete mediation education and pass the written and application mediation exam prepared by Ministry of Justice. Görgün Şanal Medenî Usûl Hukuku 5. Baskı yetkin 2016 Ankara, 732.

22 ÖZBEK Serdar Mustafa, Alternatif Uyuşmazlık Çözümü 4. Baskı 2. Cilt 2016, Ankara, yetkin, 1184.

23 Pekicanıtez Hakan, Atalay Oğuz, ÖZEKES Muhammet, Meden î UsûL Hukuku Ders Kitabı yetkin Ankara 2015, 675.

Objective six of Turkish Ministry of Justice Strategy Plan 2015- 2019 required development of alternative dispute resolution methods in Legal Disputes. The sixth objective emphasizes the significance to make studies on public awareness raising and training for members of the judiciary, employees, and public to increase the awareness of mediation[24]. To reach this goal governmental and private organizations use various methods as follows satisfaction surveys, meetings, seminars, public spotlights, books, posters, brochures, etc. Various conferences and seminars held for discussing mediation[25]. Beyond this mediation, clinics are one of the best ways to improve awareness of mediation for law students, members of the judiciary, and the public. Because clinics educate students on mediation, and students inform members of public and judiciary about it.

B. LAW CLINICS

B.1. Law Clinics in General

Generally when one says clinic first thing comes to people's mind is medical classes. According to Merriam-Websters Dictionary andThesaurus the first meaning of clinic is " *a medical class which patients are examined and discussed*"[26]. In the same dictionary above mentioned the second meaning ofthe clinic is "*a group of meeting for teaching a certain skill and working on individual problems*"[27]. Today clinics have a broader context because it's considered as an experimental teaching method. As Aristotle said,"For the things we have to learn before we can do them, we learn by doing them." Therefore learning by doing method can be used for almost for all majors that make clinical learning method available for almost all students. During International Journal of Clinical Legal Education Conference 2017, Kerrigen pointed out that clinical education is not invented by lawyers or law faculties and he added that can found any type of clinics to educate students such medical, dental, business, pets, engineering, digital, architecture,eye clinics..etc[28].

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24 Republic of Turkey Ministry of Justice, Directorate General for Strategy Development, Ministry of Justice Strategic Plan 2015-2019, 135. Avaliable at http://www.judiciaryofturkey.gov.tr/pdfler/plan.pdf (last visited in 27.07.2017).

25 For instance,a conferenceon How Would Mediation Become Efficient and Successful in Turkey? Discussions in the Light of UK and Portugal Practice is held in 2015 at Kadir Has Universty. For further reading on conference See, Süral Ceyda, Ömeroğlu Ekin: Türkiye'de Arabuluculuk Nasıl Etkin ve Başarılı Hale Gelir? İngiliz ve Portekiz Uygulamaları Işığında Öneriler, How Would Mediation Become Efficient and Successful in Turkey? Discussions in the Light of UK and Portugal Practice, Seçkin Yayınları Ankara, 2015.

26 Merriam Webster Dictionary and Thesaurus, Merriam Websters, USA, 2006, 189.

27 *Id.*

28 Kerrigen Kevin, If I ruled the world - can clinic be required in every discipline?" "Bringing It All Together: Clinical Legal Educators in the 21st Century University" IJCL Confence 3 – 5 July 2017 Faculty of Business and Law, Northumbria University, UK.

The gap between law schools and practice was considered as one of the most troublesome questions in the legal education and legal clinics were offered as a bridge to fulfill this gap[29]. In the early 20th century law schools were criticized because of their theoretical nature in the United States. The main discussion was whether law school exist to give "adequate preparation for the practice of law as profession" or rather " to cultivate and encourage the scientific study of systematic and comperative jurisprudence, legal history and principles of legislation.[30]"

In 1932, Jerome N. Frank who is an attorney and a research assistant at Yale University wrote a paper and criticized legal education. In that paper, he emphasizes that the law schools graduate law teachers, not lawyers, and the law teachers generally never practiced law. Moreover, he compares the medical education and legal education. He emphasizes that *"Law students should be given the opportunity to see legal operations"*[31].

However, the idea of founding legal clinics goes back to 1893 (Harvard Law School) in the United States(US).Between the 1960s and 1970s clinical education at law schools are expanded and the variety of the clinics grew rapidly in the United States[32]. These dates are important since the population and law schools increased. Law schools had to compete for the student market and, they used legal clinics as an attractive teaching method[33]. In addition to this Council on Legal Education for Professional Responsibility- an organization called "Council on Legal Education for Professional Responsibility (CLEPR)". founded by Ford Foundation supported legal clinics education and, Ford Foundation donated $10 million to support legal clinical education[34].

Legal clinics widespread the world through the US.Canada, Some Southern and Eastern African countries, Australia, Britian and India developedtheir first legal clinics as early as in the 1960s to 1970s and, the other countries of Europe, Africa and Asia established their legal clinics after the 1990s[35]. Clinical legal education is also used to reach justice education and very popular subject for international conferences. Global Alliance for Justice Education (GAJE) has sponsored eight international conferences to reach justice through education

29 Harno J. Albert, Legal Education in the United States 1953, 172,173.

30 Levi Edward, Talks on Legal Education,1952, 2.

31 Jerome Frank, *Why not a Clinical Lawyering School* ?81 U. Pa. L. Rev. 907 1932-1933, 916.

32 TC Adalet Bakanlığı Strateji Geliştirme Başkanlığı: Uluslarası Hukuk Klinikleri Sempozyumu International Legal Clinics Symposium 2016, Melek Matbaacılık, Ankara, 2017, 211.

33 *Id.*

34 *Id.*

35 Maria Concetta Romano, The History of Legal Clinics in the US, Europe and around the World, 16 Diritto & Questioni Pubbliche 27(2016) 27.

and used legal clinic as a tool[36]. Every two years clinicians around the world gathers and shares their experiences in the GAJE conference. International Journal of Clinical Legal Education (IJCLE) also organizes international conferences annualy and supports clinical legal education[37].

Legal clinics is superior to classic lectures in lots of ways. According to the pyramid of learning the average learning capacity rates in traditional lecture is only %5 but learning by doing is %75. This rate can increase to %90 by teaching others.[38] Legal clinics are efficient methods of learning since it can mix learning by doing and teaching others.

Savage points out that practicum and clinic are different terms and clinic term is intentionally used because clinic classes are on actual cases with the supervision of the law faculty. She describes clinic as follows: " *"Clinic" means directly engaging as a full participant in conflict resolution work, as compared to an internship, which may mean observing and assisting to learn about conflict resolution environments. Clinic students will be involved in the design, execution, and evaluation of conflict resolution interventions. Student involvement in planning, implementation, reflection, and evaluation may look different in different contexts, but all elements will be present in some form. Faculty with relevant theoretical expertise and practice experience will supervise clinic students."*[39].

There are different types of clinics for instance street law, mootcourts, pro bono, legal externship. Clinics started with general subjects like civil law clinics and criminal law clinics but today any subject of law can also be the subject of the legal clinics. Clinics teach students to learn by doing, sometimes teaching, how to think like lawyers and also they have social goals such as helping to disadvantaged groups and serving society.

B.2. Law Clinics in Turkey

Law clinics is a very new teaching method for Turkey. The first law clinic established at Bilgi University Law Faculty in 2003. Before this date, some law school used some clinical approaches like moot court competitions but these were limited and not applied systematically. Initially Bilgi University Law Faculty offered Private Law Clinic, Refugee clinic, and Street Law Clinic.

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36 GAJE Confenrences list. Available at https://www.gaje.org (Last visited in 06.05.2018).

37 Avaliable at: http://www.northumbriajournals.co.uk/index.php/ijcle (Last visited in 06.05.2018).

38 T.C. Adalet Bakanlığı Strateji Geliştirme Başkanlığı: Uluslarası Hukuk Klinikleri Sempozyumu International Legal Clinics Symposium 2016, Melek Matbaacılık, Ankara, 2017, 344.

39 Savage Cynthia A. Recommendations Regarding Establishment of a Mediation Clinic 11 Cardozo J. Conflict Resol. 511 (2009-2010), 513.

Before starting these clinics Bilgi University collaborated with American University Georgetown University, the University of KwaZulu-Natal and ELTE[40]. These clinics are elective courses for two semesters and only 12 to 14 students can enroll to the clinics. Professors choose students from 3rd and 4th year students who have high GPA's. Assistant Prof. Idil Elveriş was hired to run the clinics at Bilgi University. Legal clinics do not have a separate legal status or a Legal Clinics Department at Bilgi University, therefore, she had to be hired as a member of the academic staff and, she has been officially assigned to the Philosophy and Sociology of Law department of the Bilgi Law Faculty.[41] "In Turkey we don't have a separate profession called clinician (clinic teacher). Unfortunately law teachers also teach clinics. This causes problems since law teachers are already assigned to lots of courses moreover clinical classes needs special training.

Ankara University Law Faculty is the first law faculty established in the Republican era of Turkey, and it has the highest ranking above the public law faculties in Turkey. Founder of Turkish Republic, Atatürk said '*No other inauguration made me happier than opening this great institution which will be the sanction of the Republic and, I am delighted to show and express this feeling.*[42]" Since its a very reputable university its traditions and applications are followed by other law faculties in Turkey. Legal clinics initiated by Prof. Gülriz Uygur in 2005 but long before that date Ankara University Law Schools were participating in international mootcourt competitions and representing Turkey around the world, however, these applications were not institutionalized.When Prof. Uygur initiated the clinics she had drawbacks since the clinics concept was not familiar to the Turkish legal education system[43]. The legal clinics in Ankara University have 3 stages, it consists of two years of preparation and a year the actual legal clinic. The first stage is called preparation year 1.The second year law students should choose and successfully complete one of the elective courses between law and literature, law ethics and professional ethics, gender and law. The second stage is called preparation year 2, and in this stage, third-year law students must participate at one of the voluntary groups run by and Law of Philosophy and Sociology Department of Ankara University Law Faculty. These groups are Law and Literature Group, Family Courts

40 T.C. Adalet Bakanlığı Strateji Geliştirme Başkanlığı: Uluslarası Hukuk Klinikleri Sempozyumu International Legal Clinics Symposium 2016, Melek Matbaacılık, Ankara, 2017, 342.

41 Lonbay Julian., Toprak Musa. Legal Clinics in Turkey. In: Sarker S.P. (eds) Clinical Legal Education in Asia. Palgrave Macmillan, New York (2015) 216,217.

42 For more ınformation Ankara University Law Faculty web page Avaliable at http://www.law.ankara.edu.tr/en/about-the-faculty/(Last visited in 24.06.2018)

43 Julian Lonbay and Musa Toprak Legal Clinics in Turkey. In: Sarker S.P. (eds) Clinical Legal Education in Asia. Palgrave Macmillan, New York(2015) 217, 218.

Group, Philosophy Perspective of Law Group, Woman Rights Group[44]. These groups usually work like street law clinics, they have stands infront of courts inform people try to solve legal problems. After completing the third year and successfully completing Law Philosophy and Sociology classes, fourth year students can choose human rights clinic. This clinic is like an umbrella and after enrolling inthis clinic, students are divided into different groups according to their interest. These groups work like different clinics in different subjects: Prison Clinic, Domestic Violence Clinic, Labor Clinic, Immigrant Clinic, Disabilities Clinic, Intellectual Property Rights Clinic. Fighting with Sexual Abuse of Child Clinic, Individual Application Clinic[45].

Ankara University Law Faculty has a very brilliant way to skip procedural difficulties since they are not allowed to open as much as clinical courses, they open one clinical course and under it, they run as much as clinic they want. Also this way, each sub-clinic has its own clinic run by a different clinician who is supervised by Prof. Dr. Gülriz Uygur. Ankara University Law Faculty also collaborates with Ministry of Justice and Ankara Bar Association.For instance, In 2015 Ministry of Justice, Ministry of Family, and Social Politics, Ankara University, and Ankara Bar Association signed a Protocol on Legal Clinics related to domestic violence[46].

Anadolu University Law Faculty found its official law clinic in 2013 after two years preparation period. Dean of Anadolu University Law Faculty and Director of the Legal Clinics of Anadolu University Prof. Dr. Ufuk Aydın states that theır interest in legal clinics in 2010 following collaboration with the Raoul Wallenberg Institute of Human Rights and Humanitarian Law and with the guidance of Prof. Dr. David McQuoid-Mason, a renowned pioneer in clinical legal education[47].

In this two years preparation and clinic establishment period Anadolu Univesity collaborated with The Raoul Wallenberg Institute of Human Rights and Humanitarian Law (RWI) with RWI's support law teachers of Anadolu University visited Valencia and observed an international legal clinics conference organized by GAJE and IJCLE.Also they have been to different South African countries to visit their clinics and attend their workshops[48]. After

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44 For further information on Ankara University Law Faculty visit AUHF Insan Haklari Hukuk Klinikleri webpage, Avaliable at http://hukukklinikleri.hukukfelsefesi.org/hukuk-klinikleri/(Last visited in 24.06.2018)

45 *Id.*

46 Protocols English version is avaliable at http://www.evicisiddet.adalet.gov.tr/en/dosya/up/icerik/protokol_27.08.2015.pdf (Last visited in 26.06.2018)

47 Anadolu University Legal Clinic Unit Introduction Catalog online avaliable at http://klinikhukuk.org/dosyalar/kitaplar/582d91dd45994f52d441537f5bd78b00.pdf (Last visited in 26.06.2018)

48 Anadolu Üniversitesi Hukuk Klinikleri Birimi, Avaliable at http://klinikhukuk.org/tarihce(Last visited in 26.06.2018)

the establishment of the legal clinics, Anadolu University has been sending its clinicians around the World to attend international legal clinics conferences and hosting international symposiums and workshops.

The most successful activity of the Anadolu University Law Faculty is that they hosted 8th Worldwide GAJE International Law Clinics Conference in Eskisehir with the support of RWI. That conference held in Eskisehir approved and glorified by clinic networks.[49]

Although Anadolu University Law Faculties law clinic is relatively a new establishment, they succeeded and progressed a lot in short term. Anadolu University established the law clinic as a unit, Musa Toprak claims that establishing clinics as a unit is a creative solution and explains as follows:*"'Units" are the smallest parts of the university's organizational scheme that can be set up according to academic or administrative needs. They are easy to start and can be defined depending on needs; thus, they differ from other institutional bodies of the university, which are defined by legislation. The Turkish higher education system has a hierarchical organization, and it is strictly bound by legislation, which leaves no room for the universities to build their own organizational structures, nor to define or to add different bodies depending on their institutional needs.Units can be set up under faculties, and even though they have very limited scope, they still give some protection to the professors who are willing to work in their legal clinics if it is considered that, as explained above, there is no legislation on legal clinics*"[50].

Anadolu University offers Street law clinic, live client clinic, simulation clinic, legislation clinic, legal correspondence clinic, externship and etc. Anadolu University has the most developed structure fort he clinics in Turkey with its clinic has a front office, mootcourt room and a conference room to interview the clients and clinical library[51].

Objective 2/5 of Turkish Ministry of Justice Strategy Plan 2015-2019 required improving practices for accessto justice and victims and disadvantageous groups. These objective sare as follows: to organize scientific events on Law Clinic applications (conferences, workshops, meetings, etc.), attended by judicial actors, especially law schools and bar associations, to analyze the legal infrastructure needs regarding Law Clinic application, to make cooperation with law schools and to provide applications of Law Clinic to implement in the penal institutions[52].

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49 *Id.*

50 Julian Lonbay and Musa Toprak Legal Clinics in Turkey. In: Sarker S.P. (eds) Clinical Legal Education in Asia. Palgrave Macmillan, New York(2015) 219.

51 Anadolu University Legal Clinic Unit Introduction Catalog online avaliable at http://klinikhukuk.org/dosyalar/kitaplar/582d91dd45994f52d441537f5bd78b00.pdf (Last visited in 26.06.2018)

52 Strategic Plan, 87.

In 2016 Ministry of Justice held the International Symposium on Legal Clinics in Ankara and invited predominant clinicians around the world to share their clinical experiences and, inform and encourage all law faculties about clinical problems.[53] During his symposium opening speech Mr. Alpaslan Azapağası Director of the Department of Strategy Development summarized their collaborations with universities and Bar Associations as follows:

"*Significant practices are performed at some universities although this is a very new concept in our country. These universities include Ankara University, Istanbul University, Bilgi University and Anadolu University. For these very reasons, a Protocol was signed in 2015 between our Ministry, the Ministry of Family and Social Policies, Ankara University and Ankara Bar Association for cooperation for implementation of legal clinics by students of the Faculty of Law, Ankara University concerning the Law no 6284 in frame of fight against domestic violence. With the help of this study, students of the Faculty of Law, Ankara University informed the parties and concerned people about fight against domestic violence through their legal clinical practices.*

Additionally, our Ministry has been performing legal clinics with a large number of bar associations and institutions, primarily including Ankara University, Anadolu University, Istanbul University, Yıldırım Beyazıt University, Hacettepe University and Ankara Bar Association.

In addition to the expansion of legal clinics throughout the process of fight against domestic violence in Turkey, preparations are made for Protocols regarding legal clinical practices for mediation at mediation centers especially in big cities. Turkey hosts nearly three million refugees, who are experiencing problems with access to justice, and we as the Ministry are aiming at performing clinical practices in many fields such as refugees and intellectual - industrial rights.[54]"

Accordingly in 2016 Mediation Clinics Protocol signed between Ministry of Justice and 13 different Law Faculties in Turkey. Ministry of Justice organized a workshop on the education of clinicians. A clinical workshop on mediation clinic held in each signatory law faculties. During this workshops around 650 students educated on mediation clinics in İzmir, Antalya, Trabzon, Erzurum, Ankara, Eskişehir, Konya, Adana ve İstanbul[55]. Because of the

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53 TC Adalet Bakanlığı Strateji Geliştirme Başkanlığı: Uluslarası Hukuk Klinikleri Sempozyumu International Legal Clinics Symposium 2016, Melek Matbaacılık, Ankara, 2017 (Clinics Symposium) Sympousim is published an available at http://www.sgb.adalet.gov.tr/ekler/yayin/hukuksemposyum.pdf Last visited in 05.06.2018.

54 Clinics Symposuim, 198.

55 TC Adalet Bakanlığı Strateji Geliştirme Başkanlığı, 2017 Birim Faaliyet Raporu, 37. Avaliable at http://www.sgb.adalet.gov.tr/raporlar/faaliyet-raporlari.html Last visited in 27.06.2018.

Turkish Ministry of Justice's support in legal clinics, the law faculties started to develop an interest in legal clinics. I believe in the future Turkish Ministries support will be seen as a milestone in Turkish legal clinics history.

II. ADOPTING MEDIATION CLINICS INTO CURRICULUM, SUPERVISION OF CLINICIANS AND CLINIC STUDENTS

Signatories of the Mediation Protocol adopted mediation clinics in their curriculumin different ways. Generally, signatory law faculties sent their students to Courts after a two-day mediation education seminar, they did not offer a course for it. However, Karadeniz Technical University took this adaptation more serious and provided an elective course on mediation clinics to its clinic students. Here, Karadeniz Technical Universities adaptation of the mediation clinic into its curriculum and experiences will be discussed.

A. KTÜ Mediation Law Clinic in General

Law clinic students required to take Mediation As an Alternative Resolution Method course. Mediation As an Alternative Resolution Course (Hereinafter Mediation Clinic) opened as an elective course for only 4th grade students. The course did not have any prerequisite courses but the class was limited to only 18 students. The total number of the 4th-grade students are around 250 students a year in the KTU Law Faculty. Generally, the number of the elective courses limited to three or four. Therefore the limitation of 18 students is a challenge since the average student number of an elective course is usually around 80 students. This fact led us to interview the clinical students before accepting them to the mediation clinic. Students Election Criteria determined before the interview which are participation, eager to learn, diversity on gender, race, age, religion, political view, GPA of the students, interest in meditation. Mediation required students to 3 hours a week in class work under clinician supervision and 16 hours out of class work. The evaluation of the students comprised of %50 participation atcourt and in the class, reports % 25 midterm % 25 final exams.

In 2017, Mediation Clinics is adopted to the curriculum. The Mediation Clinic designed to adopt like faculty unit and a room assigned for law clinics. Addition to this law faculty already had seminar rooms and mootcourt room available for the clinical activities. Before this date some members of the faculty already teaching with simulation and street law methods. Also, KTU Law Faculty has one of the best moot court rooms in Turkey and participated in moot court competitions. Currently, KTU Law Faculty offers human rights on democracy clinic and mediation law, civil law, law of philosophy, research methods classes are taught by clinical law methods.

B. Clinics Students

B.1 Clinic Students Activities

Students actively involved in the mediation class which is comprised of the mediation process, communication skills, and psychology. Mediation clinic students involved in lots of activities and task some examples are given below:

- Students had different teams each week and present their topics with their method in a certain period of time. Every Tuesdays and Thursdays two different students went to the court house to inform people on mediation. They listened to their problems and decided if the dispute is suitable for mediation or not. Students prepared reports about each person applied to their information kiosk.
- Students also prepared surveys from 100 different people on mediation and write reports on their surveys.
- Students wrote role plays to about mediation.
- Students designed the logo for both our Clinics Department and mediation clinic. Students designed brochures and booklets to promote legal clinics.
- Students created their teaching technics and games. Students created their own tabu game for mediation. Students prepared public surveys on mediation.

B.2. Clinic Students Comments on Clinical Legal Education Experience

During and after the clinics students were extremely satisfied to be a part of the mediation clinics. Clinical students faced some problems during their court hours that they suppose to inform people on mediation. Some people were rude to students and asked them to do unrelated things. For instance, they asked them to write their pleadings. KTU Law Clinic does not have a secretariat staff, therefore, all paper work is done by clinic students.

After they complete their mediation clinic class on a survey their comments on mediation clinics is questioned and their answers are as follows:

"In fact, I learned that I could handle my problem by talking to my opponent."

"I learned that active listening is essential to understand real problems of people."

"This class is the most fun and active class than I have ever been. It is impossible to lose your concentration or to get bored because you are actively involved with the class all the time."

'"This my last semester at law school and, I met with classmates different than me, and I realized that they are also fun people."

"I felt special because I was elected to participate in this class even though I was older than other classmates and, I don't have a high GPA."

"Preparing daily reports, surveys, tabu games, brochures, logos, and role plays were so much fun and, made me more creative."

"We met different kinds of people during our courthouse mediation presentation. I Also, it was my first time in the courthouse."

"I learned better while teaching others."

"I understand that there are many conflicts that people can perceive the same thing differently, so I realized the importance of using the right communication and words to express their ideas."

"While preparing 20 minutes first and then 5 minutes presentations we learned to use the time efficiently.I understand the difficulty of working with teams because some members of the team do not fulfill their responsibilities."

"Classic classes depend on the professors, and the classes are so crowded therefore it's impossible to participate in the class. However, clinics classes are not crowded, and the star of the clinics' classes are students. The professor encourages us to take part in the class, and we don't worry about making mistakes. This gives us confidence."

"I felt important when people that I introduced mediation applied to this alternative method and solved their conflict."

"Now I know how to communicate with people, and they listen to me."

"I learned to take responsibilities. I realized that reality is different than theory."

C. Training of Clinicians

In April 2016, Dr. Lecturer Seda Gayretli Aydın attended to International Legal Clinics Symposium on behalf the Karadeniz Technic University Law Faculty[56]. Right after this symposium preparations for a law clinical program is initiated. On 3 November 2016, Karadeniz Technic Universities Rector, (Dean of KTU Law Faculty) Prof. Dr. Süleyman Baykal signed 2016 Mediation Clinics Protocol. On 30 November, Dr. Lecturer Seda Gayretli Aydın, research assistant Halil Kökçü, research assistant Büşra Akdoğan, and research assistant Tuğba Zorlu attended a law clinic workshop to train clinicians organized by Raoul Wallenberg Institute of Human Rights and Humanitarian Law in Istanbul.

Ministry of Justice Strategy Development Department hold a Mediation Law Clinic Training Workshop hosted by Karadeniz Technic University (KTU) Law Faculty. KTU Law students and the teaching staff attended to this

[56] International Clinics Symposium, 245.

workshop[57]. During the training, esq. Şamil Demir gave information about mediation and its legal content, and other trainers enlightened 40 law students about the communication and psychological dimension of mediation[58].

In December 2016, Dr. Lecturer Seda Gayretli Aydın, research assistant Halil Kökçü, research assistant, Büşra Akdoğan, and research assistant Tuğba Zorlu completed Ministry of Justice Strategy Development Department's 'education of the legal clinicians' seminar and received their certificates[59]. In July 2017 Dr. Lecturer Seda Gayretli Aydın participated at IJCLE International Clinics Conference in Newcastle. Following year Dr. Lecturer Seda Gayretli Aydın and 5 research assistant from KTU Law Faculty attended RWI workshop on law clinics. In that workshop Dr. Lecturer Seda Gayretli Aydın met the clinics pioneer Prof.Dr. David Mason and Prof. Mason offered her to present a paper and a workshop in 9th GAJE International Conference in Pueblo Mexico, and they presented 'Breaking Down Walls on the Road to Democracy: Using Justice Education to Enhance the Understanding of Democracy in Transitional Societies' in December 2017[60]. Overall the best way to train the clinicians are the workshops and international conferences on law clinics organized by GAJE and IJCLE, since they also include workshops also problems of all the clinics are discussed and experiences are shared during these conferences.

D. Students Relationship with Clinicians

The clinician had a passive role during in-class work and she encouraged students to create their own learning and teaching methods. Clinician gave more responsibilities to students and she coordinated students and evaluated their work.

Clinics students enjoyed the small sized classes.Clinics students noted that they had better communication with clinicians. Clinics students felt equal with theprofessor and expressed their ideas easily.Clinic classes held in various locations in thecourthouse, in the garden of campus while having lunch, so students experienced friendly ambiance with professors. Students noted that they felt special because it was easier to reach professors. Clinicians encourage students to express their ideas even they are wrong, and this gives students self-confidence. Professors are the passive role they observe students studies and activities and give advice if it's needed.

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57 http://www.sgb.adalet.gov.tr/Duyurular/arabuluculuk-hukuk-klinikleri-egitimi-trabzon.html: (last visited in 10.06.2018)

58 https://www.cadr.com.tr/2016/12/04/yonetim-kurulu-baskanimiz-karadeniz-teknik-universitesi-hukuk-fakultesinde-arabuluculuk-hukuk-klinigi-egitimi-vermistir/(last visited in 10.06.2018)

59 http://www.ktu.edu.tr/hukuk-duyuru16780 (last visited in 10.06.2018)

60 https://www.gaje.org/conferences/9th-worldwide-conference/2017-session-abstracts/?id=5922

Students create their methods to teach mediation and prepare daily weekly and monthly reports. Clinicians check their work and remind the alternative ways. Clinicians give more responsibility and control over theclass to students that make students more professional.

CONCLUSION

Today experimental learning is *sine qua non* for law students. Legal clinics are an efficient experimental learning tool for law students. Legal clinics are multifunctional; clinicians may teach theory in the classroom and take the students out to practice what they have learned. Clinical methods are student-centered thus students have an active role during the class. They learn to research, present, create their plans, and foremost acting like a lawyer. Students learn by teaching. Thus they won't forget what they have learned that quickly. Turkey as a developing country is also developing in legal areas. We are aware that legal education is going to shape our legal future. All these law students are our future lawyers, judges, notaries, academicians and, they will develop our legal system.

Establishing a legal clinic may cause some problems.The First problem is finding an experienced clinician to run the clinics. Clinics are time consuming and there is no academical reward for clinical professors. Adopting the clinics into the curriculum is the second problem. Also clinics need staff to do paper work and a budget.

Clinics are my favorite classes, they are so much fun and you can touch other peoples life. You can help disadvantaged people. These clinics also educates the clinicians. Each day you face with a different legal dispute. Because compared to the other countries with don't have Legal Clinics Department. In Turkey, if you want to be an Associate Professor, you need to write a thesis related to your law department, for instance, civil law, criminal law or administrative law. But Legal clinics is not considered as a law major that you can specialize. That means even you write dozens of books related to clinics you are not going to get any academic points. 4th reason is clinics may be seen as a distraction for research Assistant Professors, ince they have to collect academic points to be promoted. On the other hand the moral satisfaction for the clinicians is very high.

Musa Toprak pointed out that ' *Restrictive and inflexible employment rules for faculty members prevent legal clinics from having professionals who work only for the legal clinics. This is likely to cause problems fort he development of the legal clinics.*[61]' Some lucky private law schools can hire lawyers to work as a clinicians however for public law schools it is not possible since public

[61] Julian Lonbay and Musa Toprak Legal Clinics in Turkey. In: Sarker S.P. (eds) Clinical Legal Education in Asia. Palgrave Macmillan, New York(2015),217.

law schools usually have limited budgets. Therefore public law schools have to assign their law teachers to run the clinics. Running a legal clinic consumes a lot of time and effort. Because clinician should have time for each student and their problems. Research assistants of the law schools may help clinicians. However, first they need to take training of the clinicians. KTU Law Faculty sent 8 research assistants to take this training but for mediation clinical practices clinical applications clinic students worked as assistants. This way clinical students also learned to take responsibilities and manage a group.

Another problem of clinics in Turkey is that old school professors usually don't believe in them. Therefore, a dean and faculty members who supports clinical program is a key. Although, Karadeniz Technical Universities Rector Prof. Dr. Süleyman Baykal was strongly supporting the clinical program, law clinics and clinicians were still having procedural problems at KTU Law Faculty. Bolognia process was the excuse of not having more clinical classes. But interestingly during his international law symposium speech, Prof. Dr. Jose Garcia Anon was claiming that they used legal clinics to adopt the same Bologna Process[62]. In fact there is a trend in European Law Faculties to adopt the legal clinics in their curriculum during the process of harmonization with Bolgona process[63].

In order to develop clinics in Turkey, clinic students should receive credits that are countable in the European Credit Transfer System (CTS) like in European Clinics. If Legal Clinics launch as a chair (department) or with a laboratory status they can have their own budgets. This way clinics can hire clinicians whom only deal with clinics. At least if a law teacher also works as a clinic s/he can earn academic points for her/his academical works in order to be promoted.

KTU Law Faculties first clinic students are graduated now, some of them already started their master's degree program, some of them are having attorney traineeship some of them passed judge exams. One of them is choosen for Bar Education centers mootcourt team that beat all the teams in Turkey. It is already clear that clinics effected on students life, they know how to talk and act like lawyers, they developed self confidence, they respect other people, they are open minded and they are not judgemental anymore. Establishment of a new law clinic especially in Turkey is very difficult but it worths all the seconds you spent when you see your clinical students shine and make a change in the society.

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62 International Clinics Symposium, 235.

63 Meral Öztoprak Sağır Güncel Gelişmeler Işığında Türkiyede Hukuk Eğitimi Araştırma Raporu Ankara 2010,66,67.

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GEMÄß des türkischen HANDELSGESETZBUCHES (TTK) und des österreichischen VERSICHERUNGSVERTRAGSGESETZS (VersVG) "DIE DEFINITION UND DIE ANORDNUNG DER VERSICHERUNG"

Türk Ticaret Kanunu (TTK) Ve Avusturya Sigorta Sözleşmesi Kanunu (VersVG) Kapsamında "Sigortanın Tanımı ve Düzenlenişi"

Öğr. Gör. Ferhat YILDIRIM[1]

Zusammenfassung

Die Versicherung ist ein Wirtschaftsbereich, der sich seit der Vergangenheit erhalten hat und dessen Bedeutung von Tag zu Tag zunimmt. Die im Versicherungsrecht eingeführten Regelungen sollten mit den Entwicklungen im Versicherungsrecht Schritt halten und auf die Bedürfnisse eingehen können. Aus diesem Grund ist die systematische Regulierung der Gesetze sehr wichtig.

Während das Gesetz Nr. 6762 in Bezug auf die gesetzlichen Bestimmungen im türkischen Recht in Kraft war, verursachte es eine ernsthafte Verwirrung in der Versicherungswirtschaft. Mit dem neuen türkischen Handelsgesetz mit Nr. 6102 (TTK) wurde jedoch ein neues Versicherungsgesetzbuch eingeführt.

Bei dem Umgang mit der Idee der Revision vertrat der Gesetzgeber jedoch die Auffassung, dass das alte türkische Handelsgesetzbuch (TTK) nicht in der Lage sei, auf die Bedürfnisse einzugehen. Bei der Gesetzesänderung berücksichtigte der Gesetzgeber die Kritik am alten türkischen Handelsgesetzbuch (TTK), wobei er auch die rechtsvergleichenden Praktiken genau prüfte. In diesem Zusammenhang ist das Versicherungsvertragsgesetz (VersVG), das als Referenzregulierung bezeichnet werden kann, indirekt für das türkische Recht wichtig.

Der wichtigste Punkt in Bezug auf das Versicherungsrecht ist die rechtliche Bedeutung der Versicherung und des Versicherungsvertrags, der die Grundlage für alles bildet. Obwohl es keine großen Unterschiede zwischen der türkischen Rechtslehre und den Definitionen von Versicherungen in der Rechtsvergleichung gibt, zeigt sich, dass es eine vollständige Einheitlichkeit zwischen den Definitionen in Bezug auf Elemente gibt,

Özet

Türk Ticaret Kanunu (TTK) uzun yıllardır yürürlükte kalmış ve 6102 sayılı kanun ile yürürlükten kaldırılmıştır. Bu değişiklikle TTK'nın genelinde ciddi revizyonlar yapılmış olmasına karşın özellikle Kanununaltıncı kitabında kaleme alınan „Sigorta Hukuku" kitabında önemli değişikliklerin yapıldığı görülmektedir.

6102 sayılı Kanun meydana getirilirken Alman Sigorta Sözleşmesi Kanunu (Versicherungsvertagsgesetz-VVG)'nundan esinlenilmiştir. Ancak TTK için temel teşkil eden Alman Sigorta Sözleşmesi Kanunu 2008 yılında ciddi bir değişikliğe uğramıştır. Bu öylesine bir değişikliktir ki, madde numaraları ve başlıkları dahi revizyon edilmiştir. TTK, VVG'nin eski versiyonunu 2011 değişikliği ile kabul etmiş olup, aslında mehaz olarak sigorta hukuku alanında kendisine bir diğer Alman Sigorta Sözleşmesi Kanunundan etkilenen düzenleme olan Avusturya Sigorta Sözleşmesi Kanununu seçmiştir. Bu dolaylı bir seçimdir. Avusturya Sigorta Sözleşmesi Kanunu (VersVG-1958), VVG'nin 2008 değişikliğinden önceki hali ile birebir benzer düzenleme içermektedir. Bu benzerlik öyle bir benzerliktir ki, eski VVG maddeleri ile VersVG maddeleri aynı metinleri ve başlıkları içermekte, aynı madde numaralarında aynı hükümler ele alınmaktadır. Bu açıdan değerlendirdiğimizde, 6102 sayılı TTK her ne kadar eski VVG düzenlemelerini mehaz olarak örnek almış olsa da, bu aslında halihazırda yürürlükte olan VersVG hükümleri ile benzerlik göstermekte ve VersVG'nin TTK için mehaz olduğunu göstermektedir.

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die sich von Anwendung zu Anwendung ändern und in der Definition von Versicherung hervorgehoben werden.

In Österreich wird das österreichische Versicherungsvertragsrecht als separates Gesetz angewendet, das seit 1958 mit verschiedenen Revisionen in Kraft ist und sich auf dem deutschen Versicherungsgesetz beruht. Die oben erwähnte Regelung, wie in der Türkei, wurde nicht als ein Bestandteil oder ein Gesetzbuch des Handelsgesetzes, sondern als separates Gesetz eingeführt. In diesem Zusammenhang gibt es Unterschiede zwischen dem österreichischen Versicherungsvertrag (VersVG) und dem türkischen Handelsgesetzbuch (TTK) hinsichtlich der Regulierung des Gesetzes. Diese Unterschiede beziehen sich eher auf den Inhalt des Gesetzes als auf die Sache, ob ein einzelnes Gesetz verabschiedet ist. Während die Unterschiede zwischen den beiden legislativen Regelungen in der die Gültigkeitsdauer des alten türkischen Handelsgesetzbuches (TTK) mit Nummer 6762 sehr groß waren, sehen wir, dass dies mit der Einführung des neuen Gesetzes mit Nr. 6102 so weit wie möglich reduziert wurde, wobei die neue Gesetzesregelung als ähnlich mit dem österreichischen Versicherungsvertrag (VersVG) angesehen werden könnte.

Keywords: Versicherungsrecht, VVG, VersVG, Nr. 6762 türkisches Handelsgesetzbuch (TTK)

İş bu çalışma ile gerek Türk doktrininde gerekse Avusturya, Almanya ve İsviçre doktrinindeki sigorta sözleşmesinin tanımı, ve sigorta hukukuna ilişkin hükümlerin TTK ve VersVG'da nasıl düzenlendiği, benzer ve farklı yönleri ile ele alınmıştır.

Anahtar Kelimeler: Sigorta Hukuku, VVG, VersVG, 6102 sayılı Türk Ticaret Kanunu

1. Die Idee- und Definition der Versicherung

1.1. Die Idee

Die Tatsache, dass die Menschen die Gefahren, denen sie in ihrem Alltag ausgesetzt sind, beseitigen, bzw. einen Schaden im ökonomischen und materiellen Sinne vermeiden bzw. diesen Schaden minimieren wollen, ist ein Ziel, das von der Vergangenheit bis heute erstrebt wird und dieses Ziel ist ein wichtiger Faktor, der zu der Geburt und der Entwicklung des Versicherungswesens geführt hat[2]. Die private Versicherung kann als eine Art Bürgschaft definiert werden,

[2] **Gustav Emil KIEFHABER**, Ratgeber in Versicherungsfragen, Die Prämien und die Haftung in der Privatversicherung, Monatsblätter für Private und Öffentliche Versicherung, sondern Heft Nr. III, Wien 1937, S. 9 ff.; **Rayegan KENDER**, Türkiye'de Hususi Sigorta Hukuku,Sigorta Müessesi-Sigorta Sözleşmesi, İstanbul 2011, 11. S. 1; **Adnan AVCI**, Özel Sigorta Kanunları Uygulaması ve Mevzuatı, İstanbul 1998, S. 1; **Moritz KUHN**, Grundüzge des schweizerischen Privatversicherungsrechts, Zürich 1989, S. 15; **Willy KOENIG**, Schweizerisches Privatversicherungsrecht, System des Versicherungsvertrages und der einzelnen Versicherungs-arten, Bern 1967, S. 4 ff.; **Alfred MAURER**, Schweizerisches

und der Einzelne kann sich durch diese spezielle Bürgschaft gegen eventuelle Gefahren und deren Folgen in Schutz nehmen. Die Versicherung bezweckt die Beseitigung der Folgen eventueller Schäden, die der Einzelne erleidet. Der Mensch ist sein ganzes Leben lang Gefahren ausgesetzt[3], beispielsweise kann sein Haus verbrennen,sein Gesundheitszustand kann sich verschlechtern, er kann sich durch einen Autounfall verletzen bzw. sein Auto kann beschädigt werden, eine Naturkatastrophe kann ihm bzw. seinem Eigentum einen Schaden zufügen. Man könnte noch mehrere Beispiele aufzählen, alle haben einen gemeinsamen Nenner, nämlich die Beseitigung des Schadens und den Wunsch der Zukunft mit Zuversicht entgegenzusehen. Wie bereits oben erwähnt, ist dieser Wunsch die Existenzgrundlage des Versicherungswesens. In diesem Zusammenhang kann man sagen, dass die Versicherung ein Grundbedürfnis des Menschen geworden ist[4]. Neben der Tatsache, dass die Versicherung ein Grundbedürfnis ist, ist sie auch mit den Ereignissen des Alltags eng verbunden. Die Existenz neuer Risiken wie technologischer Fortschritt, Naturkatastrophen etc. wirkt automatisch auch auf die Versicherungsbranche und führt zu ihrer Entwicklung. Als ein typisches Beispiel dafür können die Terrorangriffe in den USA am 11.September 2011 genannt werden. Tatsächlich wurden nach diesen Angriffen in der Versicherungsbranche bezüglich der Terrorversicherung neue Regelungen eingeführt.[5]

Fest steht, dass, wenn auch das Versicherungsbewusstsein ein sehr altes Phänomen ist, es sich im Grunde parallel zur der Entwicklung der Kulturen, des Bildungswesens,des Glaubens und der Ansichten entwickelt hat.

Wenn man es kurz zusammenfassen will, können die Gefahren, denen die Menschen in ihrem Alltag ausgesetzt sind und die Möglichkeit, dass sich die Risiken in Zukunft verwirklichen und die Sorgen der Menschen darüber, dass sie diesen Gefahren bzw.Risiken ausgesetzt werden könnten, als Gründe für die Existenz des Versicherungsgedankens geführt werden.[6]

Privatversicherungsrecht, Bern 1986, S. 39 ff.; **Şaban KAYIHAN**, Sigorta Sözleşmelerinde Prim Ödeme Borcu, Ankara 2004 , S. 27 ff.; **Rayegan KENDER**, Türk Hukukunda Devletin Sigorta Şirketlerini Murakebesi, Banka ve Ticaret Hukuku Araştırma Enstitüsü, Ankara 1968, S. 1 und 2 ; **Huriye KUBİLAY**,Uygulamalı Sigorta Hukuku, Barış Yayınları, İzmir 2003, S. 3.

3 **von F. DÖRFEL**, Versicherungswirtschaftslehre, Wien 1931, S. 9; **Herman BRÄMER / Karl BRÄMER**, Versicherungswesen, Leipzig 1894, S. 1 ff.

4 **Murat ÖZBOLAT**, Temel Sigortacılık, Ankara 2006, S. 76.

5 **KUBİLAY**, S. 3.; **Y. Kemal ÇUHACI**, *"Terör Sigortası"*, Reasürör Dergisi, Band: 69 Juli, İstanbul 2008, (4-11); **ÖZBOLAT**, Temel Sigortacılık, S. 26 ff.

6 Für eine ähnliche Definition **DÖRFEL**, S. 10

1.2. Definition

Wenn man den Versicherungsgedanken, den wir im vorangegangenen Kapitel zu erklären versucht haben, im allgemeinendefinieren will, muss dieser folgende Elemente beinhalten. Man spricht über eine Versicherung,wenn folgendes gegeben ist [7];

- Eine Gemeinschaft, die aus Personen besteht, die Risiken ausgesetzt sind: (*Gefahrgemeinschaft).* Eigentlich beruht die Versicherung auf der Grundlage des Selbsthilfegedankens. Allerdings muss dieser Gedanke nicht als die Selbsthilfe des Einzelnen verstanden werden, sondern als der Schutz der Gemeinschaft, die aus Personen wie er selbst besteht vor bestimmten Risiken. In diesem Zusammenhang ist der Zweck der Versicherung nicht die Beseitigung der eventuellen Risiken sondern die Aufteilung der Risiken unter dieser Gemeinschaft, auf eine Art und Weise, dass die Risiken und ihre Folgen für jeden Einzelnen in der Gemeinschaft verträglich und zumutbar sind[8].
- Ein Fall, der in Zukunft eintritt und möglicherweise zu Schäden führt: *Gefahr (Risiko)* Die Gefahr entsteht im allgemeinen aus der möglichen Entstehung der Bedürfnisse[9].
- Die Tatsache, dass die Gefahren, denen die Individuen in der Gemeinschaft ausgesetzt sind, gleich bzw. ähnlich sind: *Gleichartigkeit*[10].
- Die Deckung des entstehenden Schadens nach dem Auftreten von Risiken: *Bedarfsdeckung*(Versicherungsbürgschaft)[11].
- Die Tatsache, dass der Versicherungsschutz als eine Gegenleistung zu einer Beitragszahlung gewährt wird: *Wechselseitigkeit* (Versicherungsbeitrag)[12].
- Die Tatsache, dass der Versicherte Recht auf Forderungen hat: *Rechtsanspruch*[13].

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7 Für weitere Informationen über gemeinsame Definationen der Versicherung vgl., **KENDER** , S. 2 und 3 ff., (Hususi Sigorta); **Hans MÖLLER**, Versicherungsvertragsrecht, Wiesbaden 1971, S. 2 und 3; **Edgar HOFMANN**, Privatversicherungsrecht, München 1978, S. 4; **Mertol CAN**, Sigorta Hukuku Ders Kitabı, Ankara 2005, S. 13; **KUHN**, S. 15 ff.; **KAYIHAN**, Sigorta Sözleşmelerinde Prim Ödeme Borcu, S. 29 und 30; **Erwin DEUTSCH**, Versicherungsvertragsrecht Ein Grundriß, Karlsruhe 1988, S. 4; **Hans MÖLLER**, Versicherungsvertragsrecht, Wiesbaden 1977, S. 16 ff.; für weitere verschiedene Definitionen vgl. **Ferhat YILDIRIM**, „Die Geschichte der Versicherung", Prof. Dr. Hikmet Sami Türk'e Armağan , Turhan Yayıncılık, Ekim 2017, (813-832), s. 817 ff.

8 **KAYIHAN**, Sigorta Sözleşmelerinde Prim Ödeme Borcu, 29; **MÖLLER**, S. 2, (Möller 71)

9 **MÖLLER**, S. 2, (Möller 71); **ÖZBOLAT**, S. 27; **Reşat ATABEK**, Sigorta Hukuku, İstanbul 1950, S. 6; **KAYIHAN**, Sigorta Sözleşmelerinde Prim Ödeme Borcu, S. 60

10 Für weitere Informationen vgl. **MÖLLER**, S. 3, (Möller 71)

11 Für weitere Informationen vgl. **MÖLLER**, S. 3, (Möller 71)

12 Für weitere Informationen vgl. **MÖLLER**, S. 3, (Möller 71); **KAYIHAN**, S. 64; **ATABEK**, S. 6.

13 **HOFMANN**, Privatversicherungsrecht, S. 8 ff.

Wenn man die Versicherung im Hinblick auf diese sechs Elemente definieren will, ist die Versicherung die Deckung eines aufgrund von auftretenden Risiken entstehenden Schadens, als eine Gegenleistung zu Beiträgen (Versicherungsprämien), die von Personen geleistet werden, die gleichartigen bzw. ähnlichen Risiken ausgesetzt und berechtigt sind, im Schadensfall Forderungen zu stellen[14].

Außer dieser Definition ist es auch möglich, Definitionen zu begegnen, die die Versicherung als eine Übernahme der Risiken definieren. In der Tat ist es so, dass die Versicherungsnehmer die Beiträge, die als Versicherungsprämie bezeichnet werden, in einen Pool des Versicherers zahlen (Geldtopf). Wenn sich für einen oder mehrere aus dieser Gruppe ein Risiko verwirklicht, meldet sich der Versicherte bei seiner Versicherung, um die Schadensregulierung zu fordern und die Versicherung erfüllt seine Verpflichtung mit dem im Pool gesammelten Geld[15].

Das wichtigste bei der Definition von der Versicherung ist die Tatsache, dass der Einzelne die Risiken nicht selbst trägt, sondern diese auf andere Personen überträgt, was als "Risikoabwälzung" bezeichnet wird.[16].

Diese Definitionen zeigen, dass Versicherungen nicht nur Unternehmen sind, die aus juristischen Strukturen bestehen, sondern auch aus ökonomischen Strukturen heraus Wirkungen ausüben[17]. In der Theorie führen einige Autoren Definitionen von der Versicherung vor, die die ökonomische Seite betonen. Diesbezüglich schreibt z.B. Can;

> *" Die Versicherung ist ein Unternehmen, das auf dem Prinzip beruht, dass zufällige Risiken, die negative ökonomische Folgen haben, unter Risikoträgern aufgeteilt werden, die innerhalb der Organisation eines sogenannten Versicherers zusammenkommen"*[18].

Wenn wir heutzutage von einer Versicherung sprechen, dann sehen wir, dass im allgemeinen zwischen der sozialen und der privaten Versicherung differenziert wird[19]. Zwischen den beiden Versicherungsarten existieren

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14 Für ähnliche Definitionen vgl., **KENDER**, S. 3, (Hususi Sigorta); **HOFMANN**, S. 4; **R. AEBERHARD,**Allgemeine Versicherungslehre Band I, Zürich 1947, S. 10.

15 www.versicherungschecker24.de, *"Was ist Versicherung?"* (besucht am 20.09.2018)

16 www.wer-weiss-was.de*"Generelle Informationen-Was ist Versicherung?"* (besucht am 20.09.2018); **KUBİLAY**, S. 4.

17 vgl. wirtschaftliche Basis der Versicherung: **DEUTSCH**, S. 4 ff.; **DÖRFEL**, Versicherungswirtschaftslehre, S. 9 ff.; **Fritz HERRMANNS-DORFER**, Versicherungswesen, Berlin 1928, S. 2,3 und 4

18 **CAN,** S. 13 ff.

19 **WIESER**, S. 1; **Peter KOCH / Helmut SCHIRMER / Reinhard SEIFERT / Jurgen WAGNER**, Allgemeines Recht-Versicherungsrecht, Karlsruhe 2003, S. 243; **MÖLLER**, S. 1, (VVG); **DEUTSCH**, S. 13 ff.; **W. KOENIG**, Versicherungsrecht, Band II Leitfäden für das Verischerungswesen, Bern 1971, S. 32; **Josef HOCHHAUSER**, Die Vertragsversicherung, Wien 1964, S. 118 ff.;

in Bezug auf ihre Eigenschaften diverse Unterschiede. Wenn wir diese Unterschiede näher betrachten, sehen wir, dass soziale Versicherungen die Gewährleistung der sozialen Sicherheit des Einzelnen bezwecken. Die Tatsache, dass die sozialen Versicherungen durch Gesetze geregelt werden und obligatorisch sind, ist eine ihrer charakteristischen Eigenschaften. In diesem Zusammenhang existieren die sozialen Versicherungen kraft des Gesetzes und es gelten die Vorschriften des öffentlichen Rechts. Im Gegensatz dazu dient die private Versicherung zum Schutz der eigenen Interessen der Privatpersonen. Das Privatrecht bildet ihre Grundlage und sie ist eine Versicherungsart, die auf dem gegenseitigen Konsens der Parteien beruht. In diesem Zusammenhang ist es möglich, in Bezug auf den Abschluss von privaten Versicherungen von einer freiwilligen Versicherung zu sprechen. Da die privaten Versicherungen einen freiwilligen Charakter haben, ist der Einzelne nicht verpflichtet,-außer den obligatorischen-[20] eine Versicherung abzuschließen. Falls wir diese Ausführungen in einer Grafik darstellen wollen, bestehen folgende Differenzen zwischen den beiden Versicherungsarten[21];

Tabelle I: Ein Vergleich zwischen der Sozialversicherung und Privatversicherung

Soziale Versicherung	Private Versicherung
Gewährt den Parteien kein Wahlrecht. In diesem Sinne ist sie eine obligatorische Versicherung.	Die Parteien sind in ihren Entscheidungen frei. Es handelt sich um eine freiwillige Entscheidung* Der Einzelne kann frei die Versicherung abschließen, die er braucht. *Außer den obligatorischen Versicherungen.
Beinhaltet die Forderungen, die auf öffentlichem Recht beruhen.	Beinhaltet die Forderungen, die auf dem Privatrecht beruhen.
Die Gesetze bilden die Grundlage. Die Regelungen der Versicherung werden durch Gesetze festgelegt.	Der Versicherungsvertrag bildet die Grundlage. Die Beteiligten können die Inhalte –abgesehen von den zwingenden Rechtsvorschriften- selbst bestimmen.
Der Einzelne muss einen sozialen Status haben z.B. Arbeiter etc.	Man muss nicht einen sozialen Status haben. Die Privatversicherungen entstehen gänzlich aus freiem Willen der Einzelnen.

[20] Obligatorische Versicherungen in der Türkei; KfZ-Haftpflichtversicherung, Erdbeben Versicherung (DASK), Gefahrengut Haftpflichtversicherung, Wasserverschmutzung Haftpflichtversicherung, Insassen Haftpflichtversicherung bei Bussen und Schulbussen, Privatschutz Haftpflichtversicherung, Berufshaftpflichtversicherung für Ärzte, Haftpflichtversicherung für den Küsten- und Wasserschutz

[21] Für weitere Informationen für Sozial-und Privatversicherung vgl.; **Ali BOZER**, Sigorta Hukuku–Genel Hükümler–Bazı Sigorta Türleri, Banka ve Ticaret Hukuku Araştırma Enstitüsü, Ankara 2004, S. 2 ff.; **KAYIHAN**, S. 30 und 31; **HOFMANN**, S. 2 und 3.

Die Beiträge werden im vorraus ohne den Willen der Parteien festgelegt.	Die Höhe der Versicherungsbeiträge und die Zahlungsmodalität ist den Beteiligten überlassen und wird frei bestimmt.
Die Risiken, die Gegenstand der Versicherung sind, sind begrenzt.	Die Risiken, die Gegenstand der Versicherung sind, sind verschiedenartig. Da mit der technologischen und der industriellen Entwicklung die Risiken grösser werden, werden auch verschiedene Versicherungsarten entwickelt.
In der Regel wird das Prinzip der Repartition angewandt* *Allerdingskann man feststellen, dass heutzutage eine Rückkehr zum Kapitalisierungsprinzip stattfindet.	Das Prinzip der Kapitalisierung wird angewandt* *Besonders bei den Lebensversicherungen

Bevor man sich mit der Definition des Versicherungsvertrags in dem neuen türkischenHandelsgesetz (TTK) und in der VersVG und mit der historischen Entwicklung beschäftigt, muss man noch einen Punkt klären. Die Versicherung wurde zeit ihrer Entwicklung mit den Glücksspielen in der gleichen Kategorie eingestuft und einer Wette gleichgestellt. Allerdings sind Glücksspiele und die Versicherung verschiedene Begriffe[22]. Sowohl ihre Inhalte als auch ihr Zweck und die Folgen legen diese Differenz klar und deutlich dar. Falls man diese Differenz zusammenfassend darstellen möchte, kann man die Unterschiede zwischen den beiden Systemen wie folgt schematisieren[23]:

[22] **KENDER**, Hususi Sigorta, FN. 5*"Im 18.und 19. Jahrhundert wurden die Versicherungsverträge in verschiedenen Ländern als vom Glück abhängig betrachtet. (Eichler, 16-18). Dieser Gedanke wurde zum ersten Mal im deutschen Recht aufgegeben. In diesem Zusammenhang schreibt Otto von Gierke: "Der Versicherungsvertrag stellt kein Risiko dar, sondern vermindert bzw. beseitigt ein bestehendes Risiko. Er macht das Bekannte nicht zu einem Unbekannten. Er ermöglicht, dass ein im allgemeinen zwischen den menschlichen Beziehungen möglicher, unbestimmter Zustand zu einem beschränkt bestimmten Zustand wird. Er bedingt ein Unternehmen, das nach kaufmännischen Prinzipien organisiert ist und verliert dadurch seine vom Glück abhängende Eigenschaft." (Otto von Gierke, deutsches Privatrecht, Band 3, 191, 795)"*; **HOFMANN**, S. 3;**KOENIG**, S. 33; **KOENIG**, S. 35 (Band II)

[23] Für die Unterschiede zwischen den beiden Systemen vgl. **KENDER**, S. 5 und 6, (Hususi Sigorta); Die Ansichten von VIVANTE in der Theorie*:" Laut VIVANTE bildet die Wette die Grundlage der Versicherung. Allerdings fand diese Ansicht in der Theorie keine Anhänger und wurde kritisiert. Baroquet vertritt in der Theorie die Ansicht, dass die Tatsache, dass der Einzelne sich mit einem Vertrag schützen will, bevor eine Gefahr entsteht, nicht als eine Wette bezeichnet werden kann."* vgl. **KENDER**, S. 645 ff.

Tabelle II: Unterschied zwischen den Glücksspielen, Wetten und Versicherungen

Glücksspiele und Wetten	Versicherung
Bei den Glücksspielen und den Wetten existieren zwei entgegengesetzte Behauptungen bzw. Ansichten. Demnach wird die eine Seite gewinnen und die andere verlieren. Für jeden der Beteiligten kommt ein Gewinn oder ein Verlust in Frage.	Bei der Versicherung kann man nicht von entgegengesetzten Ansichten sprechen. In diesem Zusammenhang können die Prämien, die der Versicherte zahlt, nicht als Verluste bezeichnet werden.
Glücksspiele und Wetten haben eine vom Glück abhängende Eigenschaft	Bei den Versicherungen kann man nicht vom Glück sprechen. Hier werden die Prämien mit Hilfe der Versicherungstechnik bzw. der Statistik-Wissenschaft berechnet.
Die Grundsätze Interessenschutz bzw. Entschädigung kommen nicht in Frage.	Interessenschutz bzw. Entschädigung sind wichtige Grundsätze.
Man kann bei den Glücksspielen bzw. den Wetten von einer Eigentumsvermehrung der gewinnenden Seite sprechen	Bei der Versicherung kann man nicht von einer Eigentumsvermehrung sprechen. Die Versicherung gleicht den tatsächlichen Schaden des Versicherten aus. (Im Versicherungsrecht gilt das Prinzip der Nichtbereicherung)
Die Forderungen können nicht gerichtlich geltend gemacht werden.	Die Forderungen können gerichtlich geltend gemacht werden.

Die Tatsache, dass die Versicherung als eine Art von einem Glücksspiel bzw. einer Wette angesehen wurde, wirkte negativ auf ihre Entwicklung. Vor allem in islamischen Ländern waren der religiöse Rahmen und der Umstand, dass die Versicherung mit den Glücksspielen und den Wetten gleich bewertet wurde, ein großes Hindernis vor der Entwicklung der Versicherungsbranche.[24].

[24] Für ausführliche Informationen zum Thema „die Entwicklung des Versicherungswesens“ vgl. **Arif CÜVEYCATİ**, İslam Hukukunda Sigorta ve Faiz Hakkında Bir Risale,(Çeviren : Ekrem Buğra), Erzurum Hukuk Fakültesi Dergisi, Band IV, Erzurum 2000 , S. 597-615; **Haydar ARSEVEN**, Sigortanın Tarihçesi ve Geri Kalmışlığımızın Sebepleri, İstanbul Üniversitesi İktisat Fakültesi Mecmuası, Prof. Dr. S.F. Ülgener’e Armağan, C.43, İstanbul 1987, 415-431

2. Anordnung des Versicherungsrechts im türkischen Handelsgesetzbuch (TTK) und im österreichischen Versicherungsvertragsgesetzbuch (VersVG)

2.1. Die Definition des Versicherungsvertrags im Allgemeinen

Nach unseren obigen Ausführungen über die Definition der Versicherung ist es möglich geworden das Wesen der Versicherung zu verstehen. Wenn man allerdings über die Versicherung im Rahmen der gesetzlichen Regelungen spricht, werden wir mit der Definition des Begriffes „Versicherungsvertrag" konfrontiert[25]. In diesem Zusammenhang ist es angebracht, unabhängig voneinander zu untersuchen, was der Begriff des Versicherungsvertrages im österreichischen und im türkischen Recht bedeutet. Vor allem wird hier untersucht, wie die Definition des Versicherungsvertrages in den entsprechenden Rechtssystemen geregelt, festgelegt und später in dem Gesetzestext behandelt wird.

2.1.1. Die Definition des Versicherungsvertrages nach dem türkischen Handelsgesetz (TTK)

Als ein natürliches Ergebnis der obigen Ausführungen über die Definitionen der Versicherung sind wir mit dem Begriff des Versicherungsvertrags konfrontiert. Jedes Land und jede einschlägige Theorie hat verschiedene Definitionen des Versicherungsvertrages hervorgebracht, einige Länder haben diese auf den Gesetzestext übertragen, andere wiederum vermieden, diese zu einer Gesetzesvorschrift zu erklären. Wenn man hier das österreichische und das türkische Versicherungsrecht miteinander vergleicht, zeigt sich einer der auffälligsten Unterschiede in dem Sachverhalt, ob die Definition in den Gesetzestext aufgenommen wurde oder nicht. Wenn man die Gesetzestexte der beiden Länder in Augenschein nimmt, sieht man, dass im türkischen Recht der Versicherungsvertrag klar definiert wurde.

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[25] **Claus FISCHER** , Organisation und Verbandsbildung in der Feuerversicherung, Tübingen 1911, S. 5 *"[…]Maius definiert z.B. : "Unter Versicherung versteht man den Vertrag, welchen zwei Parteien schließen, wodurch die eine gewisse, irgendwelchen Gegenstand treffen könnende Gefahr gegen eine Kaufsumme oder ein Versprechen übernimmt, während im Falle des Eintritts derselben von der andern Schadensersatz geleistet wird." […]"* ; **Hubert W. van BÜHREN**, Handbuch Versicherungsrecht, Köln 2009, S. 14: *"Der Begriff wird auch nicht einheitlich verwendet "Versicherung" kann Versicherungsvertrag, Versicherungsverhältnis, Gefahrtragung oder Haftung bedeuten"*; vgl. den Präsidenzfall über die Definition der Versicherung **van BÜHREN**, Handbuch Versicherungsrecht *"[…] Entscheidung des Bundesverwaltungsgerichts vom 22.03.1956"Eine Versicherung liegt dann vor, wenn durch privaten Vertrag in einer Gefahrengemeinschaft gleichartiger Risiken ein Leistungsanspruch gegen Entgelt für den Versicherungsnehmer begründet wird, wenn sich das versicherte Risiko-zum Schadensfall- verwirklicht."*

Demnach lautet der Art. 1401 des türkischen Handelsgesetzes TTK

"Der Versicherungsvertrag ist ein Vertrag, in dem sich der Versicherer als Gegenleistung zu einer Prämienzahlung verpflichtet, eine Ausgleichsentschädigung zu leisten, wenn sich eine Gefahr oder ein Risiko verwirklicht, der die materiell messbaren Interessen des Einzelnen beschädigt oder ein Vertrag, in dem sich der Versicherer verpflichtet, eine bestimmte Geldsumme zu zahlen, oder andere Gegenleistungen zu erbringen, aufgrund der Lebensdauer bzw. der anderen Ereignisse, die im Leben von einzelnen oder mehreren Personen stattfinden."

Eine ähnliche Definition befindet sich auch in dem Neuen TTK, allerdings hat das alte TTK[26], das über eine längere Zeit gültig war, in der Gesetzgebung[27] seinen festen Platz. Wenn man aber das schweizer Versicherungsvertragsrecht[28] (sVVG) untersucht, aus dem das TTK hervorgeht, sieht man, dass in der Gesetzgebung einer Regelung bezüglich der Definition eines Versicherungsvertrages kein Platz gewahrt wird.[29] Der erste Artikel des sVVG beschäftigt sich mit dem Versicherungsantrag und inhaltlich wird eine Regelung behandelt, die sich von der Definition des Versicherungsvertrages gänzlich unterscheidet. In diesem Zusammenhang wäre es nicht falsch, festzustellen, dass das TTK von den Regelungen abweicht, die ihre Grundlage bilden.

Wenn man nicht nur das sVVG, das die Grundlage des TTK bildet, sondern auch andere Rechtssysteme im Ausland näher untersucht, dann wird man feststellen können, dass sie keine Regelungen in Bezug auf die Definition des Versicherungsvertrags beinhalten[30].

An dieser Stelle ist die folgende Frage angebracht: "Was ist daran so wichtig, dass der Versicherungsvertrag im Gesetz geregelt wird, muss das sein?"

Meiner Meinung nach hat der Sachverhalt, dass der Versicherungsvertrag im Gesetzbuch definiert wird keinen praktischen Nutzen. Falls dies vom Nutzen wäre, würden die Gesetzestexte mehrerer Rechtssysteme im Ausland

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26 Abgeschaffter Artikel des türkischen Handelsgesetzes mit der Nr.6762

27 Abgeschaffter Artikel (Nr. 1263 f.1) des türkischen Handelsgesetzes mit der Nr. 6762

28 Das Schweizer Versicherungsvertragsgesetz vom 2 April 1908 wurde nach einer Revision ab dem 1 Januar 2011 gültig.

29 **KUHN**, S. 81

30 **Julius von GIERKE**, Versicherungsrecht unter Abschluß der Sozialversicherung, Stuttgart 1937, S. 39, *1930 französisches Versicherungsvertragsgesetz, 1908 deutsches Versicherungsvertragsgesetz (dVVG), 1908 schweizerisches Versicherungsvertragsgestz (sVVG), österreichisches Versicherungsvertragsgesetz (VersVG-1958) etc."*; für unterschiedliche Definitionen vom Versicherungsvertrag im ausländischen Recht vgl. **von GIERKE**, Versicherungsrecht, S. 76, FN. 1; **KUHN**, Schweizerisches Versicherungsrechts, S. 81; **Peter KOCH**, Privat Versicherungsrecht, München 2011, S. 202

die Definition des Versicherungsvertrages beinhalten[31]. Nachdem oben Eigenschaften in Bezug auf das Versicherungswesen erwähnt wurden und wir jetzt wissen, dass diese für die Existenz der Versicherung unbedingt nötig sind, bringt es keine Vorteile, dass man im Gesetz zusätzlich den Versicherungsvertrag definiert. Wenn man die Parteien im Versicherungsvertrag, die Rechte und die Pflichten der Parteien, die Versicherungsarten etc. als ein Ganzes betrachtet, ergibt sich die Definition des Versicherungsvertrages von selbst. Daher ist eine Regelung im Gesetz keine Notwendigkeit, sondern nur ein Detail und dient nicht einem praktischen Zweck. Außerdem ist das Versicherungswesen ein den Entwicklungen offener Sektor und wird parallel zu den Entwicklungen von den Änderungen auf der ökonomischen, sozialen und juristischen Ebene direkt beeinflusst. Meiner Meinung nach wäre eine statische Definition von dem Versicherungsvertrag auf einer den Entwicklungen solch offenen Ebene nichtzutreffend. Eine statische Definition könnte den Änderungen nicht genügen, die Aktualisierungen nicht verarbeiten und den Bedürfnissen nicht gerecht werden.[32]

In der diesbezüglichen türkischen Rechtstheorie ist die Ansicht vorwiegend,[33] dass es einer zusätzlichen Definition des Versicherungsvertrages im Gesetzbuch nicht bedarf.

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31 **John BIRDS**, Modern Insurance Law, London 1998 , S. 1 Birds stellt fest, dass*„es kein Zufall ist, dass im englischen Versicherungsrecht der Versicherungsvertrag nicht definiert wurde. Die Tatsache, dass man eine klare Definition vermied, erklärt er damit, dass es möglich ist, dass man im Versicherungsvertrag einige Risiken ausschießt, die ein klar definierter Versicherungsvertrag hätte beinhalten müssen. Aus diesem Grund ist die Definition des Versicherungsvertrages der Theorie überlassen "*, **ATABEK**, S. 2; vgl. der Begriffe von **KUHN**, S. 81; vgl. für weitere Begriffe in der Lehre **KOENIG**, S. 29 ff.; Der Begriffe der deutsche Verein für Versicherungswissenschaft (im Jahr 1966) vgl. **KOENIG** , S. 29, FN. 4.

32 Vertritt die selbe Meinung vgl. **KENDER**, S. 158; **REŞAT ATABEK**, Yeni Ticaret Kanunumuzda Kara Sigortaları, İstanbul Barosu Dergisi, İstanbul 1957, S. 265; **CAN**, Sigorta Hukuku, S. 69, FN. 136

33 **KENDER**, Hususi Sigorta, S. 157 ff.; **ATABEK**, Kara Sigotaları, S. 265; **KAYIHAN**, Sigorta Sözleşmesinde Prim Borcu, S. 33; **CAN**, Sigorta Hukuku, S. 69 ff; für eine Gegenmeinung vgl. **BOZER**, S. 21 und 22: *"Es ist schwierig, eine solche Definition des Versicherungsvertrages zu formulieren, die alle Versicherungsarten einschliesst Daher wird in der Theorie die Ansicht vertreten, dass der Versicheungsvertrag nicht definiert werden muss. Allerdings ist es so, dass in dem Art. 1263 (das alte TTK mit der Nr.6267) des Türkischen Handelsrechts der Versicherungsvertrag zutreffend definiert wurde ."*

In Anbetracht aller Ausführungen kann man sagen, dass es ÜNAN war, der in der türkischen Rechtstheorie[34] die Definition des Versicherungsvertrags am besten formuliert hat:

" Schützt jeder Versicherungsvertrag im Rahmen der Gesetze und der allgemeinen Geschäftsbedingungen der Versicherung vor den ökonomischen Folgen solcher Vorgänge, die einen unbekannten Faktor beinhalten "[35].

Die Definition von ÜNAN zeigt Ähnlichkeiten mit der Definition des Versicherungsvertrags im Gesetzbuch.

2.1.2. Die Definition des Versicherungsvertrags gemäß dem österreichischen Versicherungsvertragsgesetz (VersVG)

Wenn man über die Existenz der Versicherung spricht, ist der Versicherungsvertrag das erste, was einem einfällt. Der Versicherungsvertrag verpflichtet den Versicherer eine finanzielle Leistung in einem gewissen Rahmen zu erbringen und im Gegenzug verpflichtet er den Versicherten Prämien zu zahlen. Er ist also ein Vertrag, der die Interessen beider Parteien berücksichtigt[36].Dem zufolge regelt das Versicherungsrecht sowohl den Versicherungsvertrag als auch die Verpflichtungen, die sich aus diesem Rechtsverhältnis ergeben[37]. Wenn man nämlich das VersVG näher untersucht, sieht man, dass sich die gesetzlichen Regelungen gänzlich auf die Regelungen zwischen den Parteien beziehen und die Verpflichtungen behandeln, die die Parteien aufgrund des Versicherungsverhältnises eingehen[38].

Im Gegensatz zu dem türkischen Versicherungsvertragsgesetz beinhaltet das österreichische Versicherungsvertragsgesetz im allgemeinen die Definition des Versicherungsvertrages nicht[39]. Dieses hat freilich mehrere Gründe. Meiner Meinung nach ist der Hauptgrund die Tatsache, dass man sich in der Theorie nicht auf eine gemeinsame Definition einigen konnte und dass die Definition des Versicherungsvertrages keinen praktischen Nutzen bringt. Dem zufolge lautet

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34 Für andere Definitionen vgl. **BOZER**, S. 21; **CAN**, S. 69 ff.; **KENDER**, S. 157 ff; **Sibel KORKMAZ**, Sigorta Sözleşmelerinde İspat Sorunları, İzmir 2004, S. 25; **KAYIHAN**, S. 33; **ATABEK**, S. 1 ff. ;**Hüseyin ÜLGEN / Arslan KAYA** , *"Takseli Kara Sigortalarında Esaslı Surette Fahiş Taksenin Hile HükümlerindenHareketle Tenkisi Mümkün müdür?"*, Bilgi Toplumunda Hukuk, Ünal Tekinalp'e Armağan, C.1, İstanbul 2003, /961-980), S. 961; **KUBİLAY** , S. 3 ff.

35 **Samim ÜNAN**, Hayat Sigortası Sözleşmesi, İstanbul 1998, S. 1

36 **AEBERHARD**, S. 10; **Peter SCHIMIKOWSKI**, Versicherungsvertragsrecht; München 2009, S. 25, Rnd. 29 ff.

37 **EICHLER**, Versicherungsrecht, Karlsruhe 1976, S. 1

38 **DEUTSCH**, S. 3, (VVG)

39 **HERRMANNSDORFER**, S. 1; Auch er hat auf eine Definition verzichtet. VAG) vgl. **HOFMANN**, S. 3 ff.; **DEUTSCH**, S. 3, (VVertragsrecht); **van BUHREN**, S. 14

§ 1 Abs.1 VersVG: *"Bei der Schadensversicherung ist der Versicherer verpflichtet, dem Versicherungsnehmer den durch den Eintritt des Versicherungsfalles verursachten Vermögensschaden nach Maßgabe des Vertrages zu ersetzen. Bei der Lebensversicherung und der Unfallversicherung sowie bei den anderen Arten der Personenversicherung ist der Versicherer verpflichtet, nach dem Eintritt des Versicherungsfalles den vereinbarten Betrag an Kapital oder Rente zu zahlen oder die sonst vereinbarte Leistung zu bewirken."*

Wenn man den § 1 Abs.1 VersVG näher untersucht, sieht man, dass die Regelung sich nicht gänzlich auf die Definition des Versicherungsvertrages bezieht. Der Artikel weist auf die verschiedenen Versicherungsarten hin und legt die jeweiligen Verpflichtungen der Vertrags-parteien fest[40]. Gemäß dem 1.Absatz ist der Versicherer bei der Schadensversicherung verpflichtet, dem Versicherten nach dem Eintritt des Versicherungsfalles den entstandenen Schaden im Rahmen des Versicherungsvertrages auszugleichen. Bei der Personen-versicherung ist der Versicherer verpflichtet nach dem Eintritt des Versicherungsfalles den vereinbarten Betrag in bar oder in Raten zu zahlen oder wenn eine andere Leistung vereinbart ist, diese zu erbringen. Im Gegenzug ist der Versicherte verpflichtet, die Prämien zu zahlen.[41]

Der 1. Artikel des deutschen Versicherungsvertragsgesetzes, der die Grundlage des österreichischen Versicherungsvertragsrechts bildet, behandelt direkt die Verpflichtungen im Versicherungsvertrag ohne -im Gegensatz zu dem österreichischen Versicherungs-vertragsrecht- auf den Unterschied zwischen der Schadensversicherung und der Lebens-versicherung einzugehen.

Der erwähnte § 1 Abs.1 VVG lautet: *"Der Versicherer verpflichtet sich mit dem Versicherungsvertrag, ein bestimmtes Risiko des Versicherungsnehmers oder eines Dritten durch eine Leistung abzusichern, die er bei Eintritt des vereinbarten Versicherungsfalles zu erbringen hat. Der Versicherungsnehmer ist verpflichtet, an den Versicherer die vereinbarte Zahlung (Prämie) zu leisten"*

40 **EICHLER**, S. 1.; **HOFMANN**, S. 19 ff.

41 **EICHLER**, S. 1 ff.; **AEBERHARD**, Versicherungslehre, S. 10; **Alfred MANNES**, Grundzüge des Versicherungsrechts, Band IV, Berlin 1923, 47 ff.; **HOFMANN**, S. 30**; KOCH / SCHIRMER / SEIFERT / WAGNER**, S. 260; **SCHIMIKOWSKI**, S. 21, Rdn. 29 ff. und91, Rdn. 146 ff.; **HOFMANN**, Privatversicherungsrecht, 3 ff.

2.1.3. Die Definition des Versicherungsvertrages in der ausländischen Rechtstheorie

Der Sachverhalt in dem TTK, dem VersVG und dem VVG, das die Grundlage bildet, ist oben ausgeführt. Wenn wir von den Definitionen des Versicherungsvertrags in der ausländischen Rechtstheorie sprechen, können wir feststellen, dass sie im Grunde genommen die gleichen Elemente beinhalten, dass es aber auch unterschiedliche Definitionen existieren.

In der französischen Rechtstheorie ist der Versicherungsvertrag *HERMARD* zufolge[42] ;

" ein solcher Vertrag, in dem die eine Partei, nämlich der Versicherte, durch Zahlung einer sogenannten Prämie, die andere Partei, nämlich den Versicherer, der das Risiko den Gesetzen der Statistik entsprechend übernimmt, im Falle des Risikoeintritts verpflichtet, für sich oder für einen Dritten eine Leistung zu erbringen."

In der französischen Rechtstheorie ist die Versicherung *PICARD-BESSON* zufolge[43] ;

" ein Akt, wo die eine Seite, nämlich der Versicherer im Falle der Zahlung eines Entgelts, nämlich der Prämie, dem Versicherungsnehmer im Falle des Risikoeintritts eine Gegenleistung verspricht."

In der belgischen Rechtstheorie ist der Versicherungsvertrag *WALEFFE* zufolge[44] ;

"ein solcher Vertrag, in dem sich der Versicherer, der das Risiko den Gesetzen der Statistik entsprechend übernimmt, im Gegenzug einer sogenannten Prämien-bzw. Beitragszahlung sich verpflichtet, im Falle des Risikoeintritts dem festgelegten Leistungsempfänger eine gewisse Leistung zu erbringen"

In der englischen Rechtstheorie ist der Versicherungsvertrag **BIRDS** zufolge[45];

"ein solcher Vertrag, in dem sich die eine Partei die Vertretung der Interessen der anderen Partei (die des Versicherten) gegen ein Risiko übernimmt, das sich der Kontrolle der Versicherung entzieht und dessen Eintritt in der Zukunft ungewiss ist. Im Gegenzug verpflichtet sich die andere Partei (der Versicherte) dem Versicherer eine bestimmte Summe zu zahlen oder eine

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42 **Joseph HERMARD** , Théorie et Pratique des Assurances Terrestres I, Paris 1924 , S. 73

43 **Maurice PICARD / André BESSON** , Les Assurances Terrestres en Droit Français, I-II , Paris 1965, 1970, S. 1

44 **F. WALEFFE** , Uygulamalı Can Sigortası Hukuku , Ankara 1997, S. 84

45 **BIRDS**, S. 8 und 9; für änliche Definitionen vgl.1906 tarihli Deniz Sigortaları Kanunu (The Marine Insurance Act) Art. 1

andere entsprechende Leistung zu erbringen "

In der amerikanischen Rechtstheorie ist der Versicherungsvertrag *MILLER / HOLLEWEL*[46] zufolge;

"ein Vertrag, in dem sich die eine Vertragspartei (der Versicherer) als Gegenleistung zur einer Beitragszahlung verpflichtet, den Schaden, der den bestimmten Interessen der anderen Partei aufgrund bestimmter Risiken zugefügt wird, auszugleichen "

In der deutschen Rechtstheorie ist der Versicherungsvertrag *EHRENZWEIG* zufolge[47];

" ein Vertrag, bei dem sich der eine Vertragsteil gegen Entgelt (Prämie) entweder;

a- *dazu verpflichtet nach Maßgabe des Vertrages jenen Vermögensschaden zu ersetzen, der durch ein je nach Abrede, Person oder Vermögen betreffendes Schadensereignis etwa verursacht wird; oder*

b- *dazu verpflichte, den im Vertrag festgesetzen Betrag an Kapital oder Rente zu bezahlen oder die sonst vereinbarte Leistung zu bewirken, die je nach Abrede entweder*

b.1. nach Eintritt eines zumindest dem Zeitpunkt nach ungewissen Personen Schadensereignisses (Tod, Unfall etc.) oder eines anderen vom Vertragsverkehr bestimmten Lebensereignisses (z.B. Verehelichung, Ehescheidung, Kindesgeburt etc.) oder

b.2. schlechtweg in einem bestimmten Zeitpunkt, vorausgesetzt dass sich aus einer Vertragsbestimmung, die an Leben oder Sterben einer Person anknüpft, die Ungewissheit des wirtschaftlichen Enderfolges für beide Teile ergibt."

In der deutschen Rechtstheorie ist der Versicherungsvertrag *EHRENBERG* zufolge[48];

"Ein selbstständiger Vertrag, durch welchen sich eine Partei durch Entgelt verpflichtet im Falle des Eintrittes eines im Vertrag bestimmten überhaupt oder der Zeit oder der Wirkung nach ungewissen Ereignisses entweder den dadurch verursachten Schaden zu ersetzen oder eine vereinbarte Summe

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46 **Roger Leroy MILLER / William Eric HOLLEWELL**, Business Law, Text and Exercises, Mason-OH (USA) 2011, S. 471 ff.

47 **Albert EHRENZWEIG**, Deutsches (österreichisches) Versicherungsvertragsrecht, Wien 1952, S. 60

48 **Victor EHRENBERG**, in Versicherungslexikon (Hrsg. von Alfred Mannes), Berlin 1924, S. 1380

oder Rente zu zahlen, ist ein Versicherungsvertrag, wenn jede Partei derartige Verträge in planmäßigem Betrieb abschließt."

In der deutschen Rechtstheorie ist der Versicherungsvertrag *BRUCK* zufolge[49];

"Ein entgeltlicher Vertrag, kraft dessen ein Teil (Versicherer) selbständig eine Gefahr trägt und infolgedessen zur Deckung eines ungewissen Bedarfs des anderen Teils (Versicherungsnehmer) bei Eintritt eines bestimmten Ereignisses oder für einen Zeitpunkt eine geldliche oder Geldeswertleistung zusichert und bei dem die Leistung mindestens des einen Teils nach Höhe und/oder Zeitpunkt von ungewissen Umständen abhängt."

In der deutschen Rechtstheorie schreibt *LEIPNIZ* folgendes über den Versicherungsvertrag[50];

"Durch diesen Vertrag übernimmt der Versicherer in der Weise gegen Entgelt eine bestimmte fremde Gefahr, dass er für den Eintritt des betreffenden Unglücks oder Ereignisses die Zahlung einer bestimmten oder bestimmbaren Geldsumme verspricht."

In der deutschen Rechtstheorie schreibt *HOFMANN* folgendes über den Versicherungsvertrag[51];

"Ein Versicherungvertrag liegt vor, wenn durch ihn die dem einzelnen Versicherungsnehmer drohende Gefahr auf planmäßiger Grundlage in eine rechtliche Gefahrengemeinschaft von gleichartig Gefährdeten einbezogen wird und wenn dem Versicherungsnehmer im Falle der Gerfahrverwirklichung ein Rechtsanspruch gegen den Versicherer auf Deckung seines Bedarf zusteht."

In der schweizerischen Rechtstheorie schreibt *KOENIG*folgendes über den Versicherungsvertrag [52]

"er ist der Vertrag, bei welchem die eine Partei der anderen gegen Entgelt (Prämie) für den Fall der Vernichtung, Verletzung, oder Schädigung eines Gegenstandes (Sache, Person oder Vermögen) durch ein ungewisses zukünftiges Ereignis (Gefahr) eine Vermögensleistung (Ersatz von Schäden oder feste Summe) verspricht."

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49 **Ernst BRUCK**, Das Privatversicherungsrecht, Mannheim 1930, S. 57

50 **GOTTFRIED WILHELM LEIBNIZ**, Hauptschriften zur Versicherungs- und Finanzmathematik, (Hrsg. Eberhard Knobloch) , Berlin 2000, 679

51 **HOFMANN**, Privatversicherungsrecht, 4

52 **KOENIG**, Versicherungsrecht, Band II, 34

In der deutschen Rechtstheorie schreibt *MÖLLER* folgendes über den Versicherungsvertrag [53]

"Der Versicherungsvertrag ist ein schuldrechtlicher gegenseitiger Vertrag, bei welchem der Versicherer Versicherungsschutz (Gefahrtragung), der Versicherungsnehmer Prämienzahlung schuldet."

Bei näherer Betrachtung der türkischen, der östereichischen und der ausländischen Theorie kann man feststellen, dass sie -abgesehen von einigen Unterschieden in der Definition- auf der gleichen Grundlage beruhen.

Wenn wir alle Definitionen über den Versicherungsvertrag in der Theorie berücksichtigen, können wir sagen:Der Versicherungsvertrag ist ein Vertrag, in dem sich der Versicherer als Gegenleistung zu einer Praemienzahlung,(die von dem Versicherten geleistet wird) verpflichtet, im Falle der Risikoverwirklichung, die den materiell messbaren Interessen des Versicherten schadet, diesen Schaden, der aufgrund der Risikoverwirklichung entstanden ist, auszugleichen. Aus dieser Definition geht hervor, dass der Versicherungsvertrag ein synallagmatischer Vertrag ist, in dem beide Seiten Rechte und Pflichten haben. Mit dem Abschluss eines Versicherungsvertrages muss der Versicherer Prämien zahlen und der Versicherer ein Risiko übernehmen und im Falle einer Risikoverwirklichung den entstandenen Schaden ausgleichen. Nach dem Abschluss des Versicherungsvertrages besteht also zwischen den Parteien ein solches Rechtsverhältnis.

3. Anordnung des Versicherungsrechts im türkischen Handelsgesetzbuch (TTK)

Das türkische Handelsgesetz mit der Nr. 6762, das am 29.06.1956 erlassen wurde, war mit einigen Modifizierungen bis zum 01.07.2012 gültig. Das erwähnte Gesetz wurde am 01.07.2012 durch das „türkische Handelsgesetz" mit der Nr. 6102 ersetzt, das am 13.01.2011 beschlossen und am 14.02.2011 in dem staatlichen Anzeiger mit der Nr. 27846 veröffentlicht wurde. Die Änderungen an dem Handelsgesetz, das über mehrere Jahre gültig war, unterscheiden sich von den Modifizierungen in der Vergangenheit erheblich. Das türkische Handelsrecht, das aus dem Gesetz mit der Nr. 6102 entstanden ist, beinhaltet radikale Änderungen, die sowohl die Artikel-Nr. als auch den Inhalt der Artikel und die Rechtssprache des Gesetzgebers betrifft. Mit dem Gesetz Nr. 6102 wurden auch in dem Bereich des Versicherungsrechts, das naturgemäß ein Teil des Handelsgesetzes bildet, neue Regelungen und Systematisierungen eingeführt, die die Beseitigung der langwierigen Probleme in diesem Bereich bezweckten.

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[53] **MÖLLER**, Versicherungsvertragsrecht, 18

Um diese Unterschiede zu verdeutlichen, werden hier sowohl die Regelungen in dem türkischen Handelsgesetz Nr. 6762 als auch die in dem gültigen türkischen Handelsgesetz Nr. 6102 behandelt.

Wenn man in diesem Zusammenhang das Handelsgesetz Nr. 6102 betrachtet, sieht man, dass sich die Regelungen, die das Versicherungsrecht betreffen, in dem 6.Buch befinden. Das sechste Gesetzbuch über das Handelsrecht besteht aus zwei Teilen. In dem ersten Teil werden allgemeine Bestimmungen, die das Versicherungsrecht (den Versicherungsvertrag) betreffen, behandelt; in dem zweiten Teil befinden sich die besonderen Regelungen, die die Versicherungsarten betreffen. Wir können die Regelungen in dem Gesetzbuch in Bezug auf das Versicherungsrecht wie folgt schematisieren:

Sechstes Buch: Versicherungsrecht

Erster Teil
Allgemeine Bestimmungen

In diesem Teil befinden sich allgemeine Bestimmungen wie die Definition des Versicherungsvertrages (Art.1401)[54], die Definition der gegenseitigen Versicherung (Art.1402)[55], der Rückversicherung (Art.1403)[56], der ungültigen Versicherung (Art.1404)[57] etc. Im Anschluss werden Bestimmungen behandelt, die den Versicherungsvertrag betreffen. Diese sind wichtige Bestimmungen über die Schweigepflicht (Art..1405)[58], die Vertretung (Art..1406)[59], das Fehlen von Versicherungsinteressen (Art..1408)[60], Inhalt und Dauer der Versicherung (Art.1409-1410)[61], Kündigung und Widerruf (Art.1413-1415)[62], Insolvenz desVersicherers (Art..1418)[63], Rückerstattung der Prämien (Art.1419)[64] und Verjährung (Art.1420)[65]. Ein anderer wichtiger Punkt betrifft die Obligationen und die Pflichten der Parteien (Art.1421-1449)[66].Dies wird von dem Gesetzgeber ausführlich behandelt und die Obligationen und Pflichten werden im einzelnen unter die Lupe genommen. In diesem Teil werden zuletzt der Geltungsbereich

54 Art. 1263 des abgeschafften TTK mit der Nr. 6762
55 Art. 1263 des abgeschafften TTK Nr.6762
56 Art. 1276 des abgeschafften TTK Nr.6762
57 Art. 1277 des abgeschafften TTK Nr.6762
58 Eine entsprechende Bestimmung existiert im abgeschafften TTK Nr. 6762 nicht.
59 Art.1270 des abgeschafften TTK Nr.6762
60 Art. 1264 Abs. 2 des abgeschafften TTK Nr.6762
61 Art. 1281 und 1282 des abgeschafften TTK Nr. 6762
62 In dem Gesetz Nr. 6102 befinden sich keine Bestimmungen, die den Art. 1302, 1457, 1413 und 1414 des abgeschafften TTK Nr. 6762 entsprechen.
63 Art. 1302 und 1457 des abgeschafften TTK Nr.6762
64 Art. 1288 Abs. 2 des abgeschafften TTK Nr.6762
65 Art. 1268 des abgeschafften TTK Nr.6762
66 Das abgeschaffene TTK mit der Nr. 6762 beinhaltet die Art. von 1265 bis 1378. Ein dem Art. 1449 entsprechende Regelung befindet sich in dem Gesetz Nr.6762 nicht.

der Bestimmungen (Art..1450)[67] und die Schutzbestimmungen behandelt. (Art.1452)[68] .

Zweiter Teil
Besondere Bestimmungen bezüglich der Versicherungsarten

Die Gliederung in dem zweiten Teil unterscheidet sich von der im ersten Teil. Der zweite Abschnitt besteht wiederum aus zwei Teilen. Diese sind:

Erster Teil
Schadensversicherungen

In Bezug auf die Schadensversicherungen wurden vordergründig die Sachversicherungen geregelt (md.1453-1472). Unter dem Begriff Sachversicherung wurde hier untersucht, was eine Sachversicherung ist und was man unter dem Begriff „Interesse" verstehen muss und ferner wurden die Begriffe Versicherungswert (Art.1460)[69], Versicherungssumme (Art.1461)[70], Unterversicherung (Art.1462)[71], Überversicherung (Art.1463)[72], Taxe vesicherung (Art..1464)[73], gemeinsame Versicherung (Art..1466)[74], Doppelversicherung (Art..1467)[75], Teilversicherung (Art.1468)[76] definiert. Im Anschluss wurde die Nachfolgeregelung behandelt und somit das Kapitel der Sachversicherung, der ersten Art der Schadensversicherungen abgeschlossen.

Zum zweiten wurde unter dem Begriff Schadensversicherungen die Haftpflichtversicherung behandelt (Art.1473-1485)[77]. Hier hat der Gesetzgeber die Begriffe wie Gegenstand des Haftpflichtversicherungsvertrages, Versicherungsschutz, Meldepflicht, vorsätzliches Handeln, direktes Klagerecht, Legalzession (Art.1481), Verjährung (Art.1482) unter die Lupe genommen und ferner die Pflichthaftpflichtversicherungen geregelt (Art.1483-1484). Zum Schluss wurden die Bestimmungen bezüglich der Haftpflichtversicherungen und die Schutzbestimmungen behandelt.

Zweiter Teil
Lebensversicherungen

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67 In dem abgeschafften TTK Nr.6762 existiert keine entsprechende Bestimmung.
68 Art.1264 Abs. 2,3,4 ve 5 des abgeschafften TTK Nr.6762
69 Art. 1345 des abgeschafften TTK Nr.6762
70 Art. 1299, 1307 Abs. 2, 1345 Abs. 2 des abgeschafften TTK Nr.6762
71 Art. 1288 des abgeschafften TTK Nr.6762
72 Art. 1283, 1346 Abs. 3 des abgeschafften TTK Nr.6762
73 Art. 1283, 1350 des abgeschafften TTK Nr.6762
74 Art. 1285 des abgeschafften TTK Nr. 6762
75 Art. 1286 des abgeschafften TTK Nr.6762
76 Art. 1287 des abgeschafften TTK Nr. 6762
77 Da in dem abgeschafften TTK Nr.6762 keine Bestimmungen über Haftpflichtversicherungen enthalten sind, existieren auch keine entsprechen Artikel.

Unter dem Begriff Lebensschutzversicherungen hat der Gesetzgeber zunächst die Lebensversicherungen (Art.1487-1506)[78] behandelt und in diesem Zusammenhang eine Reihe von Regelungen in Bezug auf die Definition der Lebensversicherung, die versicherte Person, den Versicherungswert, den Begünstigten (die Bestimmung, die Ernennung etc.), die Kündigung, die Fortführung der Versicherung ohne Beitragszahlung und die Insolvenz des Versicherers getroffen.

Zum zweiten wurden in diesem Teil die Unfallversicherungen behandelt (Art.1507-1510)[79].

Hier wurden allgemeine Informationen erteilt und die Bestimmungen bezüglich der Unfallversicherungen und der versicherten Personen festgelegt.

Unter dem letzten Kapitel dieses Abschnittes wurde die Krankenversicherung behandelt. (Art.1511-1520)[80].Hier wurden die Krankenversicherungsdeckung, der Versicherungswert, der Begünstigte, die weiteren Bestimmungen und die Schutzbestimmungen geregelt.

Wenn man das oben in Grundzügen beschriebene System mit dem alten System des Handelsgesetzes mit der Nr.6762 vergleicht, sieht man, dass das neue Handelsgesetz mit der Nr.6102 die Regelung des Versicherungssystems im Vergleich zu früher verbessert hat und dass man die früheren Fehler in Bezug auf den Inhalten der verschiedenartigen Versicherungen nicht wiederholt hat. Ferner hat man versucht, mit diesem neuen System die Handhabung der Gesetze dem System des Deutschen Versicherungsgesetzes anzupassen, das die Grundlage bildet.

4. Anordnung desVersicherungsrechts im österreichischen Versicherungsvertragsgesetz (VersVG)

Wenn man das österreichische Versicherungsvertragsrecht mit dem türkischen vergleicht, ist es offenkundig, dass die beiden im Grunde ähnlich sind. Der Grund hierfür ist die Tatsache, dass die Quelle der Versicherungsgesetze der beiden Länder das deutsche Versicherungsvertragsrecht (VVG)[81] ist. Wenn auch die Ähnlichkeiten, über die wir hier sprechen die gleichen sind, liegt es in der Natur der Sache, dass es auch unterschiedliche Bestimmungen existieren. Wir können feststellen, dass der vordergründige Unterschied zwischen dem türkischen und dem österreichischen Versicherungsrecht die Tatsache ist,

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78 Da das abgeschaffte TTK mit der Nr.6762 nur die Art. von 1321 bis 1330 beinhaltet, existieren hier keine Bestimmungen, die den Art. 1494 bis 1499 entsprechen.

79 Das abgeschaffte TTK mit der Nr. 6762 beinhaltet die Art. 1331 bis 1337

80 Eine entsprechende Bestimmung existiert in dem abgeschafften TTK Nr.6762 nicht. Lediglich Art. 1334 Abs. 2 und Art. 1335 des abgeschafften TTK Nr.6762 entsprechen dem Art. 1509.

81 VVG vom 23. November 2007 (BGBl I S. 2631) zuletzt geändert durch Art. 3 Gesetz vom 27.7.2011 (BGBl I S. 1600)

dass in Österreich das österreichische Versicherungsrecht aus dem Jahre 1958 praktiziert wird. Wie wir nämlich im dem vorangegangenen Kapitel erwähnt haben, existiert im türkischen Rechtsystem keine separaten gesetzlichen Regelungen bezüglich des Versicherungsrechts, diese werden im sechsten Buch des türkischen Handelsgesetzes erfasst. Obwohl das österreichische Versicherungsvertragsgesetz wie ein individuelles Gesetz aussieht, ist es offenkundig, dass es nicht alle Bestimmungen des Versicherungsrechts beinhaltet. In der Tat wird im § 186 des Gesetzes darauf hingewiesen, dass dieses Gesetz die Regelungen bezüglich der See- bzw. der Rückversicherungen nicht eingeschließt[82]. Die Bestimmungen bezüglich der Seeversicherungen werden nämlich in dem österreichischen Handelsgesetz[83] geregelt. Allerdings existieren keine gesetzlichen Regelungen in Bezug auf die Rückversicherungen.

Wenn man das österreichische Versicherungsvertragsrecht aus dem Jahr 1958 näher betrachtet, sieht man, dass es aus sechs Abschnitten besteht, die insgesamt 192 Artikel beinhalten. Im folgenden wollen wir das Rechtssystem kurz schematisieren:

Erster Abschnitt
Vorschriften für sämtliche Versicherungszweige

In diesem Abschnitt, der die Art. 1-48 des VersVG beinhaltet, werden allgemeine Informationen erteilt.Die gemeinen Bestimmungen, die hier behandelt werden, könnten für alle Versicherungsarten zutreffen.Im ersten Teil dieses Abschnittes werden die Allgemeinen Vorschriften (§§ 1-15 VersVG) genannt, im zweiten Teil werden die Themen Anzeigepflicht und Erhöhung der Gefahr (§§ 16-34a) behandelt.Die Regelungen im dritten Teil dieses Abschnittes betreffen die Prämie (§§ 35-42) und die im letzten Teil die Versicherungsagenten (§§ 43-48) [84].

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[82] Für ähnliche Handhabungen vgl. §186 dVVG 1908. (Seeversicherung ist in den §§ 778-900, 905 HGB geregelt und gleiches gilt für die Rückversicherung); **DÖRFEL**, S. 36; **SCHIMIKOWSKI**, S. 7, Rdn. 10; **Gustav Emil KIEFHABER**, Ratgeber in Versicherungsfragen, Sonderheft, Band 3 von Das Versicherungsarchiv, Wien 1937, 27; **W. KOENIG**, Versicherungsrecht, Band II Leitfäden für das Versicherungswesen, Bern 1971, S. 30-31; **Walter ROHRBECK**, Deutsche Versicherungskunde Teil I Allgemeine Versicherungskunde, Berlin 1939, S. 70.

[83] §§ 778 ff. HGB

[84] In dem VVG vom 23.November 2007 sieht es ganz anders aus. In dem Abschnitt Allgemeine Vorschriften werden vordergründig die gemeinen Bestimmungen genannt (§§ 1-18 VVG), im Anschluss die Meldepflicht, Erhöhung der Gefahr und andere Bestimmungen über gegenseitige Verpflichtungen (§§ 19-32), dann die Prämie (§§ 33-42), und die Versicherung zugunsten Dritter (§§ 43-48), der Gesetzgeber legte den ersten Teil der allgemeinen Bestimmungen fest, indem zunächst der Inhalt des Versicherungsvertrages (§§ 49-52), die laufende Versicherung (§§ 53-58), die Versicherungsagenten, die Versicherungsberater (§§ 59-73) behandelt wurden.

Zweiter Abschnitt
Schadensversicherung[85]

Der zweite Abschnitt beinhaltet die Regelungen bezüglich der Schadensversicherungen. Wenn man diesen Abschnitt des Gesetzes mit den anderen vergleicht, dann sieht man, dass dieser ein sehr umfangreicher Abschnitt ist. In der Tat wurden die diesbezüglichen Regelungen in den §§ 49 bis 158p des VersVG genannt. Die Tatsache, dass dieser Abschnitt so viele Bestimmungen enthält, ist ein Beweis dafür, dass der Gesetzgeber die Schadensversicherungen in einem großen Rahmen behandeln will.

Die Schadensversicherungen sind in sieben Kapitel gegliedert,von denen das erste die allgemeinen Regelungen in Bezug auf die Schadensversicherungen, nämlich die Vorschriften für die gesamte Schadensversicherung (§§ 49-80)[86], das zweite die besonderen Regelungen bezüglich der Feuerversicherungen (§§ 81-108)[87]das dritte die Regulierung derHagelversicherung (§§ 109-115)[88],das vierte die Versicherung von Tieren (§§ 116-128[89]),das fünfte die Transportversicherungen (§§ 129-148)[90], das sechste die Haftpflichtversicherungen (§§149-158i)[91] und zuletzt das siebte die Rechtsschutzversicherung (§§ 158j-158p)[92]beinhaltet.

Wenn man die Bestimmungen §§ 49-80 des VersVG untersucht, die allgemeine Regelungen bezüglich der Schadensversicherungen enthalten, dann sieht man, dass die Regelungen in diesem Abschnitt nur für aktive Versicherungsarten anwendbar sind. In dem zweiten und siebten Kapitel der Schadensversicherungen wurden wiederum spezifische Versicherungsarten einzeln behandelt und entsprechende Regelungen getroffen.

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85 2007 wurde die Systematik der Regelung der Bestimmungen im deutschen Versicherungsvertragsrecht grundlegend geändert und ähnelt nicht mehr dem alten VersVG. Vor der Modifizierung waren sogar die Art. Nr. ähnlich.

86 Schadensversicherung-Allgemeine Vorschriften vgl. §§ 74-87 VVG

87 Im VVG existiert kein Abschnitt, der dem Kapitel Feuerversicherungen im VersVG entspricht.
Die Gebäudefeuerversicherungen wurden lediglich in dem 4. Teil des Abschnitts "Versicherungsarten" behandelt. §§ 142-149 VVG.

88 Im VVG existiert keine Regelung, die dem Abschnitt Hagelversicherung im VersVG entspricht.

89 Im VVG existiert kein Abschnitt, der der im VerVG geregelten Versicherung der Tiere entspricht.

90 Die Transportversicherungen werden im VVG unter einem getrennten Kapitel, zwar dem "Kapitel 3" geregelt. vgl.§§ 130-141

91 Im VVG werden die Haftpflichtversicherungen in dem ersten Teil „Haftpflichtversicherung" des 2. Abschnitts "Einzelne Versicherungszweige" geregelt. Dieser Abschnitt besteht in der Gesetzgebung aus zwei Teilen. Der erste Teil ist "die allgemeinen Bestimmungen" (§§ 100-112), der zweite Teil "obligatorische Versicherungen" (§§ 113-124).

92 Im VVG hingegen wurde die Rechtschutzversicherung in dem zweiten Teil des zweiten Abschnitts behandelt und in den §§ 125-129 geregelt.

Dritter Abschnitt
Lebensversicherung

Die Regelungen in Bezug auf die Lebensversicherungen werden in den §§ 159-178 des VersVG behandelt, und die spezifischen Vorschriften für die Lebensversicherung werden in diesem Kapitel geordnet[93].

Vierter Abschnitt
Krankenversicherung

Auch die Regelungen bezüglich der Krankenversicherung wurden von dem Gesetzgeber getrennt und zwar in den §§ 178a-178n des VersVG behandelt.[94]

Fünfter Abschnitt
Unfallversicherung

Der fünfte Abschnitt des österreichischen Versicherungsvertragsgesetzes bezieht sich auf die Unfallversicherung und wird durch die §§ 179-185 geregelt.[95].

Sechtster Abschnitt
Schlußfolgerungen

Der letzte Abschnitt des Gesetzes (§§ 186-192) bezieht sich auf die Schlussbestimmungen[96].

Bezüglich der in dem österreichischen Versicherungsvertragsgesetz nicht geregelten Versicherungsarten, –außer den o.g.- die die Schadensversicherung betreffen wie z.B. Sturm- und Wasserschäden könnten die Bestimmungen der §§ 1-48 VersVG und §§ 49-80 VersVG angewandt werden.

Auch in dem Abschnitt über die Personenversicherungen werden wesentlich die Bestimmungen des §§ 1-48 des VersVG angewandt, diese könnte man auch für die Fälle in dem dritten, vierten und fünften Abschnitt gelten lassen.

In Bezug auf die gesetzlich nicht geregelten Fälle, die die Personenversicherungen betreffen, können die Art. 1-48 des VersVG angewandt werden.

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93 Die Lebensversicherungen wurden im VVG im 5.Teil des 2. Abschnitts "Versicherungsarten" geregelt, vgl. §§ 150-171 VVG

94 Die Krankenversicherungen wurden in dem 8.Teil des 2.Abschnitts geregelt. vgl. §§ 192-208 VVG. Die Krankenversicherung wurde zum ersten Mal 1994 durch die Änderung des VersRÄG als eine gesetzliche Bestimmung in dem VersVG verankert. Für ausführliche Informationen vgl. **Attila FENYVES / Franz KRONSTEINER / Martin SCHAUER**, (Hrsg. Atilla Fenyves), Die Novellen '92, '94 und '96 Kommentar, S. 249 ff.

95 Der 7.Teil unter dem Titel "Versicherungsarten"des zweiten Abschnitts "Unfallversicherungen" im VVG vgl. §§ 178-191 VVG

96 §§ 209-216 VVG

Falls der Versicherungsbereich wie eine Personenversicherung aussieht, obwohl es sich um eine Schadensversicherung handelt, -das beste Beispiel hierfür wäre die Bestattungskostenversicherung- könnten die §§ 49-80 des VersVG eine Anwendung finden.

Wiederum kommt die Nachfolgeregelung, die der Gesetzgeber im §§ 67 VersVG behandelt hat, nur für die Schadensversicherungen in Frage.

FAZIT

Das Türkische Handelsgesetzbuch (TTK) in alter Fassung ist seit vielen Jahren in Kraft und wurde durch das Gesetz mit Nr.6102 aufgehoben. Während erhebliche Änderungen im gesamten türkischen Handelsgesetzbuch mittels neuer Gesetzesregelung vorgenommen wurden, zeigt sich, dass wesentliche Änderungen besonders im sechsten Buch des Gesetzes durchgeführt wurden.

Bei der Einführung des Gesetzes mit Nr. 6102 wurde vom deutschen Versicherungsvertragsgesetz (VVG) inspiriert. Das deutsche Versicherungsvertragsgesetz, das die Grundlage für das türkische Handelsgesetzbuch bildet, hat sich jedoch im Jahr 2008 erheblich verändert. Dieses Gesetz ist so geändert, dass sogar die Artikelnummern und Titel überarbeitet wurden. Das türkische Handelsgesetzbuch (TTK) hat die alte Fassung des Versicherungsvertragsgesetzes (VVG) mit der Novelle 2011 übernommen und sich für das österreichische Versicherungsvertragsrecht entschieden, das auch vom deutschen Versicherungsvertragsgesetz als Referenzregulierung betroffen ist. Dies ist eine indirekte Entscheidung. Das österreichische Versicherungsvertragsgesetz (VersVG-1958) enthält ähnliche Regelungen wie die Vorgängerversion des deutschen Versicherungsvertragsgesetzes (VVG) vor der Änderung von 2008. Diese Ähnlichkeit kann so begründet werden, dass die Paragraphen des deutschen Versicherungsvertragsgesetzes (VVG) in alter Fassung und des österreichischen Versicherungsvertragsgesetzes (VersVG) die gleichen Texte und Titel enthalten, wobei die gleichen Bestimmungen mit den gleichen Artikelnummern behandelt werden. In dieser Hinsicht zeigt sich, dass die Regelungen des gültigen türkischen Handelsgesetzbuches (TTK) die Ähnlichkeiten mit den des österreichischen Versicherungs-vertragsgesetzes (VersVG) aufweisen, wobei das österreichische Versicherungs-vertragsgesetz (VersVG) als Referenzregulierung für das gültige türkische Handelsgesetzbuch betrachtet werden kann, obwohl das türkische Handelsgesetzbuch mit Nr. 6102 (TTK) die Vorschriften des deutschen Versicherungsvertragsgesetzes (VVG) in alter Fassung als Referenzbeispiel genommen hat.

In dieser Arbeit werden die Definition des Versicherungsvertrags in den Rechtslehren in der Türkei, Österreich, Deutschland und der Schweiz sowie die Regelung der Bestimmungen des Versicherungsrechts im türkischen

Handelsgesetzbuch (TTK) sowie österreichischen Versicherungsvertragsgesetz (VersVG) hinsichtlich der ähnlichen und unterschiedlichen Aspekte untersucht.

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GELTUNGSKONTROLLE DER ERSTRECKUNGSKLAUSELN IN KREDITBÜRGSCHAF-TEN NACH DEM ÖSTERREICHISCHEN BÜRGERLICHEN RECHT

Avusturya Medeni Hukuku Uyarınca Kredi Kefaletlerinde Yer Alan Genişletme Şartlarının Yürürlük Denetimi

Dr. Ahmet Hakan DAĞDELEN*

Zusammenfassung

Die vom Gläubiger vorformulierten Bürgschaftsverträge in der Kreditpraxis enthalten oft eine Erstreckungsklausel, welche die Haftung des Bürgen auf anlassferne Kreditverbindlichkeiten des Hauptschuldners erstreckt. Ob eine Klausel dieser Art ein Vertragsbestandteil wird, wird anhand unterschiedlicher Aspekte geprüft. Der vorliegende Beitrag befasst sich nur mit der Geltungskontrolle solcher Klauseln und versucht, die rechtliche Lage und den Meinungsstand dazu in Österreich darzulegen.

Schlagwörter: Geltungskontrolle, allgemeine Geschäftsbedingungen, Erstreckungsklausel, Bürgschaft, Kreditsicherungsrecht, Österreich

Özet

Uygulamada, bir kredi ilişkisinden doğan borçları teminat altına almak amacıyla akdedilen alacaklı tarafından önceden hazırlanmış kefalet sözleşmelerinde ekseriyetle bir genişletme şartı bulunmaktadır. Bu şart ile kefilin sorumluluğunun kapsamı, asıl borçlunun kefalet sözleşmesinin akdedilmesine vesile olan kredi borcunu aşacak şekilde genişletilmektedir. Bu tip bir şartın sözleşmenin bir parçası mı olacağı sorusu, çeşitli açılardan değerlendirilmektedir. Bu çalışma, sadece bu tip bir şartın tabi olacağı yürürlük denetimi ile ilgilenmekte ve buna ilişkin Avusturya'daki yasal durum ile öğretideki görüşleri sunmayı amaçlamaktadır.

Anahtar kelimeler: yürürlük denetimi, genel işlem şartları/koşulları, genişletme şartı/koşulu, kefalet, Kredi Teminatı Hukuku, Avusturya

A. Einführung

In der Kreditpraxis ist der Umstand, dass ein Vertrag unter allgemeinen Geschäftsbedingungen (im Folgenden: AGB) abgeschlossen wird, keine Seltenheit. Auch die Kreditbürgschaften stellen zumeist ein Beispiel für diesen Umstand dar. Die Besonderheit eines Vertragsabschlusses solcher Art liegt in Vertragsbedingungen, die von einer Partei der anderen Partei einseitig gestellt, nicht im Einzelnen ausgehandelt und potenziell für eine Vielzahl von Verträgen vorformuliert werden[1]. Die AGB ermöglichen einerseits kostengünstigen und schnellen Vertragsabschluss. Andererseits können sie erhebliche Nachteile für jene Vertragspartei mit sich bringen, die sich Vertragsbedingungen solcher Art unterwirft, da der Klauselverwender in der Lage ist, den Vertragsinhalt im eigenen Interesse beliebig zu gestalten. Aus diesem Grund sieht österreichsicher

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1 **Christiane Wendehorst/Brigitta Zöchling-Jud**, Privatrecht Einführung in die Rechtswissenschaften und ihre Methoden Teil II, 6. Auflage, Wien, Manz, 2016, s. 28.

Gesetzgeber eine gesonderte Kontrolle für die Klauseln in AGB vor und die Geltungskontrolle ist einer der Bestandteile dieser Kontrolle.

Im Zusammenhang mit vorformulierten nachteiligen Klauseln stellt ein Problem die Erstreckung der Haftung des Bürgen über die Anlasskreditverbindlichkeit des Hauptschuldners hinaus dar. Dieses Problem kann am folgenden simplen Fall dargelegt werden: Der Kreditgeber verlangt einen Bürgen, bevor er dem Kreditgeber einen neuen Kredit gewährt. Dieses Kreditverhältnis ist nämlich der Anlass, weshalb ein Dritter einen Bürgschaftsvertrag mit dem Kreditgeber abschließt. Allerdings nutzt der Kreditgeber die Gelegenheit und nimmt eine Klausel in den Vertrag auf, womit er die Haftung des Bürgen auf jene Kredite erstreckt, die dem Kreditnehmer bereits gewährt sind und/oder künftig gewährt werden. Der Begriff „*Erstreckungsklausel*" bezeichnet solche Klauseln und die folgende Formulierung ist ein Beispiel für eine Klausel solcher Art[2]:

> *„… zur Sicherstellung aller Forderungen und Ansprüche aus Haupt- und Nebenverbindlichkeiten, die aus der Inanspruchnahme dieses Kredites, sowie aus allen darüber hinaus mit dem Kreditnehmer und dessen Rechtsnachfolgern abgeschlossenen und künftig abzuschließenden Kreditverträgen erwachsen sind oder noch erwachsen werden, übernehmen wir die Haftung als Bürge."*

Für die Frage, ob eine in den Vertragstext aufgenommene Erstreckungsklausel für den Bürgen verbindlich wird, spielen auch andere Aspekte eine entscheidende Rolle. Aus diesem Grund ist es nicht garantiert, dass eine Erstreckungsklausel Vertragsbestandteil wird, wenn sie nicht an der Geltungskontrolle scheitert. So etwa sind Inhaltskontrolle, Transparenzgebot und Bestimmtheitsgebot in diesem Zusammenhang zu nennen. Allerdings reist die vorliegende Arbeit diese Aspekte nicht an und beschränkt sein Augenmerk nur auf die Geltungskontrolle.

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[2] **Susanne Haas**, „Stichwort AGB-Kontrolle: Formularmäßige Erstreckungsklauseln auf dem Prüfstand", Juristische Ausbildung und Praxisvorbereitung (JAP), 2003/2004, s. 75, 76; **Elisabeth Böhler** in **Peter Apathy/Gerth Iro/Helmut Koziol (Herausgeber)**, Österreichisches Bankvertragsrecht Band VIII: Kreditsicherheiten Teil I, 2. Auflage, Wien, Verlag Österreich, 2012, Rz 1/160; **Peter Bydlinski**, „Wirksamkeit, Reichweite und Beendigung der Bürgenhaftung: Neue Entwicklungen in Österreich?", Österreichisches Bank Archiv (ÖBA) 1999, s. 94; **Peter Bydlinski**, Die Kreditbürgschaft im Spiegel von aktueller Judikatur und Formularpraxis, 2. Auflage, Wien, Springer, 2003, s. 43; **Thomas Rabl**, Die Bürgschaft, Wien, Manz, 2000, s. 40, 48; **Michael Gruber**, „Umfang der Bürgenhaftung: Erstreckungsklausel und Globalbürgschaft", Österreichisches Bank Archiv (ÖBA) 2002, s. 885; **Peter Mader/Wolfgang Faber** in **Michael Schwimann (Herausgeber)**, ABGB Praxiskommentar Band VI, 3. Auflage, Österreich, LexisNexis, 2006, § 1353 Rz 14.

B. Geltungskontrolle

1. Gesetzliche Grundlage

§ 864a ABGB lautet:

> *„Bestimmungen ungewöhnlichen Inhaltes in Allgemeinen Geschäftsbedingungen oder Vertragsformblätter, die ein Vertragsteil verwendet hat, werden nicht Vertragsbestandteil, wenn sie dem anderen Teil nachteilig sind und er mit ihnen auch nach den Umständen, vor allem nach dem äußeren Erscheinungsbild der Urkunde, nicht zu rechnen brauchte; es sei denn, der eine Vertragsteil hat den anderen besonders darauf hingewiesen."*

Die in § 864a ABGB vorgesehene Kontrolle enthält zwei Hauptkriterien: Nachteiligkeit und Ungewöhnlichkeit. Eine Erstreckungsklausel, die diese beiden Kriterien erfüllt, ist für den „Unterworfenen" unverbindlich.

2. Nachteiligkeit

Für den Beurteilungsmaßstab für die Frage der Nachteiligkeit einer Klausel ist der Sicht einer redlichen Vertragspartei im Zeitpunkt des Vertragsabschlusses bestimmend. Hierzu sind zwei Kriterien ausschlaggebend: Das Leitbild des ABGB und die individuelle Rechtsstellung des Unterworfenen ohne die jeweilige Klausel[3]. Demzufolge führt eine Abweichung von einer von diesen Kriterien zu Lasten des Vertragspartners des „Verwenders" zu der Annahme, dass die Klausel nachteilig ist. In der Lehre werden die Erstreckungsklauseln mit der Begründung, dass sie die Haftung des Bürgen auf anlassferne Verbindlichkeiten des Hauptschuldners erstrecken, als nachteilig angesehen[4].

3. Ungewöhnlichkeit

Die Bestimmungen ungewöhnlichen Inhalts in AGB werden nicht Vertragsbestandteil, wenn der Unterworfene nicht nach den Umständen mit ihr zu rechnen brauchte und er auf sie nicht besonders hingewiesen wurde[5]. Bei der Beurteilung dieses Kriteriums berücksichtigt man zum einen die konkreten Umstände des Einzelfalles und zum anderen den Inhalt der Klausel.

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3 **Haas**, s. 79; **Bydlinski**, Wirksamkeit, s. 99; **Gruber**, s. 890; **Andreas Riedler** in **Michael Schwimann/Georg Kodek (Herausgeber)**, ABGB Praxiskommentar Band IV, 4. Auflage, Österreich, LexisNexis, 2014, § 864a Rz 41.

4 **Haas**, s. 79; **Bydlinski**, Wirksamkeit, s. 99.

5 **Helmut Koziol-Rudolf Welser**, Bürgerliches Recht Band I, 13. Auflage, Wien, Manz, 2006, s. 133; **Gruber**, s. 891 ff; **Haas**, s. 80 ff; **Bydlinski**, Kreditbürgschaft, s. 123; **Böhler** in **Apathy/Iro/Koziol**, Rz 1/187.

a. Umstände beim Vertragsabschluss

Die Ungewöhnlichkeit, die auf die Umstände beim Vertragsabschluss zurückzuführen ist, löst einen Überraschungseffekt beim Unterworfenen aus. Als ein Beispiel für solche Umstände nennen die Lehre und Rechtsprechung eine vorvertragliche Phase, die bloß einen konkreten Kredit angeht[6]. In einem solchen Fall braucht der Bürge mit einer Erstreckungsklausel nicht zu rechnen.

Ein anderer, bei der Beurteilung des Überraschungseffekts zu berücksichtigender Umstand bezieht sich auf das äußere Erscheinungsbild der Urkunde, worauf auch § 864a ABGB hinweist. Problematisch sind jene Fälle, wo eine Erstreckungsklausel klein gedruckt bzw. im Vertragstext verdeckt ist, so dass sie der Aufmerksamkeit des Unterworfenen leicht entgehen kann[7]. Auch in diesen Fällen braucht der Bürge mit einer Erstreckungsklausel nicht zu rechnen.

b. Inhalt der Klausel

In der Lehre stellt sich die Frage, ob eine Erstreckungsklausel, der ein subjektiver Überraschungseffekt für den Bürgen fehlt, aufgrund ihres Inhalts für ungewöhnlich gehalten werden kann[8]. Für diese Frage ist die redliche Verkehrsübung für den einschlägigen Vertragstyp bestimmend, für welche dispositives Recht für diesen Vertragstyp in seiner von Rechtsprechung und Lehre geprägten Auslegung ausschlaggebend ist[9]. So führt ein erhebliches Abweichen vom dispositiven Recht zum Nachteil des Unterworfenen dazu, dass die Klausel an der Geltungskontrolle scheitert und nicht Vertragsbestandteil wird[10]. Allerdings ist es in der Lehre umstritten, ob die Erstreckungsklauseln ein erhebliches Abweichen vom dispositiven Recht darstellen.

Nach einer Ansicht sei die Erstreckung der Haftung des Bürgen auf alle künftigen Verbindlichkeiten des Hauptschuldners mit dem dispositiven Leitbild des ABGB, insbesondere dem in §§ 1378, 1390 S 2 ABGB zum Ausdruck gebrachten Grundsatz „Fremddispositionsverbot", nicht vereinbar, und sie stelle ein erhebliches Abweichen dar, weil der Bürge aufgrund der Erstreckung seiner Haftung auf alle künftigen Verbindlichkeiten des Hauptschuldners in

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6 **Haas**, s. 81; **Bydlinski**, Wirksamkeit, s. 99; **Gruber**, s. 892, 900; **Rabl**, s. 42; **Mader/W. Faber** in **Schwimann**, § 1353 Rz 14; Oberster Gerichtshof (im Folgenden: OGH) 24.05.1989, 1 Ob 558/89; OGH 27.06.1991, 8 Ob 14/91.

7 **Haas**, s. 81; **Gruber**, s. 891; **Mader/W. Faber** in **Schwimann**, § 1353 Rz 14; **Georgia Neumayer/Thomas Rabl**, in **Andreas Kletečka/Martin Schauer (Herausgeber)**, ABGB-ON 1.02 – Kommentar zum Allgemeinen bürgerlichen Gesetzbuch, Wien, Manz, 2013, §§ 1346, 1347 Rz 176; OGH 24.05.1989, 1 Ob 558/89; OGH 27.06.1991, 8 Ob 14/91.

8 Dazu Fn 11 ff.

9 **Gruber**, s. 891, 893 ff; **Böhler** in **Apathy/Iro/Koziol**, Rz 1/188; **Riedler** in **Schwimann/Kodek**, § 864a Rz 35.

10 **Gruber**, s. 894; **Böhler** in **Apathy/Iro/Koziol**, Rz 1/188.

keiner Weise mehr selbst in der Hand habe, über den Umfang seiner Haftung zu entscheiden[11]. Anders gesagt, würden der Gläubiger und Hauptschuldner ihm die Disposition über seinen Haftungsumfang zur Gänze aus der Hand nehmen[12]. Allerdings würden diese Argumente für die Erstreckung der Bürgenhaftung auf die bereits bestehenden Verbindlichkeiten des Hauptschuldners nicht gelten[13]. So sei die Erstreckung auf die bestehenden Verbindlichkeiten nicht ungewöhnlich. Diese Ansicht lässt sich zusammenfassen, dass eine Erstreckungsklausel nur dahin gehend ungewöhnlich sei, dass sie die Haftung des Bürgen auf die künftigen Verbindlichkeiten erstrecke.

Eine andere Ansicht kritisiert diese Auffassung und führt die folgenden Gegenargumente an: Zum ersten bleibe fast kein Anwendungsbereich für die Inhaltskontrolle nach einer intensiven Befassung mit dem Inhalt der Erstreckungsklauseln bei der Geltungskontrolle[14]. Zweitens impliziere die im vorstehenden Absatz dargelegte Auffassung, dass die Bürgschaften für künftig erst zu begründende Verbindlichkeiten unredlich seien, was völlig herrschender Meinung in der Lehre entgegenstehe, dass die Bürgschaften für künftige Verbindlichkeiten zulässig seien[15]. Zusammenfassend sei die (Un-) Gewöhnlichkeit einer Erstreckungsklausel nicht daran zu messen, ob sie künftige oder nur bereits bestehende Verbindlichkeiten des Hauptschuldners erfasse[16]. Eine Klausel sei in inhaltlicher Hinsicht ungewöhnlich, wenn sie ganz außerhalb der üblichen Linie liege: So etwa eine formularmäßige Pflicht des Bürgen zur Bestellung eines Pfandes[17].

4. Höchstbetragsbürgschaften

Österreichisches Bürgschaftsrecht setzt die Angabe eines maximalen Betrags bzw. Höchstbetrags in der Bürgschaftsurkunde für die Gültigkeit einer Bürgschaft nicht ausdrücklich voraus. In der Lehre stellt sich die Frage, ob der Umstand, dass eine Erstreckungsklausel mit einem Haftungshöchstbetrag in der Bürgschaftsurkunde kombiniert ist, einen Einfluss auf die Geltungskontrolle nimmt.

Die überwiegende Lehre ist bei der Bejahung der Ungewöhnlichkeit einer Erstreckungsklausel eher zurückhaltend[18], wenn sich der Bürge nur bis

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11 **Gruber**, s. 896, 897.
12 **Gruber**, s. 896, 897.
13 **Gruber**, s. 898.
14 **Haas**, s. 80.
15 **Haas**, s. 80.
16 **Haas**, s. 80.
17 **Haas**, s. 81.
18 **Helmut Koziol**, „Erstreckung von Kreditsicherheiten“, Österreichisches Bank Archiv (ÖBA) 2003, s. 811; **Haas**, s. 82; **Bydlinski**, Wirksamkeit, s. 101; **Mader/W. Faber** in **Schwimann**, § 1353 Rz 14; **Gruber**, s. 892, 897. Nach dem letzteren Autor verliere die Fremddisposition in diesem Fall an Bedeutung.

zu einem bestimmten Betrag verbürgt. Nach dieser Meinung spreche ein im Vertrag vereinbarter Höchstbetrag für die Vermutung, dass die Bürgschaft auch jene Verbindlichkeiten des Hauptschuldners decke, die anders als die Anlassverbindlichkeit sind. Diese Annahme stelle aber ja nur eine Richtschnur dar und könne die Ungewöhnlichkeit einer Erstreckungsklausel für sich allein nicht ausschließen[19].

Eine Mindermeinung, die beim Schutz des Bürgen zu weit geht, lehnt jeglichen Einfluss eines im Vertrag vereinbarten Höchstbetrags auf die Geltungskontrolle ab[20]. Der Vertreter dieser Meinung führt aus, kein Bürge rechne nach gewöhnlichen Lauf der Dinge mit der Erstreckung seiner Haftung auf alle künftigen Verbindlichkeiten des Hauptschuldners, wenn er eine formularmäßige Haftungserklärung auf Anlass eines Kredites abgebe. Ferner liege ein Überraschungsmoment, das die Ungewöhnlichkeit einer Erstreckungsklausel auslöst, nicht nur in der wirtschaftlichen Belastung des Bürgen, sondern auch in der Auslieferung des Bürgen an die Dispositionen von Hauptschuldner und Gläubiger[21].

C. Schlussfolgerung

Bürgen soll man würgen. Dieses im deutschsprachigen Raum verbreitete Sprichwort bedeutet natürlich nicht, dass man den Bürgen tatsächlich erwürgt. Wie in den Monographien, die sich mit der Bürgschaft befassen, zu sehen ist, dient es heute als Warnung, die auf die an eine Übernahme der Bürgschaft gebundenen erheblichen finanziellen Nachteilen hindeutet. Genau ein Fallbeispiel für dieses Sprichwort stellt die Erstreckung der Bürgenhaftung dar.

Zusammenfassend lässt sich Folgendes zur Geltungskontrolle formularmäßiger Erstreckung der Bürgenhaftung auf anlassferne Verbindlichkeiten feststellen: Die Erstreckung der Bürgenhaftung auf anlassferne Verbindlichkeiten des Hauptschuldners ist für den Bürgen nachteilig. Für die Ungewöhnlichkeit einer Erstreckungsklausel spielen die Umstände beim Vertragsabschluss, wie z.B. vorvertragliche Phase oder äußeres Erscheinungsbild der Urkunde, eine entscheidende Rolle. Ob man von dem Inhalt einer Erstreckungsklausel deren Ungewöhnlichkeit ableiten kann, ist umstritten. Die Frage, ob die Angabe eines maximalen Betrags in der Bürgschaftsurkunde einen Einfluss auf die Geltungskontrolle nehmen kann, ist ebenso strittig.

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19 Auch der OGH verfolgt diese Meinung: OGH 24.05.1989, 1 Ob 558/89.

20 **Rabl**, s. 42.

21 **Rabl**, s. 42.

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EVALUATING THE SUCCESS OF INTERNATIONAL CRIMINAL TRIBUNAL FOR FORMER YUGOSLAVIA

Eski Yugoslavya Uluslarası Ceza Mahkemesinin Başarısının Değerlendirilmesi

Gökberk TEKİN*

Abstract

The "International Criminal Tribunal for Former Yugoslavia" (ICTY) which was established on May 25 1993 due to the conflicts in the territory of the Former Yugoslavia that reached a size that would threaten international peace and security has completed its duties and officially ended its existence on 31 December 2017.

For more than 24 years the ICTY has undertaken significant work both for its mandate and for international criminal law and in this sense it has left a significant legacy behind. Therefore its importance both for the region and for international criminal law has been widely emphasized.

On the other hand the ICTY has had to stand to criticism directed to its activities and to international criminal law in a more general sense.

In this scope, it is evaluated that evaluating the work of the Tribunal and its success through analysing the above-referred praises and criticism bears importance.

In this framework, in this study, firstly the aims assigned to the ICTY will be determined and subsequently the success of it will be evaluated within the scope of these objectives.

Keywords: International Criminal Tribunal for Former Yugoslavia, efficiency of international tribunals, international criminal law.

Özet

Eski Yugoslavya Sosyalist Federal Cumhuriyetinin topraklarında yaşanan ve uluslararası barış ve güvenliği tehdit edecek boyutlara ulaşan çatışmalar sebebiyle 25 Mayıs 1993 tarihinde kurulan "Eski Yugoslavya Uluslarası Ceza Mahkemesi" (Mahkeme) faaliyetlerini tamamlayarak 31 Aralık 2017 tarihinde resmen varlığını sona erdirmiştir.

Mahkeme faaliyette kaldığı 24 yılı aşkın süre boyunca, hem kendi yetki alanı için hem de daha geniş anlamda uluslararası ceza hukuku için önemli çalışmalara imza atmış ve bu anlamda ardında önemli bir miras bırakmıştır. Bu sebeple Mahkemenin hem bölgesi hem de uluslararası ceza hukuku için önemi sıklıkla vurgulanmıştır.

Bununla birlikte; Mahkeme aynı zamanda, uluslararası hukuka yönelen genel eleştiriler ve etkinliği ile ilgili olumsuz değerlendirmelerle de karşılaşmıştır.

Bu kapsamda, mahkemenin ortaya koyduğu çalışmaların incelenmesi ile Mahkemeye yönelik eleştiri ve övgülerin incelenerek başarısının değerlendirilmesinin gelecekte bu alanda yapılacak çalışmalar açısından önem arz ettiği değerlendirilmektedir.

Bu çerçevede, bu çalışmada öncelikle Mahkemeye tahmil edilen hedefler tespit edilecek ve müteakiben Mahkemenin başarısı bu hedefler kapsamında değerlendirilecektir.

Anahtar Kelimeler: Eski Yugoslavya Uluslararası Ceza Mahkemesi, uluslararası mahkemelerin etkinliği,uluslararası ceza hukuku.

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1. Introduction

International Criminal Tribunal for Former Yugoslavia (the Tribunal/ICTY) has finished its activities with the decision of Appeals Chamber on "Prlic et al case"[1] and after 24 years of activity, it was formally closed on 31 December 2017.[2] Before any analysis, it is possible to note in advance that the ICTY has left its mark in the history of international criminal law since it constitutes the first organized effort of international community to prosecute serious violations of international criminal law. Therefore as noted by the last President of the Tribunal Carmel Agius in its final annual report, "closure of the Tribunal heralds a significant moment"[3]

Having noted that the closure of the Tribunal did not end its effects on international criminal law and region. On the contrary, the Tribunal has left an impressive legacy. Such that the Tribunal (along with the International Criminal Tribunal for Rwanda) has produced more precedent about the international criminal law than all of the international/domestic tribunals before it.[4] Therefore the work of the Tribunal constitutes an important asset for the future studies of international criminal law and in this sense should be evaluated carefully.

In this perspective, in this paper the legacy of ICTY will be evaluated through holding its success. In the first part, necessary background information will be presented through establishing a conceptual framework. Following to that methodology of the study will be set forth and consequently the success of the Tribunal will be evaluated accordingly with this methodology.

2. Conceptual Framework

a. Importance and the context of the study

First of all, it would be useful to present the importance of the study by emphasizing the above-mentioned importance of the Tribunal. In this context, if it is needed to take it from a bit earlier, starting with international military tribunals established after WWII would be useful. In this perspective, Nuremberg and Tokyo Tribunals which were established after WWII to try major war criminals can be named as one of the most important steps of international criminal law. Because until the establishment of these tribunals, complying with the rules regulating the means and methods of war had been

1 Prosecution v Prlic et al, Appeals Chamber Judgement, IT-04-74-A (29 November 2017)

2 International Criminal Tribunal for the Former Yugoslavia, 'Report of the International Tribunal for the Former Yugoslavia' (1 August 2017) A/72/266–S/2017/662 para 1.

3 ibid para 81.

4 Michael P. Scharf, 'The ICTY At Ten: A Critical Assessment Of The Major Rulings Of The International Criminal Tribunal Over The Past Decade: Foreword' (Boston, Massachusetts, 2003) p 865.

perceived as a merely political/moral problem rather than a legal issue[5]. Yet, after this important breakthrough achieved with the establishment of Nuremberg and Tokyo Tribunals, international community has stayed in silence for a long time, for even the gravest breaches of humanitarian law[6]. In this context, Nuremberg and Tokyo Tribunals were not able to offer an international system for enforcing humanitarian law.[7]

After this fifty years of silence, during 1990's, international criminal law has begun to be revitalized and important steps have been taken in order to hold perpetrators of IHL violations to account[8]. Especially, establishment of ad hoc tribunals for Former Yugoslavia and Rwanda has started a new phase in the international criminal law[9] which has continued with the establishment of hybrid ad hoc tribunals and eventually permanent International Criminal Court (ICC)[10].

In this perspective, experience gained in ICTY has been illuminative for future efforts in the international criminal law realm. For example, in establishing hybrid systems in Cambodia, East Timor, Kosovo and Sierra Leone experiences gained in proceedings of ICTY have been widely benefited[11]. Furthermore, it is even possible to claim that lessons learned from ad hoc tribunals (including ICTY) have been very beneficial during the establishment process of the ICC.[12]

b. The conflict in the Former Yugoslavia

In order to understand the Tribunal and evaluate its success, it is necessary to briefly present the conflict that has led to the establishment of Tribunal. In this context, a brief outline just for illuminating the way to the establishment of the Tribunal will be presented.[13]

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5 Matthew Lippman, 'The History, Development, and Decline of Crimes against Peace' (2004) 36 Geo. Wash. Int'l L. Rev. 957,966.

6 Richard Dicker and Elise Kepler, 'HRW World Report 2004 - Human Rights and Armed Conflict' (Human Rights Watch 2004) p 199.

7 Franca Baroni, 'The International Criminal Tribunal For The Former Yugoslavia And Its Mission To Restore Peace' (2000) 12 Pace International Law Review 233, 235.

8 Dicker and Kepler (n 6) p 194.

9 Olaoluwa Olusanya, 'The Statute Of The Iraqi Special Tribunal For Crimes Against Humanity– Progressive Or Regressive?' (2004) 05 German Law Journal 859, 859.

10 Agnieszka Szpak, 'Legacy of the Ad Hoc International Criminal Tribunals in Implementing International Humanitarian Law' (2013) 4 Mediterranean Journal of Social Sciences. 525,525.
Frederic Megret, 'The Legacy Of The ICTY As Seen Through Some Of Its Actors And Observers' (2011) 3 Goettingen Journal of International Law 1011,1021.

11 Rachel Kerr, 'Peace through Justice? The International Criminal Tribunal for the Former Yugoslavia' (2007) 7 Southeast European and Black Sea Studies 373,374.

12 Stuart Ford, 'The Impact of the Ad Hoc Tribunals On The International Criminal Court' [2018] SSRN Electronic Journal.

13 Christopher K. Penny, 'No Justice, No Peace: A Political and Legal Analysis of the

If it is needed to begin from a bit earlier, it should be stated that rivalries fuelled by ethnic/religious diversities between various groups have been the main reason of the war in Former Yugoslavia. And therefore emphasizing these rivalries should constitute the starting point for establishing the conceptual framework of this paper.

In this perspective, although suppressed by Marshall Tito during his reign (1945-1980)[14], Yugoslavia had been hosting vast ethnic and religious rivalries. Especially after Tito's death in 1980 and along with the collapse of communism, these ethnic and religious rivalries have begun to get deeper and rivalries between parties have become apparent.[15] Especially opportunist politicians who emphasize past ethnic divisions, like Slobodan Milosevic (Serbia), Franjo Tudjman (Croatia) and Milan Kucan (Slovenia)[16] have been very effective in creating a fragile atmosphere which will result with the cruelest armed conflict in Europe since WWII[17].

In this fragile atmosphere involving ethnic and religious rivalries; as a result of efforts of Serbs to dominate other ethnic and religious groups living in the Former Yugoslavia and secessionist policies of Croatia/Slovenia; these two republics have declared their independence on 25 June 1991[18] and confronted with the Serb dominated Yugoslav army. In Slovenia, with the help of cease-fire brokered by the European Community the conflict has been stopped without important devastation yet in Croatia above-mentioned confrontation has been transformed into an armed conflict which has been continued for months.[19]

Similar with the Croatia, above-mentioned factors have also increased the tension in Bosnia and Herzegovina. In this atmosphere of tension, Muslim and Croatian people of Bosnia and Herzegovina have held a referendum and declared their secession from Former Yugoslavia in March 1992. As it was in Croatia, this referendum and declaration have been confronted with a strong opposition of Serbian minority of Bosnia and Herzegovina. This opposition has quickly transformed into an armed conflict which confronted the Bosnian Serbs/ Serb dominated Yugoslav Army with Bosnian Muslims/Bosnian Croats.[20]

International Criminal Tribunal for the Former Yugoslavia' (1999) 30 Ottawa Law Review 259,263.

14 L.Barria and S.Roper, 'How Effective Are International Criminal Tribunals? An Analysis of the ICTY And The ICTR' (2005) 9 The International Journal of Human Rights 350.

15 Alastair Finlan, *The Collapse of Yugoslavia, 1991-1999* (Osprey 2008) 15.

16 This list is not exhaustive and my study doesn't aim to evaluate the reasons of the conflict in Former Yugoslavia. Rather herein the names of the most important figures are presented.

17 Penny (n 13) p 263.

18 ibid.

19 ibid p 264.

20 ibid.

During these conflicts occurred in the territory of Former Yugoslavia, as a part of ethnic cleansing campaign[21]; thousands of civilians have been killed, more of them have been interned in concentration camps, tens of thousands of women/girls have been raped as a weapon of war, important cultural/historical artifacts have been destroyed and the world witnessed brutal violations of international humanitarian law perpetrated by all parties to the conflict. [22]

c. Establishment of the Tribunal

In spite of this brutal situation, as a response to the violent conflict in Former Yugoslavia, international community was not able to exhibit a concerted action[23] yet as one of the first reactions, in October 1992, UN Security Council has established a "Commission on Experts" to investigate "grave breaches of Geneva Conventions and other violations of international humanitarian law"[24]. After its investigation, the Commission expressed the need for an ad hoc tribunal in its first interim report on 22 February 1993.

As a result on 25 May 1993, acting under chapter VII of the UN Charter, UN Nations Security Council has established the ICTY with the Resolution 827[25]. As also stated in the introduction part, with the establishment of the Tribunal, the UN Security Council has used its authority to take actions which maintain peace and security by establishing an ad hoc tribunal for the first time.

3. Methodology: How to Evaluate Success of a Court/the Tribunal

a. Methodology

Before dealing with the details, the methodology for evaluating the success of the ICTY should be revealed since a flawed methodology may lead to incorrect results. In this perspective, firstly it should be noted that there isn't a consensus about the role/mission of international courts in post-conflict societies. For example, while some argue that international courts should not neglect the process of negotiations of peace and act accordingly, others assert that courts should only consider moral ideas and justice.[26] And accordingly with these different views, it is also not possible to find an accepted standard for measuring the success of international tribunals.[27]

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21 Kerr (n 11) p 374.
22 Penny (n 13) p 264 -265.
23 Kerr (n 11) p 374.
24 UNSC Resolution 780 (06 October 1992) UN Doc S/RES/780 (1992)
25 UNSC Resolution 827 (25 May 1993) UN Doc S/RES/827 (1993)
26 Yuval Shany, 'Assessing the Effectiveness of International Courts: A Goal-Based Approach' (2012) 106 The American Journal of International Law 225,226.
27 Barria and Roper (n 14) p 349.
Shany (n 26) p 226-227.

Among these different approaches, in this paper "the goal-based approach"[28] will be adopted which suggest that "an action (or an organization) is effective (successful) if it accomplishes its specific aim"[29]. Accordingly with this simple concept, this approach deliberately abstains from evaluating the desirability of aims [30] or appropriateness of the organization for its specific aim.

In this context, in assessing its success, it is crucial to firstly reveal the objectives of the Tribunal. Since different purposes (such as ensuring reconciliation, ensuring rule of law, promoting a sense of accountability) can be attached to different international criminal courts which inevitably changes the basis of the evaluation about success.[31]

Another important aspect of revealing the aims of the Tribunal in a study like this is that international criminal tribunals have typically been overloaded with very big objectives/expectations. In this context, international community and parties or even scholars tend to see these tribunals as the sole arbiter of very complex conflicts and attach very difficult tasks to them such as simultaneously stopping the on-going conflict, producing a reliable record of crimes, satisfying the victims, establishing the rule of law and ensuring reconciliation[32] which may mislead us about the performance of courts.

In order to reveal the aims of the Tribunal, I find it useful to examine black-letter of law[33] which -in ICTY's case- is resolutions issued by the UNSC while establishing the Tribunal. In its Resolution 827, while establishing the ICTY, UN Security Council (UNSC) has noted that mass killings, massive, organized and systematic detention and rape of women and the continuance of the practice of ethnic cleansing occurring in the territory of former Yugoslavia constitute a threat to the international peace and security.[34]

And in order to eliminate this threat, with an unprecedented approach, UNSC has decided to establish an ad hoc international criminal tribunal: the ICTY. Accordingly, aims/goals designated to the Tribunal have been all related to the elimination of the above-referred threat. More specifically, while establishing the Tribunal, UNSC has asserted that; it is

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28 ibid p 230.

29 Chester I Barnard, *The Functions Of The Executive* (Harvard University Press 1968) p 20. cited in Shany (n 26) p 230.

30 Shany (n 26) p 230.

31 Seeta Scully, 'Judging the Successes and Failures of the Extraordinary Chambers Of The Courts Of Cambodia' (2011) 13 Asian-Pacific Law & Policy Journal 300,302.

32 ibid p 303.

33 Barria and Roper (n 14) p 350.

34 UNSC Resolution 827 (n 25) para 3-4.

> "Determined to put an end to such crimes and to take effective measures ***to bring to justice*** the persons who are responsible for them,
>
> (…)
>
> Convinced that (…) establishment as an ad hoc measure by the Council of an international tribunal and the prosecution of persons responsible for serious violations of international humanitarian law (…) ***would contribute to the restoration and maintenance of peace,***
>
> (…)
>
> Believing that the establishment of an international tribunal and the prosecution of persons responsible for the above-mentioned violations of international humanitarian law will contribute to ensuring ***that such violations are halted and effectively redressed***, (…)"[35]

Accordingly; it is possible to conclude that UNSC has emphasized three factors as the aims of establishing an ad hoc tribunal to prosecute war criminals which are "to deter future war crimes, to bring about justice and to make a contribution to the restoration and maintenance of peace"[36] In this perspective, it is proper to end this section by stating that in this paper a goal-based approach will be adopted which will focus on the performance of organizations' in fulfilling their aims and in evaluating the success of the ICTY aims designated by the UNSC will be the basis of my evaluation.

b. Limitations

And herein limitations of this study should also be presented. Accordingly with the goal-based approach mentioned above, controversies about the existence of international criminal courts do not fall in the scope of this paper. In other words, efforts will be concentrated solely to the evaluation of activities of ICTY and its success in above-presented aims instead of making evaluations about the whole international criminal law system.

4. Evaluating the success of the ICTY

After presenting some background information, in the context of evaluating the Tribunal's success, firstly it should be stated that since its establishment in

35 ibid para 5-6-7.

36 İbid.
Sabrina P. Ramet, 'The ICTY - Controversies, Successes, Failures, Lessons' (2012) 36 Southeastern Europe 1,1.

1993, the Tribunal has provoked controversies and especially in the first years has been criticised severely on several grounds. [37] In this context, it is possible to see some scholars find the ICTY unsuccessful and unnecessary. Yet, on the contrary, it is also possible to encounter views expressing that the ICTY is an unprecedented step in ending impunity and has been a significant achievement in implementation of international law.[38] In this part of this study, success of the Tribunal will be evaluated by covering these different views under three subsections as stated in the methodology part.

a. Ensuring deterrence

It has been already revealed above that one of the objectives of the Tribunal is ensuring deterrence. Before evaluating the Tribunal's success about it, it is useful to make a quick glimpse to the "deterrence" concept.

Deterrence can be defined as one of the desired outcomes of prosecution/punishment that prevent future crimes.[39] It may aim to prevent reoffending by the accused (specific deterrence) or to prevent offences of others (general deterrence).[40] And lastly, before evaluating the Tribunal's performance, it should be noted that although it is relatively easy to come to some conclusions about specific deterrence, general deterrence is very difficult to measure.[41]

In the context of evaluating its contributions to deterrence, Tribunal's role in establishing a culture of accountability should come first. Although criticized harshly on several grounds, for good or ill, the Tribunal has ended the anterior 50 years of impunity and constitute "at least" a functioning mechanism of international criminal law[42]. In this sense, it is possible to claim that even the image of once powerful military/political leaders sitting in the dock for their offences has contributed to general deterrence by promoting a culture of accountability.[43] Especially when we consider the parties' reluctance about conducting prosecutions[44] which feeds the IHL violations[45], contributions of the Tribunal in ensuring a general sense of deterrence should be credited.

In evaluating the Tribunal's success in deterrence, another important point to express is the function of proceedings in the removal of leaders who allegedly

37 ibid.
38 Barria and Roper (n 14) p 349.
39 L.Keller, 'Achieving Peace with Justice: The International Criminal Court And Ugandan Alternative Justice Mechanism' (2017) 23 Connecticut Journal of International Law 209,270.
40 ibid.
41 Penny (n 13) p 273.
42 Szpak (n 10) p 527.
43 Megret (n 10) p 1022.
44 ibid p 280.
45 Penny (n 13) p 276.

committed IHL violations.[46] By ensuring the removal of these leaders the Tribunal ensured specific deterrence which is not likely to be done by national authorities. For example; it can be noted that indictments about Bosnian Serb leaders Radovan Karadzic and Ratko Mladic pushed them to leave office. It can be concluded that by this way repetitive violations stemming from the policies of specific persons have been prevented.

Furthermore, it can be said that proceedings about above-presented leaders have delegitimized their actions and policies which led to serious IHL violations[47]. In this perspective, it is possible to claim that the successors of politicians in the region and politicians in other parts of the world have had to be more cautious because of the prosecutions.

It is possible to observe that the Tribunal has laid weight on sending a message to potential war criminals by proceedings. In "Prosecution v Dario Kordic & Mario Cerkez" case the Tribunal has expressed its concern about this issue by asserting that

> "In the context of combating international crimes, deterrence refers to the attempt to integrate or to reintegrate those persons (into global society) who believe themselves to be beyond the reach of international criminal law. Such persons must be warned that they have to respect the fundamental global norms of substantive criminal law or face not only prosecution but also sanctions imposed by international tribunals"[48]

Other than this general approach, when we examine the case law of the Tribunal, it is possible to observe that "the aim of ensuring deterrence" has been taken into consideration by the Tribunal both in judgement and sentencing.[49] Such that in "Prosecutor v Dragan Obrenovic" case, the Tribunal asserted that,

> "It is hoped that the Tribunal and other international courts are bringing about the development of a culture of respect for the rule of law and thereby deterring the commission of crimes."[50]

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46 ibid p 276.

47 ibid.

48 Prosecutor vs. Dario Kordic & Mario Cerkez, Judgement, Case No. IT-95-14/2-T (26 February 2001), para.1078 cited in Benjamin Goffrier, 'Deterrence as Principle of Sentencing in International Criminal Justice' (2014) p 13.

49 Goffrier (n 48) p 11-14.

50 Prosecutor vs. Dragan Obrenovic, Sentencing Judgement, Case No. IT -02-60/2-S (10 December 2003), para. 51 cited in Goffrier (n 48) p 13.

Similarly, in Kordic & Cerkez case, the Tribunal has noted that,

> "(…) in imposing a sentence, the Appeals Chamber has consistently held that the following purposes of sentencing shall be considered: (i) individual and general deterrence concerning an accused and, in particular, commanders in similar situations in the future; (…)"

Yet it is also possible to mention about some shortcomings of the Tribunal in administering deterrence. In this context, firstly we should note that along with the proper judicial procedures, a consistent enforcement mechanism is needed to consolidate the deterrent effects of the judicial procedures.

When we analyse the system of the ICTY, it is difficult to observe such an enforcement mechanism. Lacking its own police/enforcement force, the Tribunal has had to rely on the cooperation of states[51]. In this respect, it wouldn't be wrong to claim that such a judicial mechanism without proper enforcement ability resembles "a giant who (does not have) (…) his own arms and legs"[52].

And in the context of states' obligation of cooperation, it is possible to note that in most cases, states have been reluctant about cooperating with the Tribunal which inevitably reduces the deterring effects of the prosecutions.

To sum up, it is quite possible to note that although the Tribunal has a mixed record in ensuring deterrence due to enforcement problems, it has contributed to developing a system (or at least a sense) of accountability and made important contributions in ensuring specific deterrence. Therefore it should be concluded that the ICTY is successful in ensuring deterrence as it was tasked by UNSC.[53].

b. Ensuring justice

In addition to being a subsidiary organ of UN; the ICTY is a tribunal and beyond its duties related to the international peace and security, it is natural for parties/international society to expect justice from it. Accordingly, the Tribunal's performance in ensuring justice within its mandate should be considered as an important part of its success and therefore constitute an important part of our evaluation.

In this perspective, firstly it should be noted that beyond its international functions and high ends attributed to it, ICTY is a criminal tribunal and

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51 Olivia Q. Swaak-Goldman, 'The ICTY and The Right to a Fair Trial: A Critique of the Critics' (1997) 10 Leiden Journal of International Law 215,217.

52 The President's Second Report to the United Nations General Assembly, 7 November 1995,reproduced in 1995 Yearbook of ICTY 311 (1996) cited in Swaak-Goldman (n 51) p 217.

53 Szpak (n 10) 527

accordingly bound with the fair trial standards set out by the human right law[54] as it is also stated in the article 21 of the Statute of the Tribunal[55].

When the Tribunal's performance about ensuring a fair trial is evaluated, it is possible to note that it has been criticized widely. Critics have often asserted that the Tribunal has been insufficient in preserving the presumption of innocence, ensuring a balance of means between the prosecution and defence[56], preventing lengthy trials and pre-trial detention periods[57].

To start with the treaty law, it is possible to see that in Statute of the Tribunal[58], provisions about fair trial standards exist. I do not find it necessary to cite in full, but it is possible to note that article 21 of the Statute of the Tribunal guarantees the accused persons' right to equal treatment, right to fair and public trial, presumption of innocence. In addition to that aforementioned article also provides that the accused should be entitled to adequate time and facilities for preparation of his defence, to be tried without undue delay. Accordingly at least in the context of treaty law international human rights standards were looked out and rights of the accused persons were respected.

However it is beyond doubt that guarantees of fair trial should be more than ink on paper and provide some fundamental guarantees to the accused persons. In this context, revealing the above listed points of criticism bears importance for the purposes of this study. Firstly about the performance of the Tribunal about "presumption of innocence", it is possible to recall that this right of the accused persons were recognized in the Statute of the Tribunal. Furthermore, when the practice of the Tribunal is examined it is possible to see that it has also been respected by the Tribunal during proceedings. Accordingly with this principle, burden/standard of proof has been established accordingly with international human rights law standards[59]. Such that in Brdjanin case the Tribunal stated that "(presumption of innocence) '...places on the Prosecution the burden of establishing the guilt of the Accused [...]. That burden remains on the Prosecution throughout the entire trial; it never changes."[60]

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54 Scully (n 31) p 304.

55 Updated Statute of the International Criminal Tribunal for the Former Yugoslavia (adopted 25 May 1993, as amended on 7 July 2009) art 21.

56 Megret (n 10) p 1026.

57 Barria and Roper (n 14) p 361.
Dominic Raab, 'Evaluating The ICTY and Its Completion Strategy' (2005) 3 Journal of International Criminal Justice 82,84.

58 Updated Statute of the International Criminal Tribunal for the Former Yugoslavia (n 55) art 21.

59 Antonio Cassese, *Oxford Companion to International Criminal Justice* (1st edn, OUP 2009) p 457-458.

60 Prosecutor v Brdjanin, Judgment, IT-99-36-T (1 September 2004) 22. cited in Karolina Kremens, 'The Protection Of The Accused In International Criminal Law According To The Human Rights Law Standard1' (2011) 1 Wroclaw Review of Law, Administration & Economics 26,38.

Yet it is still possible to claim that because of heinous nature of crimes and by the contribution of media; in some cases presumption of innocence of accused persons has been weakened, at least in the before international community[61]. But it is not possible to attribute this impairment to the Tribunal's proceedings or framework establishing the Tribunal. Rather it can be listed as one of the birth defects of international criminal law.[62]

Furthermore; defence attorneys often asserted a mismatch between the prosecution and defence. These allegations include being not allowed to many parts of the facilities, not allowed to hold press conferences and most importantly having lopsided resources[63]. Herein it should be stated that as a result of differences in the burden of proof between the prosecution and defence, Tribunal's employees, resources and money should not be considered as an imbalance between prosecution and defence[64]. In this context, it can be concluded that allegations of defence councils constitute discrete issues rather than a structural problem affecting decisions of the Tribunal[65].

In the context of fair trial standards, the Tribunal has also been criticised harshly on grounds of lengthy trials[66]. And it is possible to observe that in some cases these criticisms have a point. For example, Tihofil BLASKIC was indicted on 13 November 1995 and his case was concluded on 24 November 2006[67]. Similarly case of Ratko Mladic begun with the indictment on 25 July 1995, has continued with his arrest on 26 May 2011 and concluded on 22 November 2017.[68]

Here again, the factors inherent to international criminal law should be taken into consideration. More specifically, when criticising the length of trials; one should consider that unlike domestic courts, ICTY has had to deal with legally and factually complex cases involving hundreds of victims and a large volume of documents[69].

Furthermore one should also consider that unlike national courts (or WWII Tribunals), in ICTY the prosecutor has had to rely mainly on witness acknowledgements which cause lengthy trials[70]. In addition to that absence of

61 Cassese (n 59) p 457-458.
62 ibid.
63 Megret (n 10) p 1024.
64 ibid.
65 ibid p 1025.
66 Kerr (n 11) p 376.
67 International Criminal Tribunal for the former Yugoslavia, 'Blaškić (IT-95-14)' (*Icty.org*, 2017) <http://www.icty.org/case/blaskic/4> accessed 5 November 2017.
68 International Criminal Tribunal for the former Yugoslavia, 'Mladic (IT-09-92)' (*Icty.org*, 2017) <http://www.icty.org/case/mladic/4> accessed 5 November 2017.
69 Kerr (n 11) p 376.
70 Barria and Roper (n 14) p 361.

law-enforcement agency (as in the national systems)[71] to collect evidence has also worsened the situation in the context of length of trials. When we consider these inherent difficulties and the precautions taken by the Tribunal each year to reduce the length of trials like conducting thematic/location-specific trials, completion strategy it would be unfair to criticise the Tribunal about the length of trials[72]. In the light of above-presented factors, it wouldn't be wrong to conclude that although criticisms about lengthy trials are not ill-founded they are flawed because of domestic analogy[73].

All in all, it is possible to conclude that especially with the contributions of Appeal Chambers, the Tribunal has respected rights of the defendants and complied with the principles of fair trial.[74] Despite the fact that especially length of trials doesn't fit to today's fair trial standards, it would be incorrect to attribute this defect to the Tribunal without considering the sui generis nature of international criminal law.

In addition to the concerns about fair trial standards impartiality/ independence of the international courts/tribunals also has the utmost importance for concerns about justice since it is quite possible for these institutions to be labelled as political instruments rather than tribunals to ensure justice.[75] In this perspective, apart from some reasonable demands of UN Security Council about the speed of the trials, it is possible to claim that the Tribunal has stayed immune from any type of pressure which would impair its impartiality and independence[76]. This should be considered as an important merit since especially in international realm some parties have the necessary instruments like budget or political means for putting pressure on courts. Herein along with the members of the Tribunal, Security Council should also be credited for keeping independence and impartiality.[77]

Furthermore, the Tribunal has also been criticized for its preferences between judicial restraint and judicial activism. More specifically, the ICTY was criticized about being too much creative in the judicial sense especially during the Tribunal's first years, which doesn't accord with the traditional judicial restraint approach[78]. In this context, it is possible to observe that the

71 Patricia M. Wald, 'Judging War Crimes' (2000) 1 Chicago Journal of International Law 189,190.

72 Kelly D. Askin, 'Reflections On Some Of The Most Significant Achievements Of The ICTY' (2003) 37 New England Law Review 903,913.

73 A.Cassese, 'The ICTY: A Living And Vital Reality' (2004) 2 Journal of International Criminal Justice p 594.

74 ibid.

75 Ruth Mackenzie and Philliphe Sands, 'International Courts and Tribunals and the Independence of the International Judge' (2003) 44 Harvard International Law Journal p 277

76 Cassese (n 73) p 591.

77 ibid.

78 ibid p 589.

Tribunal also placed detailed examination of legal issues that were not included to the *petitum*[79]. For example, in the Čelebići case details of "command responsibility"[80], in Kvočka case "joint criminal enterprise" was revealed in a detailed way[81]. And one may allege that these detailed evaluations are waste of time and sources.

Yet again, herein we should emphasize the differences of the Tribunal from the national courts. More specifically, it is true that national courts' traditional role is to decide the issues raised by the parties and in their situation neither parties nor the community expect more.[82] But in the international criminal law realm, where a corpus of well-established rules are missing in most cases, judicial findings of the courts/tribunals about the side-issues gains importance. In other words, obiter dicta on important issues of international criminal law (like the existence of specific customary rules) is needed in enlightening the future tribunals and developing international criminal law[83].

In addition to that "highly abstract manner" of the international law which usually neglects even defining the terms makes a certain level of judicial activism mandatory to implement international criminal norms. When it is also considered that the ICTY had no precedents to use except Nuremberg and Tokyo Tribunals, the need to interpret abstract norms and terms get even more necessary[84].

In this context, as long as the principle of legality is not breached, it should be noted the judicial activism to clear some important and unclear points during first years of the ICTY[85] does not impair the Tribunal's success about "bringing justice".[86] Even more, the absence of such activism to define ambiguous concepts and terms would constitute a failure and would undermine the credibility/legitimacy of the Tribunal and even the whole international humanitarian law[87].

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79 ibid.

80 Prosecutor v Kvocka et al., IT-98-30/1-T, Trial Chamber Judgement, 2 November 2001, paras. 265-312.cited in Askin (n 72) p 909.

81 Prosecutor v Delaic et al., Trial Chamber Judgement, IT-96-21-T (16 November 1998); Prosecutor v Delaic et al., Appeals Chamber Judgement, IT-96-21-A (20 February 2001); Prosecutor v Muic et al., Sentencing Judgement, IT-96-21-T bis-Rl17 (9 Oct. 2001) cited in Askin (n 74) p 909.

82 Cassese (n 73) p 590.

83 ibid.

84 Wald (n 71) p 527.

85 Casssesse claims that this tendency of the Tribunal has changed in the following years see Cassese (n 73) p 590.

86 Cassese (n 73) p 590.

87 Szpak (n 10) p 526.

Apart from ensuring justice in the territory of Former Yugoslavia, Tribunal's contribution to international criminal law should also be mentioned to reveal its performance. During its proceedings, the Tribunal has dealt with different elements of international criminal law which have stayed ambiguous due to absence of concrete treaty-law and precedent. As a consequence, it is possible to observe that during proceedings, for determining applicable law, the Tribunal has carefully examined and clarified many of these notions[88] which should be considered as a great contribution to international criminal law. If we are to present a non-exhaustive list of these notions to illustrate this argument, it is possible to note that notions like "grave breaches, the objective and subjective elements of crimes against humanity, (…) torture, rape, deportation, enslavement, extermination (…) persecution, (…) principle of legality [in international criminal law] (…) joint criminal enterprise, the responsibility of superiors, (…) the notion of aiding and abetting (…)"[89] have been clarified successfully. Accordingly, with the struggles of implementing some international criminal norms for the first time, the Tribunal has provided an important body of precedents to the future international courts/tribunals.[90]

Another criticism made often is that the Tribunal has wasted its time and resources by dealing with middle-low level perpetrators instead of political and military leaders[91]. This attitude of the ICTY should be criticised since the Prosecution should has considered that the Tribunal cannot simply try thousands of people and enlighten all the crimes committed in the Former Yugoslavia. Therefore the prosecution should have developed a system of selectivity aiming to include high-level defendants.[92]

This issue has also been covered by the UN Security Council in its Resolution 1534 on 26 March 2004. Although Security Council had been careful in the general sense, about the independence of the Prosecution and the Tribunal[93], it is stated in the resolution that "UNSC (…) Calls on each Tribunal, in reviewing and confirming any new indictments, to ensure that any such indictments concentrate on the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the relevant Tribunal (…)"[94] And accordingly with the Resolution of UNSC, it is possible to observe that,

Baroni (n 7) p 237.

88 Cassese (n 73) p 591.

89 ibid p 592-593.

90 Megret (n 10) p 1021.

91 Raab (n 57) p 87.

92 Cassese (n 73) p 595.

93 Raab (n 57) p 87.

94 UNSC Resolution 1534 (26 March 2004) UN Doc S/RES/1534 (2004)

in the following phases prosecution strategy of the Tribunal has been changed and directed to senior leaders responsible for IHL violations. Therefore it is possible to conclude that this approach of the Tribunal adopted in the first years has been amended in the following period.

To sum up, it is possible to claim that as a criminal court, ICTY was obliged to bring justice which has also been emphasized by the UNSC as pointed above. Accordingly, the Tribunal's performance on this issue should constitute an important part of this study.

As a result of the analysis made in this perspective, it is possible to claim that the ICTY has implemented fair trial standards successfully. Furthermore, its actions have been directed to ensure justice rather than seeking political goals. From this perspective, although the Tribunal has been blamed for favouring the "others" by all parties to the conflict, it is possible to claim that the Tribunal has stayed independent and impartial which as a result has increased its contribution to justice. Because of these reasons it is possible to conclude that the Tribunal has contributed to justice in its mandate.

In addition to that, from a wider perspective, the Tribunal has also contributed to justice by creating case law in the important issues of international criminal law which was missing before its establishment. From this perspective, the Tribunal has not only contributed to ensuring justice in the territory of Former Yugoslavia but also has been illuminative for future of international criminal law.

c. Restoration and Maintenance of Peace

First of all, if it is needed to provide a brief definition of peace, it is possible to claim that "peace refers to the cessation of overt military hostilities, widespread violence and IHL violations and prevention of their re-emergence at a later date through peaceful consolidation of post-conflict societies".[95] Accordingly with this definition, the concept of peace has two aspects: "immediate aspect" which is cessation of over military hostilities and a "long-term aspect" which is prevention of re-emergence of military conflicts through consolidation of post-conflict societies".

As stated above, in this part of this study, discussions about the function of trials in ensuring peace in the post-conflict societies will be avoided. Yet it is still needed to briefly mention about the relationship between peace and justice. In this perspective, the relationship between peace and judgements held after conflicts is controversial. While some scholars argue that these trials can ensure reconciliation. Some others assert that these tribunals are detrimental to reconciliation process[96] since these trials protract the conflict and cause

[95] Penny (n 13) p 262.

[96] J.Meernik and J.Guerrero, 'Can International Criminal Justice Advance Ethnic Reconciliation? The ICTY and Ethnic Relations in Bosnia-Herzegovina' (2014) 14 Southeast European and Black Sea Studiesp 386.

repetitive exposure to suffering.[97]

But when the Resolution 827 is analysed, it is possible to see that UNSC believes the existence of such a positive correlation since it is stated in the resolution that "establishment (…) of an international tribunal and the prosecution of persons responsible for serious violations of international humanitarian law (…) would contribute to the restoration of peace."[98]

In evaluating the Tribunal's contribution to peace in the territory of Former Yugoslavia, at first glance, it is quite possible to conclude that the Tribunal's goal of restoring and maintaining peace could not be reached. Because although the Tribunal was established in 1993, the conflict in the Former Yugoslavia has continued until the Dayton Accord which was signed at the end of 1995[99]. More tragically, parties have continued to commit serious IHL violations such that one of the gravest incidents of the conflict- Srebrenica Genocide – happened in July 1995, after the establishment of the Tribunal.

Yet it should be also reminded that the conflict in the Former Yugoslavia has been a complex one involving political and military decisions and having sociological and historical roots. And when this complexity of the case is considered, it would not be realistic to expect from a judicial organization to simply solve deep-rooted conflicts in a short time without the support of other national/international precautions.

In some cases complex as Yugoslavian conflicts, the effect of the international proceedings are not direct and simple[100]. Accordingly, for evaluating the success of ICTY in ensuring peace, our analysis should contain more than the above-presented plain fact about the immediate aspect of peace. In this context, by not ignoring that the Tribunal could not immediately end the conflict and ensure peace, its contribution to the long-term aspect of peace will be evaluated below.

First of all, the Tribunal has contributed to restoration and maintenance of peace by "individualization of guilt"[101]. With the help of this mechanism, attribution of offences to the individuals instead of blaming whole community has been possible. By the individualization of offences, it has been possible to lessen the ethnic hatred and the need for ethnic vengeance[102] which has contributed to the reconciliation and peace.[103]

97 ibid p 387.
98 UNSC Resolution 827 (n 25)
Penny (n 13) p 266.
99 Barria and Roper (n 14) p 358.
100 Meernik and Guerrero (n 96) p 387.
101 Meernik and Guerrero (n 96) p 386.
102 ibid p 391.
103 ibid p 386.

Moreover, the Tribunal has contributed to the restoration of peace by ensuring the removal of convicted political and military leaders so that they cannot protract the conflict[104]. Moreover, this contribution of the Tribunal has created a very immediate and tangible effect by creating a more moderate political atmosphere.[105] For example, indictment of Bosnian Serb leaders Karadzic and Mladic has resulted with their removal from their duties. And by the absence of these two leaders who were not willing about peace talks, it has been possible to make Dayton Peace without granting amnesty for war criminals.[106]

Furthermore, ICTY has served to restoration of peace in the Former Yugoslavia by establishing the truth about course of events. With the contribution of proceedings, victims of IHL violations have had the chance to claim their rights before a tribunal and opportunity to be acknowledged by a formal authority. As UNSC Representative of US M. Albright notes "Only the truth can cleanse the ethnic and religious hatreds and begin the healing process." [107]. Otherwise it would be quite possible to expect re-emergence of the ethnic/religious hatred and conflicts. From this perspective, the Tribunal has served to consolidation of peace and easing ethnic/religious hatred in the long run by establishing the truth.[108]

Yet there are still important points which decrease the contribution of the Tribunal to restore peace. If we are to briefly list these points, it is possible to note that "the remoteness of the proceedings from the population, the lack of involvement of local actors, the relatively high cost and complexity of trials, and the initial strategy of building cases against lower-level accused"[109] have decreased the effects of proceedings to reconciliation and peace. In addition to that reluctance of international community to take supportive precautions especially during the first years of the Tribunal has decreased the effect of the proceedings to peace.

Accordingly, it would not be wrong to conclude that although the Tribunal could not be able to restore peace immediately or ensure a complete reconciliation due to above-presented reasons; it has contributed to creating the conditions for peace talks and long-term consolidation of peace.

104 ibid p 388.
105 Megret (n 10) p 1029.
106 Penny (n 13) p 300.
107 ibid p 270.
108 ibid
109 Kerr (n 11) p 379.

5. Conclusion

As a conclusion; firstly it should be stated that although important steps have been taken, national courts have not been successful in ensuring deterrence, justice and peace to post-conflict societies. Therefore, it is not very difficult to assert that international criminal justice will exist and constitute an important part of the reconciliation processes. Bearing this in mind, in order to enhance existing mechanisms and to establish even more successful ones; lessons gained from the ICTY are crucial.

In this perspective, it should be stated that with the evaluations, the ICTY has opened a new path, a new way of thinking for important problems of international criminal law[110]. In other words, as the first example of ad hoc tribunals, the ICTY has "upgrad(ed) humanitarian laws from empty words to enforceable behavioural standards"[111]. From this perspective, it is possible to claim that even establishment of ICTY should be considered as an important success for international criminal law.

Herein it should be emphasized that while evaluating the success of international courts/tribunals, the methodology should be established carefully since domestic analogies may mislead these evaluations. In other words, it is important to consider special conditions of international criminal law and post-conflict societies before making assessments about the success of international courts/tribunals.

Another common mistake in evaluating the success of international tribunals is overloading them with very big and vague objectives. In this context, it has already been revealed that any analysis about this international criminal tribunals should consider that "international tribunals cannot be everything to everyone."[112] In this perspective, in this study efforts were firstly directed to reveal the objectives of the Tribunal and as a result in the light of Resolution 827 of UNSC three objectives were identified which are ensuring deterrence, justice and peace.

About the Tribunal's contribution to ensure deterrence in the region; it is quite possible to conclude that although decreased considerably because of the absence of proper enforcement mechanisms, the ICTY has contributed to the specific deterrence by removing the warlords from their duties. Furthermore, by creating an atmosphere of accountability, activities of the ICTY has broken the impunity lasting for 50 years and therefore contributed to general deterrence.

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110 Megret (n 10) p 1020.

111 Baroni (n 7) p 246.

112 Mirjan Damaska, 'Problematic Features of International Criminal Procedure', *The Oxford Companion to International Criminal Justice* (1st edn, OUP 2009) p 175. cited in Scully (n 31) p 303.

When the activities of the Tribunal are considered from the perspective of justice, it is possible to note that although the ICTY has had to struggle with sui generis problems of international criminal law, complex cases with a great quantity of witnesses and a large volume of documents; it has managed to provide fair trial standards in accordance with the human rights law. Moreover, the Tribunal has kept its independence and impartiality and drew the line between law and politics correctly. In addition to that with the help of the activities of Tribunal victims of IHL violations have had the opportunity to be acknowledged. Because of these reasons, it can be concluded that the Tribunal have fulfilled its mission regarding to ensuring justice.

It has already been pointed out that in addition to ensuring deterrence and justice, UNSC has accepted the theoretical relationship between peace and justice and accordingly assigned the Tribunal with "contributing to the restoration and maintenance of peace". As a result of above-presented analysis, it is possible to conclude that although establishment of the Tribunal couldn't provide an immediate ceasefire or peace, in the long-rung it has contributed to create atmosphere required for peace talks and contributed to reconciliation in the territory of Former Yugoslavia.

As a last remark, it should be noted that the ICTY has a special place in enforcing and applying the international criminal law and it has fulfilled its duties in a successful way. A few negative aspects should be considered in the light of inherent difficulties of international criminal law.

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