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# „BAUVERTRAG ALS GEGENLEISTUNG DER ÜBEREIGNUNG DES EIGENTUMS EINES GEBÄUDETEILS“ IM RAHMEN DES DEUTSCHEN, TÜRKISCHEN UND SCHWEIZERISCHEN RECHTS *

*Alman, Türk ve İsviçre Kanunu Çerçevesinde “Bir Binanın Bir Kısmının Mülkiyetinin Devri Karşılığında İnşaat Sözleşmesi”*

**Orhan GÜRGEN, LL.M. (SAARLAND)***

*Graduate Thesis Article*

**Abstract**

Construction activity has always been of great importance in Turkey, both in residential construction and in the commercial sector. Due to the increasing number of new buildings in the past decade, more and more international companies are becoming familiar with the construction industry in Turkey. In this context, the prevailing type of construction contract in Turkish construction, the ‘construction contract in return for the transfer of ownership of a part of a building’ is becoming increasingly important for international companies.

In order to avoid long-lasting legal disputes, the parties must be able to understand the formal legal scope and content of this building contract. Although the Turkish civil law system is based on Swiss law, there are various results in the interpretation of the case law.

In the context of this work, such a construction contract is examined with regard to the Turkish, Swiss and German legal system. Legal incident resolution technique was used as the examination method. The aim and purpose of this work is to consider this building contract and to show how approximately the same regulations can be differentiated from one another based on the interpretation of case law and literature.

**Keywords** Construction Contract • Work Contract • Ordinary Company • Comparative Law• Court of Cassation

**Özet**

Türkiye’de hem konut inşaatında hem de ticari sektörde inşaat faaliyeti her zaman büyük önem taşımaktadır. Son on yılda yeni inşaat projelerinin sayısının artması nedeniyle, giderek daha fazla sayıda uluslararası şirket Türkiye’deki inşaat sektörünü tanımaktadır. Bu bağlamda, Türk inşaatında hâkim olan inşaat sözleşmesi türü olan ‘Kat Karşılığı İnşaat Sözleşmesi ‘ uluslararası şirketler için giderek daha önemli hale gelmektedir. Uzun süren yasal uyuşmazlıklardan kaçınmak için taraflar, bu inşaat sözleşmesinin resmi yasal kapsamını ve içeriğini anlayabilmelidir. Türk Özel Hukuk sistemi İsviçre Hukukuna dayanmakla birlikte, Kanunun ve sözleşmelerin yorumlanmasında ülkeler arası farklılıklar ortaya çıkabilmekte, böylece Yargı kararları farklılaşabilmektedir. Bu çalışma kapsamında, Türk, İsviçre ve Alman hukuk sistemi açısından kat karşılığı inşaat sözleşmesi incelenmiştir. Bu çalışmanın amacı, bu inşaat sözleşmesini incelemek ve benzer kanuni düzenlemelerin hukuki yorum neticesinde Doktrin ve Yargı kararlarında birbirinden nasıl ayrılabileceğini göstermektir.

**Anahtar Kelimeler** İnşaat Sözleşmesi • Eser Sözleşmesi • Adi Şirket • Yargıtay • KarşılaştırmalıHukuk

* This Article has been prepared by making some changes from the work used in the LLM program at the University of Saarland..

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## EINLEITUNG

Die Bautätigkeit ist in der Türkei sowohl im Wohnbau als auch im gewerblichen Bereich seit jeher von großer Bedeutung. Durch die im letzten Jahrzehnt immer weiter angestiegene Zahl von Neubauten werden immer mehr internationale Firmen mit dem Bauwesen der Türkei vertraut. In diesem Zusammenhang gewinnt die herrschende Bauvertragsart des türkischen Bauwesens, der ‚Bauvertrag als Gegenleistung der Übereignung des Eigentums eines Gebäudeteils‘ eine immer größer werdende Bedeutung für internationale Unternehmen.

Um lang andauernde Rechtstreitigkeiten zu vermeiden, müssen die Parteien den formal juristischen Umfang und Inhalt dieses Bauvertrages erfassen können. Obwohl das türkische Zivilrechtssystem auf dem schweizerischen Recht beruht, ergeben sich verschiedene Resultate bei der Auslegung durch die Rechtsprechung. Ein Beispiel dafür ist Folgendes: nach Ansicht des türkischen Obergerichtshofs Yargıtay gilt ein Bauvertrag als Gegenleistung der Übereignung des Eigentums eines Gebäudeteils als Gesellschaftsvertrag, hingegen gilt er nach Ansicht des schweizerischen Rechts als Mischvertrag, der aus Tausch- und Werkvertrag besteht[1].

Im Rahmen dieser Arbeit wird ein solcher Bauvertrag im Hinblick auf das türkische, schweizerische und deutsche Rechtssystem untersucht. Ziel und Zweck dieser Arbeit ist die Betrachtung dieses Bauvertrags besonders im Rahmen einfacher Gesellschaftsvertrag und die Darstellung, wie annähernd gleiche Vorschriften anhand der Auslegung der Rechtsprechung und Literatur anders verstanden werden können. In unserer Studie wird ein rechtlicher Sachverhalt aufgedeckt. Während der Lösung dieses rechtlichen Sachverhalts wird dem Leser rechtliche Erklärungen zu diesem Thema vorgelegt.

### Der Sachverhalt

B und die BU-GmbH schließen am 01.01.2016 einen Vertrag mit notariell beurkundetem Vertrag ab. Laut dieses Vertrages erteilt B der BU-GmbH die Erlaubnis zum Bau eines vierstöckigen Gebäudes mit 14 Wohnungen auf seinem Grundstück. Die BU-GmbH muss ein Gebäude errichten, von der Bauaufsichtsbehörde eine Genehmigung zur Errichtung des Gebäudes erhalten und mit einem Architekten einen Architektenvertrag abschließen, um das Projekt vorbereiten zu lassen.

Laut dieses Vertrages zwischen B und der BU-GmbH muss dieses Gebäude innerhalb von drei Jahren fertiggestellt werden. Wenn die BU-GmbH bis Ende des 1. April 2016 von der Bauaufsichtsbehörde keine Genehmigung zur Errichtung dieses Gebäudes erhält, oder bis Ende dieses Datums kein Projekt

[1] Gauch, der Werkvertrag, 5. Auflage, 2011, st.43.

vorbereiten lassen kann, wird dieser Vertrag zwischen B und der BU-GmbH ohne weitere Aktion von selbst (ipso jure) von Grund auf angefochten.

Beim Bau dieses Gebäudes müssen hochwertiges Baumaterial und ausgezeichnete Bauarbeiter verwendet werden. Der erste Stock dieses Gebäudes muss zweiteilig sein und zur gewerblichen Nutzung dienen. Die anderen Stockwerke sind zu Wohnnzwecken vorgesehen. B hat das Recht, das Baugelände zu überprüfen.

Alle Baukosten werden von der BU-GmbH getragen. Nachdem dieses Gebäude fertiggestellt ist, wird B die zwei gewerblichen Abteilungen im ersten Stock und die sechs Wohnungen in anderen Stöcken der BU-GmbH übereignen und ins Grundbuch auf den Namen der BU-GmbH, ohne der BU-GmbH etwas zu bezahlen, als Eigentümer eintragen lassen.

## A. DER VERTRAG ZWISCHEN B UND DER BU-GMBH KÖNNTE EIN WERKVERTRAG SEIN.

Im Rahmen der Gestaltungsfreiheit[2] sind die Vertragsparteien hier frei darin, was sie als Inhalt des Vertrages bezeichnen. Auch wenn die Parteien einen bestimmten Vertragstyp wählen, können sie einzelne gesetzliche Regeln abbedingen oder sich zusätzlicher Pflichten verschulden[3].

Bei dieser Vertragsart könnte es sich nach dem Bürgerlichen Gesetzbuch um einen Werkvertrag handeln. Ein Werkvertrag ist nach §631 Abs. 1 BGB (Bürgerliches Gesetzbuch) ein Vertrag, durch den sich die eine Partei, der Unternehmer, zur Herstellung des versprochenen Werkes und die andere Partei, der Besteller, zur Entrichtung der vereinbarten Vergütung verpflichten[4].

Der Werkvertrag ist im Obligationengesetzbuch der Schweiz (OR) in Art. 363[5] und im Obligationengesetzbuch der Türkei (TBK) in Art. 470[6] geregelt. Nach der Vorschrift des Art. 363 OR ist der Werkvertrag ein vollkommen zweiseitiger Vertrag, durch dessen Abschluss sich die beteiligten Parteien zum Austausch bestimmter Leistungen verpflichten. Die eine Leistung besteht nach dem Wortlaut des Art. 363 OR in der „Herstellung eines Werkes“ die andere in

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2 Der Begriff “Gestaltungsfreiheit” gilt auch in der Türkei und in der Schweiz. Basler Kommentar Obligationenrecht I, Art. 1-529 OR, Vor Art. 1-40f Rn.5 ff., 6. Auflage, 2015, st.34ff., Eren, Borçlar Hukuku Genel Hükümler, 9. Auflage, 2006, st.18ff.

3 Brox/Walker, Allgemeines Schuldrecht, 39. Auflage, 2015, st.33.

4 Emmerich, BGB-Schuldrecht Besonderer Teil, 14. Auflage, 2015, st.143

5 “Durch den Werkvertrag verpflichtet sich der Unternehmer zur Herstellung eines Werkes und der Besteller zur Leistung einer Vergütung.”

6 “Eser sözleşmesi, yüklenicinin bir eser meydana getirmeyi, işsahibinin de bunun karşılığında bir bedel ödemeyi üstlendiği sözleşmedir.” Übersetzung: Der Werkvertrag ist ein Vertrag, bei dem sich der Unternehmer zur Herstellung eines Werkes und der Besteller dafür zur Leistung einer Vergütung verpflichtet.

der „Leistung einer Vergütung“[7]. Nach der Vorschrift des Art. 470 TBK enthält der Werkvertrag auch gegenseitige Verpflichtungen zur „Herstellung eines Werkes“ und zur „Leistung einer Vergütung“.

Die Betrachtung des Sachverhalts hängt davon ab, ob der Inhalt des geschlossenen Vertrages zwischen B und der BU-GmbH die Voraussetzungen des Werkvertrages erfüllt oder nicht. Maßgeblich für die Abgrenzung des Werkvertrages von anderen Vertragstypen ist §631 BGB. Die Vereinbarung zwischen den Parteien ist daher dann nach Werkvertragsrecht zu behandeln, wenn sich eine Partei zur Zahlung einer Vergütung und die andere Partei zur Herstellung eines Werks verpflichtet haben[8].

## I. PFLICHTEN DES UNTERNEHMERS BEIM WERKVERTRAG

### 1. Hauptleistungspflichten des Unternehmers laut BGB

Die Hauptleistungspflichten des Unternehmers ergeben sich aus den §631 i.V.m. §633 BGB, wonach sich der Unternehmer dazu verpflichtet, dem Besteller das Werk frei von Sach- und Rechtsmängeln zu übermitteln[9].

Der Werkvertrag zeichnet sich durch seine Erfolgsbezogenheit aus. Der Unternehmer schuldet dem Besteller durch den Werkvertrag die Herbeiführung eines konkreten Erfolges. Anhand dieses Kriteriums ist der Werkvertrag von anderen Verträgen, besonders vom Dienstvertrag, abzugrenzen[10]. Nach §631 Abs. 2 BGB kann sowohl die Herstellung oder Veränderung einer Sache als auch ein durch Arbeit oder Dienstleistung herbeizuführender Erfolg Gegenstand des Werkvertrages sein. Der erste Teil der Definition betrifft die sog. Körperlichen Werke[11], wie hier das Gebäude.

Die andere Hauptleistungspflicht des Unternehmers ist es, dem Besteller das Werk frei von Sach- und Rechtsmängeln zu verschaffen. Der Sachmangel ergibt sich aus §633 Abs. 2 BGB. Ein Sachmangel ist besonders dann anzunehmen, wenn es eine negative Abweichung des Werks von der vereinbarten Beschaffenheit gibt oder für die gewöhnliche Verwendung nicht geeignet ist. Ein Rechtsmangel ergibt sich aus §633 Abs. 3 BGB. Ein Rechtsmangel ist anzunehmen, wenn Dritte in Bezug auf das Werk Rechte gegen den Besteller geltend machen können, die der Besteller in dem Vertrag nicht übernommen hat[12].

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7 Gauch, der Werkvertrag, st.3.

8 Erman Kommentar zum BGB, Bd. 1: §§ 1-758, §§ Vor 631-651 Rn.7, 14. Auflage, 2014, st.2733.

9 Medicus/Lorenz, Schuldrecht II Besonderer Teil, 17. Auflage, 2014, st.256/257.

10 Juris PraxisKommentar zum BGB, Bd. 2.3: Schuldrecht §§631 bis 853, §631 Rn.5, 6. Auflage, 2013, st.2/3.

11 Messerschmidt/Voit, Privates Baurecht, Kommentar zu §§ 631 ff. BGB, 2. Auflage, 2012, st.737.

12 Emmerich, BGB-Schuldrecht Besonderer Teil, st.145/146.

### 2. Hauptleistungspflichten des Unternehmers laut OR und TBK

Nach der Vorschrift des Art. 363 OR kann das Werk, das der Unternehmer als Ergebnis seiner Arbeit dem Besteller schuldet, ein körperlicher oder ein unkörperlicher Arbeitserfolg sein. Das unkörperliche Werk bildet das Ergebnis einer immateriellen Leistung, die ebenfalls geeignet ist, Gegenstand einer werkvertraglichen Unternehmerleistung zu sein. Das körperliche Werk kann eine bewegliche oder unbewegliche Sache oder eine Mehrheit von Sachen sein, die der Unternehmer neu zu errichten hat, beispielsweise wie hier das Gebäude[13], oder an einer bereits vorhandenen Sache (auch Mehrheit von Sachen) auszuführen hat. Der Unternehmer kann sich im Werkvertrag auch zur Befestigung, Erhaltung oder Veränderung der Sachen verpflichten[14]. Nach den Vorschriften des TBK und der Rechtsprechung der Türkei verpflichtet sich der Unternehmer bei dem Werkvertrag zur Herbeiführung eines konkreten Erfolges[15]. Laut schweizerischem Obligationenrecht werden die Pflichten des Unternehmers mittels Vorschriften Art. 364-371 OR geregelt. Nach der Vorschrift des Art. 363 OR besteht die Hauptpflicht des Unternehmers in der Herstellung des Werkes und dessen Ablieferung an den Besteller. Bei einem Werklieferungsvertrag muss das Werk zudem frei von Sach- und Rechtsmängeln[16] sein[17].

### 3. Nebenleistungspflicht des Unternehmers laut BGB

Als Nebenleistungspflichten kann man alle anderen selbständig einklagbaren Pflichten bezeichnen. Sie können auf die ordnungsgemäße Erbringung und Nutzung der eigenen Hauptleistung bezogen sein, aber auch einen anderen selbständigen Zweck verfolgen[18]. Bei dem Werkvertrag beschränken sich die Pflichten des Unternehmers nicht auf die Herstellung des geschuldeten Werkes. Vielmehr kommen zu dieser Hauptleistungspflicht Nebenleistungspflichten hinzu, die kraft eines Vertrages oder Gesetzes entstehen. Gesetzliche Nebenpflichten ergeben sich aus Treu und Glauben §242 BGB oder aus Vertragszweck[19]. Im Einzelnen bestehen für den Unternehmer Aufklärungs-

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13 Fall Doppeleinfamilienhäuser BGr 4C.433/2005 (http://www.polyreg.ch/bgeunpub/Jahr_2005/Entscheide_4C_2005/4C.433__2005.html)

14 Gauch, der Werkvertrag, st.9/10.

15 “Die Abgrenzung zwischen Werkvertrag und Arbeitsvertrag richtet sich nach dem konkreten Erfolg und der persönlichen Abhängigkeit.“ T.C Yargıtay 21.Hukuk Dairesi Esas: 2013 / 14457 Karar: 2014 / 15156 Karar Tarihi (das Datum): 26.06.2014.

16 Art. 364-371 OR in Verbindung mit Art.2 OR.

17 Koller, Schweizerisches Werkvertragsrecht, Werkvertragsrecht, 2015, st.54/55.

18 Brox/Walker, Allgemeines Schuldrecht, st.10, Huguenin, Obligationenrecht Allgemeiner und Besonderer Teil, st.26.

19 Juris PraxisKommentar zum BGB, Bd. 2.3: Schuldrecht §§631 bis 853, §631 Rn. 165, st.22.

und Beratungspflichten, Obhuts- und Verwahrungspflichten sowie Sicherungs- und Fürsorgepflichten[20].

### 4. Nebenleistungspflicht des Unternehmers laut OR und TBK

Art. 364 OR und Art. 471 TBK behandeln die allgemeinen Nebenpflichten des Unternehmers, nämlich die Pflichten zur Sorgfalt, zur persönlichen Ausführung oder persönlichen Leitung der Ausführung des Werkes und zur Besorgung der erforderlichen Arbeitsmittel. Zu diesen gesetzlichen Nebenpflichten kommen vielfach noch zusätzlich vereinbarte Nebenpflichten hinzu[21].

## II. PFLICHTEN DES BESTELLERS BEI EINEM WERKVERTRAG

### 1. Hauptleistungspflichten des Bestellers laut BGB

Die Hauptleistungspflicht des Bestellers ergibt sich aus §631 Abs. 1 BGB, wodurch sich der Besteller zur Entrichtung der vereinbarten Vergütung verpflichtet. Die Höhe der Vergütung richtet sich nach der Vereinbarung der Parteien oder nach §632 Abs. 2 BGB, wenn die Parteien die Höhe der Vergütung nicht bestimmen. Das BGB trifft keine ausdrückliche Anordnung, welche Art der Vergütung beim Werkvertrag geschuldet ist. In der Regel ist von Geld auszugehen. Im Rahmen der Vertragsfreiheit sind aber auch andere Gegenleistungen vorstellbar[22].

### 2. Hauptleistungspflichten des Bestellers laut OR und TBK

Nach Art. 372 OR und Art. 470 TBK ist die Vergütungspflicht des Bestellers also notwendiger Inhalt des Werkvertrages. Das bedeutet aber nicht, dass die Höhe der Vergütung im Vorhinein festgelegt sein muss. Fehlt im Vertrag ein fester Preis und fehlt auch eine Vereinbarung darüber, wie der Preis zu berechnen ist, oder besteht zwar eine Preisvereinbarung, ist diese aber zu unbestimmt, regelt Art. 374 OR, Art. 481 TBK subsidiär die Art und Weise der Preisberechnung[23]. Die Vergütung muss auch nicht ausdrücklich versprochen werden; eine stillschweigende Vereinbarung genügt[24]. Nach dem Regelungsmodell des Gesetzes (OR und TBK) besteht die Vergütung des Unternehmers in einer Geldleistung des Bestellers. Haben die Parteien eine andere Art der Vergütung vereinbart, so ist der betreffende Vertrag ein

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20 Wenzel/Winkel, Schuldrecht Besonderer Teil I, 7. Auflage, 2015, st. 208ff.
21 Basler Kommentar Obligationenrecht I, Art. 1-529 OR, Art. 364 Rn.1, st. 2292/2293.
22 Juris PraxisKommentar zum BGB, Bd. 2.3: Schuldrecht §§631 bis 853, §632 Rn.10, st.29.
23 Huguenin, Obligationenrecht Allgemeiner und Besonderer Teil, 2. Auflage, 2014, st.875.
24 Basler Kommentar Obligationenrecht I, Art. 1-529 OR, Art. 363 Rn. 4, 6. Auflage, 2015, st.2281.

gemischter Vertrag[25]. Bei den behandelten Innominatkontrakten scheitert also die Annahme eines gesetzlichen geregelten Werkvertrages[26].Laut des Vertrages zwischen B und der BU-GmbH wird die Höhe der Vergütung als die zwei gewerblichen Abteilungen im ersten Stock und die sechs Wohnungen bestimmt. Die Art der Vergütung wird laut BGB nicht zwingend bestimmt, sondern die Parteien können die Höhe und die Art der Vergütung selbst bestimmen. Deswegen könnten die zwei gewerblichen Abteilungen im ersten Stock und die sechs Wohnungen bei dem Werkvertrag nach der Ansicht des BGB als Vergütung angenommen werden, da sie einen Vermögenswert haben. Angesichts der Gestaltungsfreiheit können die Vertragsparteien hier frei wählen, was sie als Vergütung bestimmen. Demgegenüber wird die Art von Vergütung bei einem Werkvertrag laut OR und TBK zwingend als Geldleistung bestimmt, deshalb wird diese Vertragsart nicht als Werkvertrag sondern als gemischter Vertrag oder Innominatkontrakt bezeichnet, wenn die Parteien wie hier die Art von Vergütung nicht als Geldleistung vereinbaren.

### 3. Nebenleistungspflicht des Bestellers laut BGB

Bei dem Werkvertrag beschränken sich die Pflichten des Bestellers nicht auf die Leistung der vereinbarten Vergütung des bestellten Werkes. Vielmehr treten zu dieser Hauptleistungspflicht Nebenleistungspflichten, die kraft eines Vertrages oder eines Gesetzes entstehen. Dem Unternehmer ist häufig eine Herstellung des Werkes ohne Mitwirkung des Bestellers[27] nicht möglich. Ein Beispiel dafür ist bei Bauwerkverträgen die Bereitstellung des entsprechend vorbereiteten Grundstücks durch den Bauherren[28]. Laut des Vertrages zwischen B und der BU-GmbH verpflichtet sich B als Nebenleistungspflicht dazu, der BU-GmbH die Erlaubnis zum Bau auf seinem eigenen Grundstück zu erteilen. Diese Nebenleistungspflicht des B könnte bei dem Werkvertrag die Mitwirkungspflicht im Rahmen des BGB sein[29].

### 4. Nebenleistungspflicht des Bestellers laut OR und TBK

Anders als im BGB werden in der Schweiz und in der Türkei die Mitwirkungspflichten des Bestellers allgemein zu den Obliegenheiten[30]

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25 Gauch, der Werkvertrag, st.43.

26 Gauch, der Werkvertrag, st.129.

27 Juris PraxisKommentar zum BGB, Bd. 2.3: Schuldrecht §§631 bis 853, §631 Rn.183, st.25.

28 Emmerich, BGB-Schuldrecht Besonderer Teil, st.155.

29 “Aufgrund der Bedeutung der Mitwirkungsplichten kann es daher empfehlenswert sein, diese nicht nur als verträgliche Nebenpflichten, sondern als Hauptpflichten auszugestalten.“ Juris PraxisKommentar zum BGB, Bd. 2.3: Schuldrecht §§631 bis 853, §642 Rn.7, st.178.

30 “Obliegenheiten sind ebenfalls Verhaltensregeln. Anders als bei den Pflichten kann die Kontrahentin ihre Einhaltung aber nicht einfordern bzw. Einklagen. Ausserdem steht ihr bei deren Nichtbefolgung kein Schadenersatzsanspruch zu.” Huguenin, Obligationenrecht Allgemeiner und Besonderer Teil, st.28.

gezählt[31]. Wohl aber wird zurecht darauf hingewiesen, dass die Auslegung das einzelnen Werkvertrages möglicherweise etwas anderes ergibt, dass nämlich nach dem vereinbarten Inhalt des konkreten Vertrages die Mitwirkungspflichten ausnahmsweise echte Verpflichtungen sind, deren Erfüllung der Unternehmer einklagen und bei deren Verletzung er allenfalls Schadenersatz fordern kann. Namentlich bei langfristen Werkverträgen, aber auch sonst, kann es sich erweisen, dass der Unternehmer von Anfang an und für den Besteller erkennbar ein starkes Eigeninteresse an der tatsächlichen Ausführung des Werkes hat. Dieser Umstand bildet ein Indiz dafür, dass die Mitwirkungspflichten des Bestellers nach dem maßgeblichen Vertragswillen der betreffenden Parteien eigentliche Nebenpflichten sind[32].

## B. DER VERTRAG ZWISCHEN B UND DER BU-GMBH KÖNNTE EIN EINFACHER GESELLSCHAFTSVERTRAG/ GESELLSCHAFT BÜRGERLICHEN RECHTS SEIN.

Bei dieser Vertragsart könnte es sich um einen Gesellschaftsvertrag bürgerlichen Rechts[33] handeln. Ein Gesellschaftsvertrag ist nach §705 BGB ein Vertrag, durch den sich die Gesellschafter gegenseitig verpflichten, die Erreichung eines gemeinsamen Zwecks in der durch den Vertrag bestimmen Weise zu fördern, insbesondere durch die Leistung der vereinbarten Beiträge[34]. Die Entscheidung hängt davon ab, ob der Inhalt des geschlossenen Vertrages zwischen B und der BU-GmbH die Voraussetzungen des Gesellschaftsvertrages erfüllt oder nicht. Maßgeblich für die Abgrenzung der BGB-Gesellschaft von anderen Vertragstypen ist §705ff. BGB. Die Vereinbarung der Parteien ist daher dann nach der BGB-Gesellschaft zu behandeln, wenn sich die Parteien, die sich aus mindestens zwei Personen bilden, im weiteren Sinne zur Förderung des vereinbarten gemeinsamen Zwecks im engeren Sinne zur vertraglichen Verbindung und in der Regel zur gesamthänderischen Beteiligung, die sich durch nicht beliebig auswechselbare Mitgliedschaft auszeichnet, verpflichtet haben[35].

### I. WESENSMERKMALE DER GESELLSCHAFT BÜRGERLICHEN RECHTS LAUT BGB

Das Vorliegen einer BGB-Gesellschaft setzt das Vorhandensein mehrerer Tatbestandsmerkmale voraus. Es muss ein Vertrag vorliegen, in dem sich die

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31 Koller, Schweizerisches Werkvertragsrecht, st. 72/73, Gauch, der Werkvertrag, st.534.
32 Gauch, der Werkvertrag, st.540.
33 BGB-Gesellschaft
34 Erman Kommentar zum BGB, Bd. 1: §§ 1-758, §705 Rn.1, st.3272
35 Ulmer/Schaefer, Gesellschaft bürgerlichen Rechts und Partnerschaftsgesellschaft: Systematischer Kommentar, 6.Auflage, 2013, st.5.

Vertragspartner zur gegenseitigen Förderung eines gemeinsamen Zwecks verpflichten[36]. Gemeinsamer Zweck und Förderpflicht[37] als die beiden nach §705 BGB konstitutiven Merkmale des Gesellschaftsvertrages hängen untrennbar zusammen. Als negative Tatbestandsvoraussetzungen kommen hinzu, dass weder im Handelsgewerbe i.S.d. §§1-7 HGB betrieben wird (§105 Abs.1 HGB) noch eine konstitutive Eintragung als Partnerschaftsgesellschaft vorliegt (§7 Abs.1 PartGG)[38]. Die Vergemeinschaftung des Zwecks kommt einerseits darin zum Ausdruck, dass die Gesellschafter als Vertragspartner eine Einigung über bestimmte gemeinsam zu verfolgende Interessen oder Ziele herbeiführen, um dadurch gemeinsam einen bestimmten Erfolg zu erzielen[39]. Die Arten des gemeinsamen Zwecks unterscheidet §705 BGB nicht. Jeder erlaubte Zweck kann Gegenstand einer Gesellschaft sein[40]. Der Zweck muss für alle Vertragsschließenden gleich sein, d.h. jeder Gesellschafter kann die Förderung des Zwecks von den anderen beanspruchen. Durch die Zusammenarbeit der Gesellschafter muss der Zweck erreicht werden[41]. Bei dem Werkvertrag zeigt sich auch entsprechend dem Parteiwillen der mit dem Vertrag verfolgte wirtschaftliche Zweck[42]. Dieser Zweck belegt die vorherrschende und insofern die in der Praxis durchaus vorrangige Bedeutung der Werkverträge, für die es kennzeichnend ist, dass die Leistungen jeweils im eigenen Interesse erbracht werden. Im Kern geht es dem Wesen synallagmatischer Verträge entsprechend um den Austausch von Leistung und Gegenleistung. Nicht das gemeinschaftliche Fördern, sondern das Fördern zum eigenen Nutzen ist prägend für den Bau- und Werkvertrag[43]. Die Förderpflicht der Gesellschafter zur Förderung des gemeinsamen Zwecks ist notwendiger Gegenstand der mit der Beteiligung an einer BGB-Gesellschaft begründeten rechtsgeschäftlichen Bindung. Keine Gesellschaft liegt daher vor, wenn die

36 Juris PraxisKommentar zum BGB, Bd. 2.3: Schuldrecht §§631 bis 853, §705 Rn.3, st.919.

37 “Der gemeinsame Zweck bildet als das gemeinschaftsrechtliche Element das charakteristische Merkmal der Gesellschaft und grenzt sie von sonstigen vertraglichen Schuldverhältnissen ab, namentlich von Austauschverträgen; die vertragliche Einigung hierüber steht notwendig am Beginn jeder gesellschaftlichen Zusammenarbeit. Demgegenüber enthalten die Abreden über die Förderpflichten der Parteien, insbesondere über die Leistung von Beiträgen, in erster Linie das obligatorische Element, das die Gesellschaft als vertragliches Schuldverhältnis von der Rechtsgemeinschaft unterscheidet.“ Münchener Kommentar zum BGB, Bd. 5: Schuldrecht Besonderer Teil III, §§705-853, §705 Rn.128, 6. Auflage, 2013, st.121/122.

38 Juris PraxisKommentar zum BGB, Bd. 2.3: Schuldrecht §§631 bis 853, §705 Rn. 3, st.919.

39 Ulmer/Schaefer, Gesellschaft bürgerlichen Rechts und Partnerschaftsgesellschaft: Systematischer Kommentar, st.120, Juris PraxisKommentar zum BGB, Bd. 2.3: Schuldrecht §§631 bis 853, §705 Rn. 30ff., st.930.

40 BGH 02.06.1997,Az.: II ZR 81/96

41 Juris PraxisKommentar zum BGB, Bd. 2.3: Schuldrecht §§631 bis 853, §705 Rn. 32, st.930.

42 Juris PraxisKommentar zum BGB, Bd. 2.3: Schuldrecht §§631 bis 853, §631 Rn.5, st.2.

43 Messerschmidt/Voit, Privates Baurecht, Kommentar zu §§631 ff. BGB, st.14/15.

Beteiligten entweder keine Förderpflichten übernommen haben oder wenn sich die in Frage stehenden Pflichten nach Art und Ausmaß bereits aus anderen, unabhängig vom Gesellschaftsvertrag zwischen ihnen bestehenden, Bindungen ergeben[44]. Im Hinblick auf die Förderpflicht gibt es keine Abweichungen zur BGB-Gesellschaft. Beitragsleistung kann jedes Tun oder jede Unterlassung sein, die zweckfördernd ist[45]. Ebenso kann die Leistung in der Einbringung von Sachwerten bestehen. Eine solche Einbringung kann durch Übertragung zu vollem Eigentum geschehen, durch Übertragung der Werte nach oder durch bloße Gebrauchsüberlassung[46]. Ein weiteres Kennzeichnen der BGB-Gesellschaft ist die vertragliche Dauerbeziehung zwischen den Gesellschaftern. Die BGB-Gesellschaft erweist sich damit als Unterfall der im allgemeinen Schuldrecht, mit Ausnahme des §314 BGB, nicht näher geregelten Kategorie der Dauerschuldverhältnisse. Deren Kennzeichen besteht darin, dass anders als etwa beim Kauf- oder Werkvertrag Rechte und Pflichten des Vertragspartners nicht auf die Erbringung einer oder mehrerer bestimmter Leistungen gerichtet sind, deren Erfüllung zur Beendigung des Schuldverhältnisses führt[47]. Die BGB-Gesellschaft beruht zwar auf einem Dauerschuldverhältnis, aufgrund dessen der Bestand der BGB-Gesellschaft von der Erfüllung der Einzelverpflichtungen der Gesellschafter unabhängig ist. Der instabilen, nicht auf lange Dauer bezogenen gesetzlichen Grundstruktur entspricht die Verwendung der BGB-Gesellschaft als Rechtsform für Gelegenheitsgesellschaften. Hierunter sind Zusammenschlüsse zu verstehen, die der Durchführung eines oder einer begrenzten Anzahl von Einzelgeschäften auf gemeinsame Rechnung dienen[48]. Dauerbeziehung und gemeinsamer Zweck bilden zugleich den Grund für ein anderes Wesensmerkmal der BGB-Gesellschaft: die Treubindung der Gesellschafter und der von der grundsätzlichen Unübertragbarkeit der Mitgliedschaft ausgehenden persönliche Charakter des Zusammenschlusses[49]. Auch für die Feststellung, ob Werkvertrag, Gesellschaftsvertrag oder Innengesellschaft[50] vorliegt, ist im Ergebnis die Vertragsauslegung (§133,157

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44 Münchener Kommentar zum BGB, Bd. 5: Schuldrecht Besonderer Teil III, §§705-853, §705 Rn.153, st.131.

45 Neu, Gesellschatsrecht Schnell erfasst, 2004, st.84.

46 Schwerdtfeger, Gesellschaftsrecht Kommentar, 3. Auflage, 2014, st.38.

47 Münchener Kommentar zum BGB, Bd. 5: Schuldrecht Besonderer Teil III, §§705-853, §705 Rn.5, st.6.

48 Ulmer/Schaefer, Gesellschaft bürgerlichen Rechts und Partnerschaftsgesellschaft: Systematischer Kommentar, st.42.

49 Ulmer/Schaefer, st.7.

50 “Als typische Merkmale einer Innengesellschaft, die geeignet sind, sie vom gesetzlichen Normaltyp der Aussengesellschaft zu unterscheiden, werden in Rechtsprechung (BGHZ 12,308,314 f. NJW 1954,1159) und Literatur (Erman/Westermann Vor §705 Rn.28) zwei Negativ-Umstände genannt: einerseits die vertragliche geregelte Nichtteilnahme der Gesellschaft am Rechtsverkehr und dementsprechend das Fehlen von

BGB) maßgebend. Für die Abgrenzung von Werkvertrag, Gesellschaftsvertrag oder Innengesellschaft kommt es darauf an, ob die Vertragsschließenden in einer Bestimmung auf Besonderheiten[51] hingewiesen haben, denn das Gebäude gehört anstelle des Gesellschaftsvermögens unmittelbar den Parteien und B hat keinen Geschäftsführungswillen und keine Geschäftsführungspflicht. Im Hinblick auf diese Besonderheiten ist dieser Vertrag kein Gesellschaftsvertrag, sondern könnte ein Innengesellschaftsvertrag oder Werkvertrag sein. Laut des Vertrages zwischen B und der BU-GmbH verpflichtet sich B dazu, der BU-GmbH die Erlaubnis zum Bau auf seinem eigenen Grundstück zu erteilen. Diese Verpflichtung des B ist ein Bestandteil des Vertrags zwischen B und der BU-GmbH, denn die BU-GmbH kann dieses Gebäude nicht fertigstellen, ohne dass B der BU-GmbH die Erlaubnis erteilt. Diese Erlaubnis ist als Förderpflicht anzunehmen, denn die Förderpflicht kann sowohl als Tun als auch als Unterlassen gelten. Die Parteien vereinbaren hingegen, dass alle Baukosten nur von der BU-GmbH zu tragen sind. Zwar gilt eine solche Vereinbarung, die die Verantwortung einer oder mehrerer Parteien beschränken, bei dem Gesellschaftsvertrag gegen dritte Personen nicht, aber das ist ein Indiz, um den Vertrag und der tatsächliche oder mutmaßliche Wille der Parteien auszulegen.

Ob dieses Gebäude ein gemeinsamer Zweck für einen Gesellschaftsvertrag oder ein Erfolg für einen Werkvertrag ist, kommt auf die Vertragsauslegung (§133,157 BGB) an. Bei dem Vertrag zwischen den Parteien haben die Parteien eine Gewinnerzielungsabsicht, die nicht auf das gemeinschaftliche Fördern, sondern auf das Fördern zu eigenem Nutzen abzielt. Diese Absicht der Parteien, die im Rahmen des Werkvertrages als Merkmale des Motivs für die Gewinnerzielungsabsicht der Parteien anzunehmen ist, ist prägend für den Bau- und Werkvertrag.

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Vertretungsregelungen im Gesellschaftsvertrag, zum anderen der Verzicht auf die Bildung von Gesellschaftsvermögen.“ Münchener Kommentar zum BGB, Bd.5: Schuldrecht Besonderer Teil, §§705-853, §705 Rn.275ff., st.180/181, “Wie die Beispiele der Innengesellschaft, insbesondere der stillen GbR und der Unterbeteiligung zeigen, gibt es Gesellschaften, die in Abweichung von §718 über kein gemeinsames Vermögen verfügen und sich daher, ohne Gesamthandsbeziehungen zwischen den Gesellschaftern, auf den Schuldverhältnis des §705 beschränken (Rn.285).“ Münchener Kommentar zum BGB, Bd. 5: Schuldrecht Besonderer Teil III, §705-853, §705 Rn.8, st.7.

[51] “Die Haftung der Gesellschafter; ob die Geschäftsführung und die Vertretung gemeinschaftlich ist; ob die Gesellschafterrechte nicht ohne weiteres auf Dritte übertragen werden können; ob die Beiträge der Gesellschafter und die durch die Geschäftsführung erworbenen Gegenstände zu gemeinschaftlichem Gesellschaftsvermögen gehört; ob die gesamthänderische Bindung und auch die gesamthänderische Verpflichtung der Gesellschafter eintritt; Ende der Gesellschaft; Auseinandersetzung der Gesellschaft im gesetzlich vorgegebenen Rahmen; ob ein verbleibender Überschuss den Gesellschaftern zur Verfügung gestellt wird.“ Messerschmidt/Voit, Privates Baurecht, Kommentar zu §§ 631 ff. BGB, st.16.

## II. WESENSMERKMALE DER EINFACHEN GESELLSCHAFT NACH OR

Laut Art. 530 OR ist die einfache Gesellschaft die vertragliche Verbindung von mehreren Personen zur Verfolgung eines gemeinsamen Zwecks. Vertragspartner können natürliche und juristische Personen sein und der Zweck muss möglich und darf nicht widerrechtlich oder unsittlich sein. In diesem gemeinsamen animus societatis der Vertragsparteien liegt das Wesensmerkmal der Gesellschaft und der Unterschied zum Austauschvertrag[52]. Bei der Gesellschaft werden durch den Zusammenschluss jedoch gemeinsame Interessen gefördert; jeder Gesellschafter hat durch seine Leistungen etwas zum gemeinsamen Zweck beizutragen. Die zweiseitigen Verträge sind hingegen durch den Interessengegensatz zwischen den Vertragsparteien sowie durch die Bestimmtheit ihres Gegenstandes charakterisiert[53]. Auch bei den Geschäftsbesorgungsverträgen (zweiseitige Verträge wie etwa der Werkvertrag) scheinen sich die Kräfte mehrerer Personen auf die Erreichung eines gemeinsamen Zwecks zu konzentrieren: Hier wird jedoch der Zweck nicht gemeinsam, sondern nur von einem Vertragspartner bestimmt[54]. Bei dem Werkvertrag gibt es durchaus auch Fälle, in denen der Unternehmer aus ideellen oder wirtschaftlichen Gründen daran interessiert ist, das vereinbarte Werk tatsächlich auszuführen. Das mögliche Eigeninteresse des Unternehmers an der tatsächlichen Vertragsdurchführung hat im Rahmen des Werkvertrages zwar nur <untergeordnete> Bedeutung, da die Werkherstellung nach dem Zweckgehalt des Vertrages <vorwiegend> den Belangen des Bestellers dient[55]. Die Zweckverwirklichung geschieht durch die Gesellschafter, also aufgrund ihrer Beiträge an die Gesellschaft. Als Beitrag wird jede einmalige oder dauernde Leistung bezeichnet, die ein Gesellschafter aufgrund des Gesellschaftsvertrages im Hinblick auf den gemeinsamen Zweck erbringt[56]. Alles, was geeignet ist, kann Beitrag der Gesellschafter sein, den Gesellschaftszweck zu fördern. In Frage kommen auch Immaterialgüterrechte und Unterlassungspflichten. Diese Leistungen brauchen keinen Marktwert zu haben; entscheidend ist allein ihr Nutzen für die Gesellschaft. Nicht jede Leistung eines Gesellschafters ist ein Beitrag zur Gesellschaft; sie kann auch

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52 Basler Kommentar Obligationenrecht II, Art. 530-964 OR, Art. 530 Rn.1, st.1.

53 BGE 104 II 102, Gauch/Aepli/Casanova, Schweizerisches Obligationenrecht : Besonderer Teil mit Einschluss des Handels- und Wertpapierrechts (Art. 184-1186) : Rechtsprechung des Bundesgerichts, 2. Auflage, 1990, st.353.

54 Basler Kommentar Obligationenrecht II, Art. 530-964 OR, Art. 530 Rn.10a, 4. Auflage, 2012, st.4.

55 Gauch, der Werkvertrag, st.232.

56 “Als Beispiel, der Einbringer behält das Eigentum, die Gesellschafter erwerben aber das Nutzungsrecht.“ Nicolas/Eva/Lucas, Gesellschafts- und Handelsrecht, 11. Auflage, 2015, st. 49/50

Gegenstand eines Austauschvertrages zwischen ihm und den Gesellschaftern als Ganzes sein[57].

## III. ENTSCHEIDUNG DES GROSSSENATS DES OBERGERICHTSHOFES DER TÜRKEI FÜR ZIVILSACHEN[58]

Laut Art. 620 TBK[59] ist der einfache Gesellschaftsvertrag ein Vertrag, durch den sich zwei oder mehrere Personen zum Verbund ihrer Arbeit und ihres Kapitals verpflichten, um einen gemeinsamen Zweck zu erreichen. Vertragspartner können natürliche und juristische Personen sein. Der Zweck muss möglich sein und darf nicht widerrechtlich oder unsittlich sein. Die Wesensmerkmale der einfachen Gesellschaft sind die Person, der Vertrag, der Beitrag, der gemeinsame Zweck und affectio societatis. Nach Ansicht des Großsenats kann alles als Beitrag der Gesellschafter verstanden werden, um den Gesellschaftszweck zu fördern. Die Beiträge müssen nicht identisch sein. Die Parteien müssen den Beitrag nicht tatsächlich erbringen. Die Verpflichtung zu einem Beitrag ist ausreichend. Im Hinblick auf die Arten des gemeinsamen Zwecks unterscheidet der Großsenat nicht. Jeder erlaubte Zweck kann Gegenstand einer Gesellschaft sein. Der Großsenat betont aber, dass der Zweck häufig die Erzielung von Gewinn ist. Für die Feststellung, ob ein Vertrag ein Gesellschaftsvertrag ist, sind der gemeinsame Zweck und der Verbund nicht ausreichend, sondern die Parteien müssen sich mit gemeinsamen Beteiligungen und Förderungen zur Realisierung des gemeinsamen Zwecks verpflichten. Affectio societatis ist das wichtigste Wesensmerkmal des Gesellschaftsvertrages und es ist der Unterschied zum Austauschvertrag.

Bei der Entscheidung[60] akzeptiert der Großsenat, dass die Parteien als gemeinsamen Zweck die Erhöhung ihres eigenen Vermögens durch das Gebäude haben. Die Parteien leisten als Beitrag ihr eigenes Vermögen, um diesen gemeinsamen Zweck zu fördern. Sie haben den gleichen Rechtsstatus. Der Anteil am Gewinn wird vertraglich vereinbart. Die Parteien haben die Befugnis und die Haftung für den Bau. In diesem Fall vereinbaren die

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57 “Das dürfte bei Arbeitsleistungen eines Gesellschafters der Fall sein, welche weit über den Beiträgen der übrigen Gesellschaftern liegen, bei denen angenommen werden kann, dass sie im Rahmen eines Auftrages oder eines Werkvertrages und nicht entschädigungslos ausgeführt werden.“ Basler Kommentar Obligationenrecht II, Art. 530-964 OR, Art.530 Rn.9, st.10.

58 Der Großsenat (Yargıtay)

59 “Adi Ortaklık sözleşmesi iki ya da daha fazla kişinin emeklerini ve mallarını ortak bir amaca erişmek üzere birleştirmeyi üstlendikleri sözleşmedir.” Übersetzung “Der einfache Gesellschaftsvertrag, durch den sich zwei oder mehrere Personen zum Verbund ihrer Arbeit und ihres Kapitals verpflichten, um einen gemeinsamen Zweck zu erreichen.”

60 T.C.Yargıtay Hukuk Genel Kurulu E:2012/13-798 K:2013/568 T:24.04.2013 Y.K.D. August 2014 C.40,S.8 st.1597ff

Parteien, die Wohnungen nur zusammen (gesamthänderisch) zu verkaufen. Der Grundstückseigentümer hat ein Recht darauf, das Baugelände zu kontrollieren. Der Großsenat akzeptiert diese Vereinbarungen als ein Indiz für affectio societatis.

Für die Feststellung ob es sich bei dem Vertrag zwischen B und der BU-GmbH um einen Gesellschaftsvertrag handelt, ist die Auslegung des Vertrages nötig. Die Parteien haben eine wirtschaftliche Gewinnerzielungsabsicht und dieser Zweck ist mehr als nur der wirtschaftliche Zweck eines Werkvertrags. Affectio societatis enthält aktive Beteiligung zur Förderung des gemeinsamen Zwecks; andererseits ist es nicht erforderlich, alle Geschäfte zusammen ausführen. B beteiligt sich zwar nicht am Bauprozess, die Parteien vereinbaren aber von Anfang an, dass die Baukosten von der BU-GmbH getragen werden. Da bei dem Gesellschaftsvertrag die Parteien nicht jedes Geschäft zusammen ausführen müssen, ist diese Vereinbarung als Geschäftsaufteilung anzunehmen. B hat ein Recht darauf, das Baugelände zu kontrollieren und verpflichtet sich sowohl zur Übereignung vereinbarter Abteilungen und Wohnungen an die BU-GmbH als auch zur Erteilung einer Erlaubnis zum Bau und darüber hinaus zur Eintragung vereinbarter Abteilungen und Wohnungen ins Grundbuch auf den Namen der BU-GmbH. Diese Rechte und Pflichten sind in Hinsicht auf B als ein Indiz für affectio societatis anzunehmen.

## C. DER VERTRAG ZWISCHEN B UND DER BU-GMBH KÖNNTE EIN GEMISCHTER VERTRAG SEIN

Bei dieser Vertragsart könnte es sich um einen gemischten Vertrag handeln, der aus Werkvertrag und Kauf- oder Tauschvertrag besteht. Die Entscheidung hängt davon ab, ob der Inhalt des geschlossenen Vertrages zwischen B und der BU-GmbH die Voraussetzungen des gemischten Vertrages erfüllt, der aus Werkvertrag und Kaufvertrag oder Tauschvertrag besteht.

### I. DER WERKVERTRAG NACH BGB

Bei dem Werkvertrag (§631 BGB) verpflichtet sich der Unternehmer zur Herstellung des versprochenen Werkes, bei dem Kaufvertrag (§433 BGB) verpflichtet sich hingegen der Verkäufer zur Übereignung einer Sache. Zwar stellt sich die damit verbundene Rechtsänderung auch als ein nach außen sichtbarem Erfolg dar, entbehrt aber das dem Werkvertrag immanente schöpferische Element. Soll ein wesentlich über diese Sache hinausgehender Erfolg erzielt werden, der dem Vertrag das Gepräge gibt, sind die §631 BGB anzuwenden[61]. Der Vertrag zwischen B und der BU-GmbH richtet sich

[61] Juris PraxisKommentar zum BGB, Bd. 2.2: Schuldrecht §§433 bis 630, §433 Rn. 22ff., st.5/6.

nach dem Gebäude als Erfolg im Sinne des Werkvertrages. Ein Kaufvertrag ist nach §433 BGB ein Vertrag, durch den sich der Verkäufer dem Käufer verpflichtet, die Sache zu übergeben und ihm das Eigentum an der Sache zu verschaffen; der Käufer dem Verkäufer hingegen den vereinbarten Kaufpreis bezahlt[62]. Ein Tauschvertrag ist nach §480 BGB ein Vertrag, in dem sich die Parteien zum Austausch von Sachen, Vermögenswerten oder Rechten verpflichten. Der Unterschied zum Kaufvertrag besteht also allein darin, dass nicht Geld, sondern andere Sachen oder Rechte geschuldet werden[63]. Maßgeblich für die Abgrenzung des Kaufvertrages von dem Tauschvertrag ist die Art der Leistung. Die Vereinbarung der Parteien ist daher dann nach Tauschvertrag zu behandeln, wenn sich die Parteien als Gegenleistung anstelle der Geldleistung einer Sachleistung verpflichtet haben[64]. Demgegenüber muss bei dem Werkvertrag die Gegenleistung des Bestellers nicht als Geldleistung sein. Die Gegenleistung des Bestellers kann auch die Sachleistung sein[65], da die Parteien die Leistung und die Gegenleistung im Sinne des Werkvertrages bestimmen. Die Art des Vertrages zwischen B und der BU-GmbH ist nach BGB als Werkvertrag anzunehmen.

## II. DER WERKVERTRAG NACH OR UND TBK

Laut Art. 363 OR ist das Gebäude als Erfolg im Sinne des Werkvertrages anzunehmen. Bei dem Werkvertrag im Sinne des OR muss die Gegenleistung des Bestellers als Geldleistung bestimmt werden, sonst ist der Vertrag zwischen den Parteien als gemischter Vertrag anzunehmen[66]. Bei dem Kaufvertrag (Art. 184 OR) verpflichtet sich der Verkäufer dazu, dem Käufer den Kaufgegenstand zu übergeben und ihm das Eigentum daran zu verschaffen. Dagegen verpflichtet sich der Käufer, dem Verkäufer den Kaufpreis zu bezahlen. Der Kaufvertrag unterscheidet sich vom Tauschvertrag dadurch, dass für den zu übereignenden Gegenstand ein Entgelt geschuldet wird. Als Kaufpreisforderung kommt nur eine Geldschuld nach Art. 84ff. OR infrage. Beim Tausch (Art. 237 OR) ist die Gegenleistung nicht in Geld, sondern in Sachen oder anderen Vermögenswerten zu erbringen[67]. Aus der Sicht des TBK ist das Gebäude als Erfolg im Sinne des Werkvertrages Art. 470 ff. anzunehmen. Bei dem Werkvertrag im Sinne des TBK muss die Gegenleistung des Bestellers wie im OR auch als Geldleistung bestimmt werden. Wenn die Voraussetzungen des anderen Vertrages nicht erfüllt werden, kann er als gemischter Vertrag angenommen werden.

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62 Eckert/Maifeld/Matthiessen, Handbuch des Kaufrechts, 2. Auflage, 2014, st.1.

63 Juris PraxisKommentar zum BGB, Bd. 2.2: Schuldrecht §§ 433 bis 630, §480 Rn. 7, st.378.

64 Münchener Kommentar zum BGB, Bd. 3: Schuldrecht Besonderer Teil I, §§433-610, §480 Rn.2, st.497.

65 Juris PraxisKommentar zum BGB, Bd. 2.3: Schuldrecht §§ 631 bis 853, §632 Rn.10, st.29.

66 Gauch, der Werkvertrag, st.43.

67 Huguenin, Obligationenrecht Allgemeiner und Besonderer Teil, st. 655.

Bei dem Vertrag zwischen B und der BU-GmbH ist die Leistung der BU-GmbH die Errichtung des Gebäudes. Die Gegenleistung von B ist die Übereignung der zwei gewerblichen Abteilungen im ersten Stock und der sechs Wohnungen in anderen Stöcken an die BU-GmbH, ohne der BU-GmbH etwas zu bezahlen. Deshalb ist der Vertrag zwischen den Parteien nach den Vorschriften des OR als gemischter Vertrag anzunehmen, der aus Werkvertrag und Tauschvertrag besteht. Die Errichtung des Gebäudes richtet sich nach dem Werkvertrag; die Übereignungspflicht des B richtet sich hingegen nach dem Tauschvertrag.

Der Vertrag zwischen B und der BU-GmbH ist im Sinne des BGB als Werkvertrag, im Sinne des OR als gemischter Vertrag, der aus Werk- und Tauschvertrag besteht, und im Sinne des TBK als einfache Gesellschaft zu verstehen. Obwohl in diesen drei Ländern fast gleiche Vorschriften in Kraft sind, entstehen sehr unterschiedliche Ergebnisse, die sich aus den verschiedenen Auslegungen und Sichtweisen ergeben.

## SACHVERHALT ABWANDLUNG

Am 01.03.2016 teilt die BU-GmbH B mit, sie schließe mit dem Architekt A einen Architektenvertrag ab. Gemäß dieses Vertrages bereite A ein Projekt vor und diesem Projekt entsprechend wird von der Bauaufsichtsbehörde eine Genehmigung zur Errichtung dieses Gebäudes erteilt.

Die X-GmbH und die BU-GmbH schließen am 10.04.2016 einen Vertrag mit notarieller Urkundung ab. Laut dieses Vertrages muss die X-GmbH alle Stahlbauarbeiten erledigen. Nach der Fertigstellung des Gebäudes wird die BU-GmbH zwei von den im Grundbuch zur BU-GmbH gehörenden Wohnungen der X-GmbH übereignen und ins Grundbuch auf den Namen der X-GmbH, ohne der X-GmbH etwas anderes dafür zu bezahlen, als Eigentümer eintragen lassen.

Der Bau beginnt am 15.04.2016. Die X-GmbH stellt am 01.09.2016 alle Stahlbauarbeiten fertig.

Bei dem Übernahmeprotokoll zwischen der X-GmbH und der BU-GmbH stellt die BU-GmbH fest, dass alle Kontrollen gemacht wurden und bei den Stahlbauarbeiten der X-GmbH keine Mängel vorhanden waren.

Am 20.02.2017 wird das Gebäude fertiggestellt.

Am 01.03.2017 schließen B und E einen Kaufvertrag auf eine Wohnung mit Nummer 13 im dritten Stock mit notarieller Urkundung ab. Nachdem E seine neue Wohnung bezogen hat, bemerkt er 15 Tage später, dass die Wohnung wegen eines Fehlers bei den Stahlbauarbeiten einen Mangel aufweist. E teilt B diesen Mangel unverzüglich mit und fordert ihn zur Mängelbeseitigung innerhalb von 12 Tagen auf. 15 Tage später verlangt E die Minderung des Kaufpreises, da der

Mangel innerhalb einer gesetzten Frist nicht behoben wurde.

Am 15.03.2017 teilt C dem B mit, er habe mit der BU-GmbH einen Vorkaufvertrag über die zwei gewerblichen Abteilungen im ersten Stock mit notarieller Urkundung abgeschlossen und anhand dieses Vertrages werde er innerhalb kürzester Zeit den Eintragungsprozess im Grundbuch beginnen. B verkauft sofort die zwei gewerblichen Abteilungen im ersten Stock und alle übrigen Wohnungen. Er erledigt dazu die Eintragungsprozesse im Grundbuch.

## A. RECHTE UND PFLICHTEN DER PARTEIEN AUS DEM WERKVERTRAG[68].

Beim Schuldrecht geht es um Sonderverbindungen zwischen einzelnen Personen. Das Schuldrecht gibt dem Gläubiger ein Recht auf Leistung nur gegen eine bestimmte Person; diese Forderung ist also ein relatives Recht und kann regelmäßig nur durch den Schuldner verletzt werden[69].

### I. RECHTE UND PFLICHTEN AUS DEM ARCHITEKTENVERTRAG ALS WERKVERTRAG

Die BU-GmbH und A schließen einen Architektenvertrag ab, der ein Werkvertrag[70] ist. Der Werkvertrag bringt aus der Sicht des BGB ein Schuldverhältnis, also ein Rechtsverhältnis, zu Stande, aufgrund dessen eine Person der anderen etwas schuldet und ihr gegenüber zur Leistung und/oder zur Rücksicht verpflichtet ist[71]. A steht nicht in Vertragsbeziehung mit B. Im Verhältnis zum A ist die BU-GmbH Besteller, A ist hingegen Unternehmer und A haftet nur gegenüber der BU-GmbH als Unternehmer. Außerdem steht B nicht in Vertragsbeziehung mit A. Deswegen haben B und A kein Recht und/oder keine Pflicht auf ein gegenseitiges Schuldverhältnis.

### II. RECHTE UND PFLICHTEN AUS STAHLBAUARBEITEN ALS WERKVERTRAG

Die X-GmbH und die BU-GmbH schließen am 10.04.2016 einen Vertrag mit notarieller Urkundung ab. Laut dieses Vertrages muss die X-GmbH alle Stahlbauarbeiten erledigen. Nach der Fertigstellung des Gebäudes wird die BU-GmbH zwei von den im Grundbuch zur BU-GmbH gehörenden Wohnungen der X-GmbH übereignen und ins Grundbuch auf den Namen der X-GmbH, ohne der X-GmbH etwas anderes dafür zu bezahlen, als Eigentümer eintragen lassen.

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68 Der Vertrag zwischen B und der BU-GmbH wird aus der Sicht des BGB als Werkvertrag angenommen.

69 Brox/Walker, Allgemeines Schuldrecht, st.5.

70 Juris PraxisKommentar zum BGB, Bd. 2.3: Schuldrecht §§ 631 bis 853, §631 Rn.38ff., st.7/8.

71 Brox/Walker, Allgemeines Schuldrecht, st.1.

Dieser Vertrag ist ein Werkvertrag im Sinne des BGB, denn die X-GmbH verpflichtet sich als Unternehmer zur Durchführung der Stahlbauarbeiten und die BU-GmbH verpflichtet sich zur Übereignung der Wohnungen. Die BU-GmbH als Generalunternehmer untervergibt die Stahlbauarbeiten an andere Unternehmer[72]. Vertragsbeziehungen existieren nur zwischen B und der BU-GmbH sowie der BU-GmbH und der X-GmbH. Dies ist besonders für Mängelrechte bedeutsam. Mängelrechte in den beiden Vertragsverhältnissen zwischen der X-GmbH beziehungsweise der BU-GmbH und B sind rechtlich grundsätzlich unabhängig voneinander[73].

## III. RECHTE UND PFLICHTEN AUS DEM KAUFVERTRAG

Am 01.03.2017 schließen B und E einen Kaufvertrag über eine Wohnung ab, die einen Mangel beim Stahlbau aufweist. Ob B mit E einen Kaufvertrag über eine Wohnung abschließen kann, ist zu untersuchen. Da ein Bauwerk gemäß §94 BGB als wesentlicher Bestandteil des Grundstücks gilt, erstreckt sich das Eigentum am Grundstück im Regelfall auch auf das Bauwerk. B ist Eigentümer des Grundstücks und erwirbt nach §946, 94 BGB als Grundstückeigentümer das Eigentum des Gebäudes. Als Eigentümer darf B die Wohnung dem E übereignen und E kann nach §929 BGB das Eigentum erwerben.

E teilt B den Mangel unverzüglich mit und fordert zur Mängelbeseitigung auf. 15 Tage später verlangt E die Minderung des Kaufpreises, da der Mangel innerhalb einer gesetzten Frist nicht behoben wurde. Es ist nicht zweifelhaft, dass zwischen B und E ein Kaufvertrag über eine Wohnung bestand, die einen Mangel hat. Nach §434 Abs. 1 Satz 2 Nr. 2 BGB ist dieser Mangel ein Sachmangel, denn die Wohnung weist keine Beschaffenheit auf, die bei Sachen der gleichen Art üblich ist und die der Käufer aufgrund der Art der Sache erwarten kann. Die Wohnung hat einen Mangel, der vor der Übergabe der Wohnung also bereits vorlag. Der Käufer verursachte diesen Mangel nicht nach der Übergabe[74]. Hat die Sache wie hier eine Mangel, so kann der Käufer ein Interesse daran haben, die Sache zu behalten und den Kaufpreis herabzusetzen. Die Minderung (§§ 437 Nr. 2 Alt. 2, 441 BGB) ist als Gestaltungsrecht des Käufers konzipiert und eine automatische Minderung des Kaufpreisanspruchs findet nicht statt[75]. Die Minderung setzt also insbesondere auch den erfolglosen

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72 Messerschmidt/Voit, Privates Baurecht, Kommentar zu §§ 631 ff. BGB, st.99 ff., “Schließen mehrere Unternehmer einen einheitlichen Werkvertrag mit dem Besteller ab, so handelt es sich dabei um eine Arbeitsgemeinschaft, die häufig als Gesellschaft bürgerlichen Rechts einzustufen ist“ Juris PraxisKommentar zum BGB, Bd. 2.3: Schuldrecht §§ 631 bis 853, §631 Rn.193, st.26.

73 Messerschmidt/Voit, Privates Baurecht, Kommentar zu §§ 631 ff. BGB, st.114.

74 Eckert/Maifeld/Matthiessen, Handbuch des Kaufrechts, st.130/131.

75 Münchener Kommentar zum BGB, Bd. 3: Schuldrecht Besonderer Teil I, §433- 534, §441 Rn.1, st.208.

Ablauf einer Frist zur Nacherfüllung voraus. Hingegen ist die Fristsetzung in bestimmten Fällen entbehrlich, die das Gesetz zunächst in §§323 Abs. 2, 323 Abs. 2 Nr. 3 BGB regelt. Wenn die Nacherfüllung unmöglich (§ 326 Abs. 5 BGB) oder für den Käufer unzumutbar (§ 440 S. 1 BGB) ist, ist die Fristsetzung weiter entbehrlich[76]. E hat aufgrund des Kaufvertrags einen Anspruch gegen B auf die Minderung des Kaufpreises im Sinne des §441 BGB, denn E verlangt von B die Minderung des Kaufpreises, nachdem ihm eine Frist (§323 Abs. 1 BGB) zur Nacherfüllung gegeben wurde. Es liegt kein Fall der Entbehrlichkeit der Fristsetzung nach §§ 323,440,326 Abs. 5 BGB vor, E muss B zunächst eine Möglichkeit geben, den Mangel ordnungsgemäß zu beseitigen. Da B die Nacherfüllung innerhalb einer von E gesetzten angemessenen Frist nicht vorgenommen hat, ist E nach §441 Abs. 1,3 BGB berechtigt, den Kaufpreis durch Erklärung zu mindern[77] und den Minderungsbetrag nach §441 Abs. 4 Satz 1 BGB zurückzuverlangen. Demgegenüber hat E kein Recht gegenüber BU-GmbH und X-GmbH, denn bei einem Kaufvertrag handelt es sich um ein zweiseitiges Rechtsgeschäft und BU-GmbH und X-GmbH stehen nicht in Vertragsbeziehung mit B und E. Dagegen hat B aufgrund der Minderung des Kaufpreises einen Anspruch gegenüber der BU-GmbH wegen Rechtsmangel[78] und wegen dem Mangel an dem Gebäude als Sachmangel[79] aus §633 Abs. 3 BGB i.V.m. §634 Abs. 4 BGB, §280ff. BGB.

## IV. RECHTE UND PFLICHTEN AUS DEM VERTRAG IM HINBLICK AUF DAS HANDELSRECHT UND ALS KAUFMANN

Ob die BU-GmbH ein Recht gegen die X-GmbH aufgrund des Werkvertrages aus §631ff. BGB in Verbindung mit §280 ff. BGB hat, ist zu untersuchen. Da beide Parteien im Sinne §6 HGB kraft ihrer Rechtsform Kaufleute sind und dieses Geschäft zum Betrieb ihrer Handelsgewerbe gehören, ist dieses Verhältnis im Sinne des §343 HGB

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76 Eckert/Maifeld/Matthiessen, Handbuch des Kaufrechts, st.245 ff.

77 “Hat ein Verbraucher Nacherfüllung verlangt und ist diese nicht innerhalb angemessener Frist erfolg, kann darin ein <besonderer Umstand> gesehen werden, der dann eine Fristsetzung entbehrlich macht” Medicus/Lorenz, Schuldrecht II Besonderer Teil, Rn.149.

78 “Auf Vereinbarungen über einen Verwendungszweck kommt es für den Rechtsmangel anders als beim Sachmangel nicht an. Ein Recht, das ein Dritter hinsichtlich der Sache gegen der Besteller geltend machen kann, stellt auch dann einen Rechtsmangel dar, wenn es den Besteller bei der von ihm konkret vorgesehenen Verwendung der Sache nicht oder nur unerheblich beeinträchtigen kann. Weil Absatz 3 darauf abstellt, ob Dritte ein Recht geltend machen “können”, reicht es nicht aus, dass ein Dritter ein Recht beansprucht. Ein Rechtsmangel liegt grundsätzlich nur dann vor, wenn ein Recht eines Dritten wirklich besteht.” Juris PraxisKommentar zum BGB, Bd. 2.3: Schuldenrecht §§631 bis 853, §633 Rn. 40 st. 46/47.

79 B darf von BU-GmbH Schadenersatz verlangen, nachdem ihm eine Frist zur Nacherfüllung gegeben hat.

als beidseitiges Handelsgeschäft[80] anzunehmen. Der Vertrag zwischen der X-GmbH und der BU-GmbH ist ein Werkvertrag und die Stahlbauarbeiten sind als Erfolg eines Bestandteils des Vertrages anzunehmen. Bei dem Werkvertrag gibt es keine Untersuchung- und Rügepflicht[81], dagegen finden laut §651 BGB unter bestimmten Voraussetzungen die Vorschriften über den Kauf Anwendung. Da es sich bei den Stahlbauarbeiten um einen Werkvertrag handelt und die Voraussetzungen des §651 BGB nicht erfüllt werden, sind die Vorschriften des Handelskaufs (§433 ff. BGB i.V.m. §373 ff. HGB) für dieses Verhältnis nicht anwendbar. Obwohl die BU-GmbH keine Rüge- und Untersuchungspflicht hat, hat die BU-GmbH alle Kontrollen durchgeführt und feststellte, dass es bei den Stahlbauarbeiten zu keinen Mängeln kam, obwohl eigentlich Mängel vorhanden waren. Es heißt, dass die BU-GmbH ihre Untersuchungen nicht ordnungsgemäß erfüllt hat. Andererseits muss die BU-GmbH, da sie kraft ihrer Rechtsform Kaufmann ist, für die Sorgfalt eines ordentlichen Kaufmanns[82] eintreten (§ 347 HGB). Die BU-GmbH stellt bei dem Übernahmeprotokoll zwischen BU-GmbH und X-GmbH fest, dass alle Kontrollen durchgeführt wurden und diese Stahlbauarbeiten der X-GmbH keine Mängel aufwiesen. Ob dieses Übernahmeprotokoll im Sinne des §639 BGB als eine Vereinbarung anzunehmen ist, durch die die Rechte der BU-GmbH wegen Mangels ausgeschlossen werden, oder ob sie im Sinne des §377 HGB analog die Stahlbauarbeiten als genehmigt anzunehmen sind, ist durch Auslegung der Übernahmeprotokoll gemäß §§133,157 BGB zu klären. §639 BGB gilt für alle einschlägige Vereinbarungen unabhängig vom Zeitpunkt ihres Zustandekommens, also auch für den nach Abnahme erklärten Verzicht auf das Mängelrecht[83]. Bei dem Übernahmeprotokoll zwischen BU-GmbH und X-GmbH vereinbaren die Parteien

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80 “Das HGB unterscheidet einseitige und beiderseitge Handelsgeschäfte. Beide Gruppen fallen unter §343 HGB. Beidederseitige Handelsgeschäfte sind solche, die für alle Beteiligten (auf beiden Seiten) die Merkmale des §343 erfüllen. Einseitige Handelsgeschäfte sind diejenigen, die nur für einen Beteiligten Handelsgeschäfte sind.” Münchener Kommentar zum HGB, Bd.5: Handelsgesetzbuch, §§343-406, §343 Rn.2, 3. Auflage, 2013, st.29.

81 “Die Vorschrift des § 377 HGB zur Untersuchungs- und Rügepflicht des Käufers ist gemäß § 381 Abs. 2 HGB auf einen (reinen) Werkvertrag grundsätzlich nicht anwendbar” BGH Urteil vom 23. 7. 2009 (VII ZR 151/08) NJW 2009, 2877

82 “Aus heutiger Sicht ist §347 HGB eine überflüssige Vorschrift. Nach §276 Abs. 1 S. 1 BGB hat der Schuldner Vorsatz und fahrlässigkeit zu vertreten, wenn nicht dem Schuldverhältnis eine andere Haftung zu entnehmen ist. Fahrlässigkeit liegt vor, wenn die im Verkehr erforderliche Sorgfalt ausser acht gelassen wird. (§276 Abs. 2 BGB). Dieser Fahrlässigkeitmassstab wird nach Verkehrskreisen bestimmt, weshalb sich von selbst versteht, dass der im Rahmen von Handelsgeschäften agierende Kaufmann die von einem Kaufmann zu erwartende Sorgfalt aufzubringen hat. Die einzige Bedeutung der Vorschrift besteht im Aufruf zur Konkretisierung kaufmännischer Sorgfaltsmassstäbe. §347 HGB wird als Bestätigung des allgemeinen Grundsatzes verstanden, dass im Unternehmensbereich andere, nämlich strengere Sorgfaltsanderungen gestellt werden als im Privatbereich” Münchener Kommentar zum HGB, Bd.5: Handelsgesetzbuch, §§343-406, § 347 Rn.2, st.169/170.

83 Palandt, Bürgerliches Gesetzbuch,§639 BGB, 74. Auflage, 2015, st.1054.

keinen Haftungsausschluss. Sie erklären stattdessen, dass die Stahlbauarbeiten nicht mangelhaft waren. Der Besteller (BU-GmbH) hat zwar bei dem Werkvertrag keine Untersuchungs- oder Rügepflicht, aber sie hat diese Untersuchungen durchgeführt, deshalb muss sie als Händler diese Untersuchung gemäß der Sorgfalt eines ordentlichen Kaufmanns erledigen. Da die BU-GmbH ihre Untersuchungen während der Abnahme gemacht hat, wird die analoge Anwendung des Handelskaufrechts §§373 ff. HGB in Betracht gezogen. Als ordentlicher Kaufmann verliert die BU-GmbH ihre Rechte aufgrund des Mangels der Stahlbauarbeiten im Sinne §§347, 377 analog HGB an die X-GmbH. Da sie ihre Untersuchungspflicht nicht ordnungsgemäß erfüllt hat, gelten die Stahlbauarbeiten als mängelfrei.

## V. RECHTE UND PFLICHTEN AUS EINEM VORKAUFVERTRAG

BU-GmbH hat mit C einen Vorkaufvertrag über die zwei gewerblichen Abteilungen abgeschlossen; hingegen schließt B mit Dritten einen Kaufvertrag über alle Wohnungen und beide gewerblichen Abteilungen ab. B ist Eigentümer des Grundstücks und erwirbt nach §946, 94 BGB als Grundstückeigentümer das Eigentum über den Bau. Als Eigentümer darf B alle Wohnungen an Dritte übereignen und diese können nach §929 BGB Eigentum erwerben. Allerdings ist dieses Verhalten ein Verstoß gegen den Werkvertrag zwischen B und der BU-GmbH und deswegen hat die BU-GmbH einen Anspruch gegen B nach §280 ff. BGB.

Die BU-GmbH könnte mit C einen Vorkaufvertrag über die zwei gewerblichen Abteilungen abschließen. Obwohl die BU-GmbH das Eigentum der Wohnung noch nicht erwirbt, ist der Vorkaufvertrag mit der BU-GmbH gültig. Da der Vertrag ein Verpflichtungsgeschäft ist, darf man einen Kaufvertrag abschließen, ohne das Eigentum zu erwerben. Wenn die Kaufsache im Sinne des §929 BGB nicht übereignet werden kann, entspricht dies einem Verstoß gegen den Kaufvertrag. Somit hat die andere Partei laut §280 ff. BGB einen Anspruch.

C hätte einen Anspruch von der BU-GmbH aus §280 ff. BGB. Laut §275 Abs. 1 BGB ist der Anspruch auf die Leistung ausgeschlossen, soweit sie für jeden, inklusive den Schuldner, unmöglich ist[84]. Laut §275 Abs. 4 BGB

[84] “Unmöglichkeit liegt dann vor, wenn sich die geschuldete Sache im Eigentum und/oder Besitz eines nicht herausgabebereiten Dritten befindet. Allein die Tatsache, dass der Schuldner nicht Eigentümer und Besitzer der geschuldeten Sache ist und auch keinen Anspruch auf ihre Übertragung besitzt, reicht allerdings nicht zur Feststellung der Unmöglichkeit. Diese liegt erst dann vor, wenn feststeht, dass der Schuldner die Verfügungsmacht nicht mehr erlangen und zur Erfüllung des geltend gemachten Anspruchs auch nicht auf die Sache einwirken kann. Macht der Gläubiger den Erfüllungsanspruch geltend, ist es Sache des Schuldners, darzulegen und gegebenenfalls zu beweisen, dass die Erfüllung rechtlich oder tatsächlich nicht (mehr) möglich ist.” Juris PraxisKommentar zum BGB, Bd. 2.1: Schuldrecht §§241 bis 432, §275 Rn.29 st.355.

bestimmen sich die Rechte des Gläubigers nach den §§280, 283 bis 285, 311a und 326 BGB. Wenn der Schuldner überhaupt nichts leistet, stellt sich zunächst die Frage, ob der Schuldner aus den §275 BGB genannten Gründen nichts leisten kann[85]. Die BU-GmbH kann mit C keinen Kaufvertrag abschließen, denn sie kann das Eigentum der zwei Abteilungen nicht mehr erwerben und daher C nicht mehr übereignen, da Dritte das Eigentum über die gewerblichen Abteilungen erworben haben.

**1. Die Bedeutung des Vorkaufvertrags**

Die Parteien werden in der Zukunft den Abschluss eines Kaufvertrages über die gewerblichen Abteilungen vereinbaren. Es geht bei der Aufnahme von Vertragshandlungen im Sinne des §311 Abs. 2 Nr. 1 BGB um einen tatsächlichen Vorgang, also (noch) nicht notwendigerweise bereits um die Abgabe von Willenserklärungen, insbesondere in Gestalt eines Antrags nach §145 BGB; erfasst werden vielmehr darüber hinaus alle sonstigen Formen (bereits) rechtsgeschäftlicher Kontakte einschließlich bloßer Vorgespräche zu einem beabsichtigten Vertragsabschluss[86]. Die Feststellung, ob dieser Vertrag von Rechtsgeschäften oder von rechtsgeschäftsähnlichen Schuldverhältnissen im Sinne des §311 BGB handelt, ist durch Vertragsauslegung (§133,157 BGB) zu ermitteln. Da die Parteien den Abschluss des Kaufvertrages erst zukünftig vereinbaren werden, ist dieser Vertrag im Sinne des §311 Abs. 2 Nr. 1 BGB als rechtsgeschäftsähnliches Schuldverhältnis und daher als Vorvertrag anzunehmen. Bestimmte Pflichtverletzungen sind im Rahmen des §280 BGB nur in vorvertraglichen Schuldverhältnissen möglich. Dies ist bei dem grundlosen Abbruch von Vertragsverhandlungen oder bei der Verhinderung eines wirksamen Vertragsschlusses der Fall[87]. Demgegenüber haftet laut §280 Abs. 1 Satz 2 BGB der Schuldner nicht, wenn er die Pflichtverletzung nicht zu vertreten hat. Da B ohne Zustimmung der BU-GmbH kraft seiner Eigentumsmacht diese Kaufverträge abgeschlossen und alle diese Wohnungen und Abteilungen übereignet hat, haftet die BU-GmbH nicht. C hat keinen Anspruch gegen die BU-GmbH aus §280 ff. BGB.

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85 Brox/Walker, Allgemeines Schuldrecht, st. 222.

86 Münchener Kommentar zum BGB, Bd. 2: Schuldrecht Allgemeiner Teil, §§ 241-432, §311 Rn. 46, st.1550.

87 Juris PraxisKommentar zum BGB, Bd. 2.1: Schuldenrecht §§ 241 bis 432, §280 Rn. 43, st.387.

## B. RECHTE UND PFLICHTEN DER PARTEIEN AUS EINEM EINFACHEN GESELLSCHAFTSVERTRAG[88]

Laut dem türkischen Obergerichtshof Yargıtay ist der Vertrag zwischen B und BU-GmbH als Gesellschaftsvertag anzunehmen, weil die Parteien in diesem Fall durch die gegenseitige Förderung einen gemeinsamen Zweck verfolgen.

### I. RECHTE UND PFLICHTEN AUS EINEM ARCHITEKTENVERTRAG ALS WERKVERTRAG

Die BU-GmbH schließt mit A einen Architektenvertrag ab. Ob die BU-GmbH als Gesellschafter, also im Namen der Gesellschaft, handelt, ist durch die Auslegung des §714 BGB zu ermitteln. Die Vertretungsmacht steht nach §714 (i.V.m. §709) BGB grundsätzlich den Gesellschaftern zu. Art und Umfang der Vertretungsmacht der Gesellschafter ergeben sich grundsätzlich aus dem Gesellschaftsvertrag. Bei dem Vertrag zwischen B und der BU-GmbH verpflichtet sich die BU-GmbH zum Vertragsabschluss eines Architektenvertrags mit einem Architekten, also er hat eine Befugnis.

Da die BGB-Gesellschaft rechtsfähig[89] ist, kann sie grundsätzlich selbst Gläubigerin und Schuldnerin sein. Die Gesellschaft selbst haftet für die Erfüllung vertraglicher und gesetzlicher Pflichten[90]. Der Gesellschafter haftet für alle Verbindlichkeiten der Gesellschaft analog §128 HGB, solange auch die Gesellschaft haften würde. Andererseits ist eine einfache Gesellschaft laut TBK nicht rechtsfähig, denn TBK legt offensichtlich dar, dass alle Rechte

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88 Der Vertrag zwischen B und BU-GmbH wird aus der Sicht des türkischen Obersgerichtshofs Yargıtay als einfacher Gesellschaftsvertrag angenommen

89 “Diese kann zum einen Aussengesellschaft sein. Die Frage nach der Rechtsfähigkeit der BGB-Gesellschaft war Erlass des BGB heftig umstritten. Lange seit ging man davon aus, dass die BGB-Gesellschaft eine Personengemeinschaft ohne eigene Rechtsfähigkeit sei. Rechtsträger sei nicht die Gesellschaft, sondern die Gesellschafter in ihrer gesamthänderischen Verbundenheit. Neuere Entwicklungen hingegen betonten zunehmend die rechtliche Verselbstständigung der BGB-Gesellschaft. Der Rechtsfähigkeit der BGB-Gesellschaft durch das Grundsatzurteil des BGH vom 29.01.2001: Die Gesellschaft bürgerlichen Rechts besitzt Rechtsfähigkeit, soweit sie durch Teilnahme am Rechtsverkehr eigene Rechte und Pflichten begründet (BGH v. 29.01.2001-II ZR 331/00-BGHZ 146, 341-361 ” Juris PraxisKommentar zum BGB, Bd. 2.3: Schuldenrecht, §§631-853, §705 Rn. 43, st.937/938.

90 “Aus heutiger Sicht hat sich die Akzessorietätstheoorie durch höchstrichterliche Rechtsfortbildung durchgesetzt. Die akzessorische Gesellschafterhaftung erstreckt sich auf grundsätzlich alle Gesellschaftsverbindlichkeiten, unabhängig von deren Rechtsgrund. BGH hat die Haftung mehrfach ausdrücklich auf die Analogie zu §128 HGB gestützt.” Münchener Kommentar zum BGB, Bd.5:Schuldrecht Besonderer Teil III, §§705-853, §714 Rn.34 st.333.

und Schulden zu den Gesellschaftern gehören[91]. In der Türkei geht man davon aus, dass die einfache Gesellschaft eine Personengemeinschaft ohne eigene Rechtsfähigkeit ist, also gilt die Gesamthandslehre. Laut der Gesamthandslehre ist nicht die Gesellschaft Rechtsträger, sondern die Gesellschafter in ihrer gesamthänderischen Verbundenheit. Das Gesellschaftsvermögen ist nur ein den Gesellschaftern zustehendes Sondervermögen. Die Parteifähigkeit wird abgelehnt[92]. Laut BGB sind B und die BU-GmbH als Gesellschafter Träger von Rechten und Pflichten aus den vertraglichen Verbindungen der Gesellschaft gemäß analog §128 HGB. In diesem Fall ist es anzunehmen, dass der Vertrag zwischen A und der Gesellschaft statt mit der BU-GmbH abgeschlossen wurde. Als Gesellschafter haften B und die BU-GmbH für die Verbindlichkeiten. Aus der Sicht des TBK verpflichtet sich ein Gesellschafter gegen Dritte selbst zur Verbindlichkeit, wenn er mit Dritten einen Vertrag im eigenen Namen aber auf fremde Rechnung – auf Rechnung der Gesellschaft – abschließt. Schließt ein Gesellschafter hingegen mit Dritten einen Vertrag im Namen der Gesellschaft, so haften die anderen Gesellschafter für die Verbindlichkeit im Rahmen der Vertretung und Vollmacht[93].

## II. RECHTE UND PFLICHTEN AUS DEM KAUFVERTRAG

Am 20.02.2017 wird das Gebäude fertiggestellt. Nach der Fertigstellung, aber vor der Verteilung des Gesellschaftsvermögens und der Auflösung der Gesellschaft, schließen B und E am 01.03.2017 einen Kaufvertrag über eine Wohnung ab, die einen Mangel bei den Stahlbauarbeiten aufweist. E teilt diesen Mangel unverzüglich B mit und fordert zur Mängelbeseitigung auf. 15 Tage später verlangt E die Minderung des Kaufpreises, da der Mangel innerhalb einer von E gesetzten Frist nicht behoben wurde. Es ist nicht anzuzweifeln, dass zwischen B und E ein Kaufvertrag über eine Wohnung bestand, die einen Mangel hat.

Ob B als Gesellschafter allein, also ohne Zustimmung der BU-GmbH, im Namen der Gesellschaft handeln darf, ist durch die Auslegung des §714

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91 Art. 638 TBK “Ortaklık için edinilen veya ortaklığa devredilen şeyler, alacaklar ve ayni haklar, ortaklık sözleşmesi çerçevesinde elbirliği hâlinde bütün ortaklara ait olur.” Übersetzung “Alle Gegenstände, Rechte und Forderungen, die im Rahmen der Gesellschaft erworben werden, gehören im Hinblick auf die Gesellschaftsvertrag gesamthänderisch zu den Gesellschaftern.”

92 Juris PraxisKommentar zum BGB, Bd. 2.3: Schuldenrecht, §§631 bis 853, §705 Rn.43, st.937/938.

93 Art. 637/2 TBK “Ortaklardan biri, ortaklık veya bütün ortaklar adına bir üçüncü kişi ile işlem yaparsa, diğer ortaklar ancak temsile ilişkin hükümler uyarınca, bu kişinin alacaklısı veya borçlusu olurlar.” Übersetzung “Wenn einer der Partner der Gesellschaft im Namen der Gesellschaft oder der Gesellschafter mit Dritten einen Vertrag abschliesst, haften die andere Gesellschafter für die Verbindlichkeit im Rahmen der Vorschriften der Stellvertretung.”

BGB zu ermitteln. Die Vertretungsmacht steht nach §714 (i.V.m. §709) BGB grundsätzlich den Gesellschaftern zu. Art und Umfang der Vertretungsmacht der Gesellschafter ergeben sich grundsätzlich aus dem Gesellschaftsvertrag. Bei dem Vertrag zwischen B und der BU-GmbH gibt es keine Vorschrift, ob B allein die Gesellschaft vertreten darf. Nach §714 BGB knüpft die Vertretungsbefugnis an die Geschäftsführungsbefugnis an. Demnach sind gemäß §§709,714 BGB grundsätzlich alle Gesellschafter gemeinsam zur Vertretung befugt (Gesamtvertretungsmacht).

Für die Feststellung, ob B im eigenen Namen oder im Namen der Gesellschaft handelt, muss die Vertragsauslegung herangezogen werden (§133,157 BGB). Wenn B im Namen der Gesellschaft handeln würde, wäre der Vertrag zwischen E und B schwebend unwirksam und bräuchte eine Genehmigung der BU-GmbH (§177 BGB)[94]. Wenn B im eigenen Namen handeln würde, wäre der Vertrag zwischen B und E gültig. Da ein Gebäude gemäß §94 BGB als wesentlicher Bestandteil des Grundstücks gilt, erstreckt sich das Eigentum am Grundstück im Regelfalle auch auf das Gebäude. Aus der Sicht des Zivilgesetzbuches der Türkei erstreckt sich das Eigentumsrecht auch auf das Gebäude[95]. Laut Art. 684 i.V.m. Art. 718 OR der Türkei erwirbt der Eigentümer des Grundstücks auch das Eigentum über das Gebäude. Obwohl B sein Grundstück als Beitrag an die Gesellschaft übergeben hat, ist er noch immer Eigentümer des Grundstücks und erwirbt nach §946, 94 BGB als Grundstückeigentümer das Eigentum über das Gebäude. Als Eigentümer darf B die Wohnung an E verkaufen und E kann nach §929 BGB das Eigentum erwerben. Demgegenüber ist dieses Verhältnis ein Verstoß gegen den Gesellschaftsvertrag, deshalb hat die Gesellschaft einen Anspruch gegen B nach §280 ff. BGB.

Aufgrund der Rechtsbeziehungen zu Dritten handelt es sich um eine Außengesellschaft, denn die Gesellschaft nimmt am Rechtsverkehr durch die für ihre Gesellschaft handelnden Organe teil. Eine Außengesellschaft bürgerlichen Rechts kann auch Gläubiger und Schuldner sein und ist wie eine OHG zu behandeln. Demgegenüber haften die Gesellschafter aus der Sicht des TBK unmittelbar für die Verbindlichkeiten gegen Dritte und es ist nicht möglich, die einfache Gesellschaft wie eine OHG zu behandeln.

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94 Dieses Ergebnis gilt auch aus der Sicht des TBK.

95 Zivil Gesetzbuch der Türkei Art. 684 “Bir şeye malik olan kimse, o şeyin bütünleyici parçalarına da malik olur.” Übersetzung “Wer Eigentümer einer Sache ist, ist also Eigentümer der wesentlichen Bestandteile dieser Sache.” i.V.m. Zivil Gesetzbuch der Türkei Art. 718 “Arazi üzerindeki mülkiyet, kullanılmasında yarar olduğu ölçüde, üstündeki hava ve altındaki arz katmanlarını kapsar. Bu mülkiyetin kapsamına, yasal sınırlamalar saklı kalmak üzere yapılar, bitkiler ve kaynaklar da girer.” Übersetzung “Das Eigentum an Grund und Boden erstreckt sich nach oben und unten auf den Luftraum und das Erdreich, soweit für die Ausübung des Eigentums ein Interesse besteht. Es umfasst unter Vorbehalt der gesetzlichen Beschränkungen alle Bauten und Pflanzen sowie die Quellen.”

In diesem Fall hat E nur gegen B einen Anspruch, aber nicht gegen die Gesellschaft aus dem Kaufvertrag, da die BU-GmbH keine Genehmigung erteilt hat. Da B ohne Vertretungsmacht aber anhand seiner Eigentumsmacht handelt, wird der Vertrag zwischen B und E zu Stande kommen. E ist nach §441 Abs. 1,3 BGB berechtigt, den Kaufpreis durch Erklärung zu mindern und den Minderungsbetrag nach §441 Abs. 4 Satz 1 BGB zurückzuverlangen, denn die Nacherfüllung wird innerhalb einer von E gesetzten angemessenen Frist nicht vorgenommen.

## III. RECHTE UND PFLICHTEN AUS STAHLBAUARBEITEN ALS WERKVERTRAG

Ob B als Gesellschafter aufgrund der Mängel bei den Stahlbauarbeiten einen Anspruch gegen die BU-GmbH hätte, obwohl er selbst gegen den Gesellschaftsvertrag verstößt, kommt auf das Verhältnis zwischen BU-GmbH, X-GmbH und der Gesellschaft an. Bei dem Gesellschaftsvertrag verpflichtet sich die BU-GmbH zur Erbringung der Beiträge und zur Errichtung des Gebäudes, um den Gesellschaftszweck zu fördern. Für die Beitragspflicht der BU-GmbH gegen die Gesellschaft ist die analoge Anwendung von §631 ff. BGB (Werkvertrag) in Betracht zu ziehen, besonders für die Mängel, denn die BU-GmbH verpflichtet sich zum erfolgreichen Bau. Dieser Zweck ist im Sinne des Werkvertrages als Erfolg anzunehmen. Andererseits ist ein Sachmangel besonders dann anzunehmen, wenn es eine negative Abweichung des Werks von der vereinbarten Beschaffenheit gibt oder diese für die gewöhnliche Verwendung nicht geeignet ist.

Laut TBK setzen sich die Beiträge aus den Sachen in Gebrauch zusammen, so wird die analoge Anwendung der Vorschriften des Mietvertrages in Betracht gezogen. Die Beiträge setzen sich hingegen aus dem Eigentum einer Sache zusammen, so muss die analoge Anwendung der Vorschriften des Kaufvertrages in Betracht gezogen werden[96], besonders was Beschädigung, Mängel und den Rechtanspruch von Dritten betrifft. Zwar stellt TBK die Vorschriften des Werkvertrages ausdrücklich nicht dar, aber eine analoge Anwendung ist für Werkverträge ebenso möglich.

[96] Nach Sicht des TBK “Bir ortağın katılım payı, bir şeyin kullandırılmasından oluşuyorsa kira sözleşmesindeki; bir şeyin mülkiyetinden oluşuyorsa satış sözleşmesindeki hasara, ayıptan ve zapttan sorumluluğa ilişkin hükümler kıyas yoluyla uygulanır.” Übersetzung “In Bezug auf die Tragung der Gefahr und die Gewährleistungspflicht finden, sofern der einzelne Gesellschafter den Gebrauch einer Sache zu überlassen hat, die Grundsätze des Mietvertrages und, sofern er Eigentum zu übertragen hat, die Grundsätze des Kaufvertrages entsprechende Anwendung.”

**1. Bedeutung des Vertrags zwischen BU-GmbH und X-GmbH**

Um die Stahlbauarbeiten durchführen zu lassen, schließt die BU-GmbH einen Vertrag mit der X-GmbH ab. Laut dieses Vertrages muss die X-GmbH alle Stahlbauarbeiten erledigen. Nach der Fertigstellung des Gebäudes wird die BU-GmbH zwei der im Grundbuch zur BU-GmbH gehörenden Wohnungen der X-GmbH übereignen und ins Grundbuch auf den Namen der X-GmbH als Eigentümer eintragen lassen, ohne der X-GmbH etwas anderes dafür zu bezahlen. Diese Vertragsart ist als Arbeitsgemeinschaft und demnach als BGB-Gesellschaft anzunehmen[97]. Aus der Sicht des Yargıtay ist diese Vertragsart auch als Gesellschaftsvertrag anzusehen. Der Eintritt eines neuen Gesellschafters in eine Gesellschaft erfolgt in der Regel durch Abschluss eines Gesellschaftsvertrages mit den bisherigen Gesellschaftern. Ein neuer Gesellschafter kann aber auch durch die Übernahme des Geschäftsanteils eines bisherigen Gesellschafters in die Gesellschaft gelangen (§§717,719 BGB)[98]. Laut Art. 632[99] TBK erfolgt der Eintritt eines neuen Gesellschafters in eine Gesellschaft nur mit der Zustimmung aller Gesellschafter. Wenn allerdings ein Gesellschafter seinen eigenen Gesellschaftsanteil an Dritte übereignet oder sich ein Dritter an einem Gesellschaftsanteil des Gesellschafters beteiligt, so kann der Dritte die Eigenschaft des Gesellschafters nicht erwerben. Mit dem Vertrag zwischen BU-GmbH und X-GmbH wird eine neue Gesellschaft gegründet, denn es ist nicht möglich, ohne ausdrückliche Zustimmung von B in die Gesellschaft (zwischen B und der BU-GmbH) einzutreten.

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97 “Unter Arbeitsgemeinschaften versteht man Zusammenschlüsse von selbstständigen (Bau-)Unternehmern zur gemeinsamen Durchführung eines bestimmten Bauauftrags. Die Unternehmer treten dem Besteller gegenüber als einheitlicher Vertragspartner auf. Rechtsform der Arbeitsgemeinschaft ist regelmäßig GbR.” Münchener Kommentar zum BGB, Bd. 5: Schuldrecht Besonderer Teil III, §§705-853, §705 Rn.43., st.23. Aus der Sicht des Obergerichtshof Yargıtay ist diese Vertragsart auch als Gesellschaft anzunehmen, weil die Parteien in diesem Fall durch die gegenseitige Förderung einen gemeinsamen Zweck verfolgen.

98 “Überträgt ein Gesellschafter mit Zustimmung der übrigen Gesellschafter seinen Gesellschaftsanteil, so tritt der Erwerber als neuer Gesellschafter an seiner Stelle in das Rechtsverhältnis zu den übrigen Gesellschaftern ein.“ Juris PraxisKommentar zum BGB, Bd. 2.3: Schuldenrecht, §§631 bis 853, §719 Rn. 9, st.1042

99 Art. 632 TBK “Ortaklığa, yeni bir ortak alınması, bütün ortakların rızasına bağlıdır. Ortaklardan biri tek taraflı olarak bir üçüncü kişiyi ortaklıktaki payına ortak eder veya payını ona devrederse, bu üçüncü kişi ortak sıfatını kazanamaz.” Übersetzung “Ein Gesellschafter kann ohne die Einwilligung der übrigen Gesellschafter keinen Dritten in die Gesellschaft aufnehmen. Wenn ein Gesellschafter einseitig einen Dritten an seinem Anteil beteiligt oder seinen Anteil an ihn abtritt, so wird dieser Dritte dadurch nicht zum Gesellschafter der übrigen und erhält insbesondere nicht das Recht, in die Gesellschaftsangelegenheiten Einsicht zu nehmen.”

**2. Vertrag zu Gunsten Dritter**

Das Verhältnis zwischen BU-GmbH, der Gesellschaft (zwischen BU-GmbH und X-GmbH) und der anderen Gesellschaft (zwischen B und der BU-GmbH) könnte nach BGB als Vertrag zu Gunsten Dritter gelten. Ob im Einzelfall ein Vertag zu Gunsten Dritter vorliegt, ist durch Vertragsauslegung (§133,157 BGB) zu ermitteln. Soweit keine ausdrückliche Vereinbarung getroffen wird, sind die gesamten Umstände, vor allem aber der Vertragszweck, zu berücksichtigen. Nach dem Parteiwillen, der von der Auslegungsregel des §328 Abs. 2 BGB als maßgeblich anerkannt wird, kann der Schuldner auch lediglich verpflichtet sein, an einen Dritten zu leisten, ohne dass der Dritte einen Anspruch auf die Leistung erwirbt. Dies entspricht einem unechten Vertrag zu Gunsten Dritter[100]. Zusätzlich gibt es einen Vertrag, durch den sich jemand gegenüber einem Schuldner verpflichtet, dessen Gläubiger zufrieden zu stellen (Erfüllungsübernahme §329 BGB). Im Zweifelsfall ist dies ein unechter Vertrag zu Gunsten Dritter[101]. Wenn jemand laut Art. 129 TBK in eigenem Namen mit anderen einen Vertrag abschließt, durch den er zu Gunsten Dritter eine Leistungspflicht verlängert, so darf er vom Schuldner die Leistung des Dritten verlangen[102]. Zwar kann der Dritte seinen Anspruch nicht verlängern, der Schuldner kann aber von seiner Schuld nur durch die Zufriedenstellung des Dritten befreit werden.

Die Gesellschaft zwischen BU-GmbH und X-GmbH erfüllt die Verpflichtung der BU-GmbH gegen die Gesellschaft zwischen B und BU-GmbH. Dieses Verhältnis ist als unechter Vertrag zu Gunsten Dritter anzunehmen, denn die Gesellschaft stellt den Gläubiger der BU-GmbH zufrieden, ohne die Schuld zu übernehmen. Im Hinblick auf dieses Verhältnis ist die Gesellschaft zwischen BU-GmbH und X-GmbH als Versprechender (Schuldner), die Gesellschaft zwischen BU-GmbH und B als Dritter (Begünstigter) und die BU-GmbH als Gesellschafter der Gesellschaft zwischen BU-GmbH und B als Versprechensempfänger (Gläubiger) anzunehmen.

Ob dieses Verhältnis zwischen BU-GmbH, X-GmbH und B aus der Sicht des TBK als Vertrag zu Gunsten Dritter anzunehmen ist, ist zu untersuchen. In der Türkei gilt für die einfache Gesellschaft die Gesamthandslehre. Laut Gesamthandslehre ist die Gesellschaft nicht Rechtsträger, sondern die

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100 Münchener Kommentar zum BGB, Bd. 2: Schuldrecht Allgemeiner Teil, §§241-432, §328 Rn.9, st.2198

101 Brox/Walker, Allgemeines Schuldrecht, st.378/379

102 Art. 129 TBK “Kendi adına sözleşme yapan kişi, sözleşmeye üçüncü kişi yararına bir edim yükümlülüğü koydurmuşsa, edimin üçüncü kişiye ifa edilmesini isteyebilir.” Übersetzung “Hat sich jemand, der in eigenem Namen handelt, eine Leistung an einen Dritten zu dessen Gunsten versprechen lassen, so ist er berechtigt zu fordern, dass diese an den Dritten geleistet werde.”

Gesellschafter in ihrer gesamthänderischen Verbundenheit. Die Parteifähigkeit wird abgelehnt. Aus der Sicht des TBK ist das Gebäude ein Problem des Innenverhältnisses zwischen BU-GmbH und X-GmbH und es ist nicht möglich, das Verhältnis zwischen B, BU-GmbH und X-GmbH als Vertrag zu Gunsten Dritter anzunehmen, denn erstens verlängert die BU-GmbH durch den Vertrag zwischen ihr und der X-GmbH zu Gunsten Dritter eine Leistungspflicht nicht[103] und zweitens ist die einfache Gesellschaft nicht Rechtsträger und kann daher die einfache Gesellschaft zwischen B und der BU-GmbH im Namen der BU-GmbH nicht befriedigen. In diesem Verhältnis stellt die X-GmbH im Rahmen der Gesellschaftsvertrag die BU-GmbH zufrieden.

**3. Ereignis der Leistungsprüfung**

Im Fall von Leistungsstörungen stellt sich die Frage, ob dem Dritten als Inhaber des Leistungsanspruchs die daraus resultierenden Rechte zustehen oder ob sie dem Gläubiger als Vertragspartner des Versprechenden zustehen und wer die Rechte gegebenenfalls geltend machen kann. Bei dem unechten Vertrag zu Gunsten Dritter kann dem Übernehmer gegenüber Ersatz oder Mängelansprüche nur dann von dem Schuldner als Vertragspartner geltend gemacht werden, wenn er schlecht oder verschuldet ist und die Unmöglichkeit der Leistung bezeugt[104], da der Begünstigte (Dritte) durch den Vertrag zwischen dem Versprechender (Schuldner) und dem Versprechensempfänger (Gläubiger) keinen Anspruch erwirbt. Nach §633 Abs. 2 Satz 2 Nr. 2 BGB ist in diesem Fall dieser Mangel ein Sachmangel, denn die Wohnung eignet sich für die gewöhnliche Verwendung nicht und weist eine Beschaffenheit auf, die bei Werken der gleichen Art üblich ist und die der Besteller anhand der Art des Werkes erwarten kann. In diesem Fall hat die Wohnung ohne Zweifel einen Mangel.

Da sich die BU-GmbH gegenüber der Gesellschaft zwischen B und BU-GmbH zur Errichtung des Gebäudes dazu verpflichtet, die vereinbarten Beiträge[105] zu leisten, darf B als Gesellschafter nur auf Grund eines

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103 TBK Art. 129.

104 „Andererseits, bei dem echten Vertrag zu Gunsten Dritter, wenn der Übernehmer schlecht oder verschuldet er die Unmöglichkeit der Leistung leistet, können ihm gegenüber Ersatz oder Mängelansprüche nur von dem Schuldner als seinem Vertragspartner geltend gemacht werden. Nach Ansicht mancher soll der Schuldner (Versprechensempfänger) berechtigt sein, neben seinem eigenen Verlust auch den Schaden des Gläubigers mittels Drittschadensliquidation ersetzt zu verlangen. Damit würde der Übernehmer aber dem Gläubiger im Ergebnis wegen Nicht- oder Schlechterfüllung haften, obgleich ihm gegenüber keine Leistungspflicht besteht. Der Versprechensempfänger kann daher nur seinen eigenen Schaden beim Versprechenden, der Dritte Ansprüche aus dem Valutaverhältnis nur beim Schuldner geltend machen“ Münchener Kommentar zum BGB, Bd. 2: Schuldrecht Allgemeiner Teil, §§241-432, §329 Rn.21 st.2271.

105 Für die Beitragspflicht der BU-GmbH gegen die Gesellschaft wird die analoge Anwendung

Innenverhältnisses der Gesellschaft laut §634 Abs. 4 BGB analog i.V.m. §280 ff. BGB aufgrund der Leistungsstörung der Gesellschaft zwischen BU-GmbH und X-GmbH von der BU-GmbH Schadenersatz verlangen. Der Anspruch der Gesellschaft, der sich gegen B nach §280 ff. BGB aus dem Verstoß gegen den Gesellschaftsvertrag durch den Kaufvertrag zwischen B und E ergibt, scheidet diesen Anspruch, der sich aus §280 ff. BGB auf Grund Innenverhältnis der Gesellschaft ergibt, nicht aus, denn diese zwei Ansprüche unterscheiden sich voneinander und einer kann keinen Abschiebungsgrund für den anderen sein.

**4. Rechte und Pflichten der Parteien aus dem Innenverhältnis des Gesellschaftsvertrags**

Ob die BU-GmbH ein Recht gegen die X-GmbH auf Grund eines Innenverhältnis der Gesellschaft i.V.m. aus §631ff. §280 ff. BGB hat, ist zu untersuchen. Da beide Parteien im Sinne §6 HGB kraft ihrer Rechtsform Kaufleute sind und dieses Geschäft zum Betrieb ihrer Handelsgewerbe gehören, ist dieses Verhältnis im Sinne des §343 HGB als beidseitiges Handelsgeschäft anzunehmen. Der Vertrag zwischen X-GmbH und BU-GmbH ist ein Gesellschaftsvertrag, andererseits müssen die Vorschriften §631 ff. BGB für die Stahlbauarbeit analog angewendet werden.

Bei dem Werkvertrag gibt es keine Rügepflicht[106], hingegen finden die Vorschriften laut §651 BGB unter bestimmten Voraussetzungen über den Kauf Anwendung. Da es sich bei den Stahlbauarbeiten um einen Werkvertrag handelt und die Voraussetzungen des §651 BGB nicht erfüllt werden, sind die Vorschriften des Handelskaufs (§433 ff. BGB i.V.m. §373 ff. HGB) für dieses Verhältnis nicht anwendbar. Deswegen hat die BU-GmbH keine Rüge- und Untersuchungspflicht, hingegen hat die BU-GmbH alle Kontrollen durchgeführt und festgestellt, dass die Stahlbauarbeiten nicht mangelhaft waren, obwohl die Stahlbauarbeiten tatsächlich doch Mängel aufwiesen. Es heißt, dass die BU-GmbH ihre Untersuchungen nicht ordnungsgemäß erfüllt hat. Andererseits muss die BU-GmbH, da sie kraft ihrer Rechtsform Kaufmann ist, als Handelskaufmann diese Untersuchung gemäß der Sorgfalt eines ordentlichen Kaufmanns laut §347 HGB durchführen. Die BU-GmbH stellt bei dem Übernahmeprotokoll zwischen BU-GmbH und X-GmbH fest, dass sie alle Kontrollen durchgeführt hat und die Stahlbauarbeiten der X-GmbH nicht mangelhaft waren. Ob dieses Übernahmeprotokoll im Sinne des §639 BGB als Vereinbarung gilt, durch die die Rechte der BU-GmbH wegen Mangels ausgeschlossen werden, oder ob im Sinne von §377 HGB

von §631 ff. BGB (Werkvertrag), besonders für die Mängel, in Betracht gezogen.

106 “Die Vorschrift des § 377 HGB zur Untersuchungs- und Rügepflicht des Käufers ist gemäß § 381 Abs. 2 HGB auf einen (reinen) Werkvertrag grundsätzlich nicht anwendbar” BGH Urteil vom 23. 7. 2009 (VII ZR 151/08) NJW 2009, 2877.

analog die Stahlbauarbeit als genehmigt anzunehmen ist, ist durch Auslegung des Übernahmeprotokolls gemäß §§133,157 BGB zu klären. §639 BGB gilt für alle einschlägigen Vereinbarungen, unabhängig vom Zeitpunkt ihres Zustandekommens. Sie gelten daher auch für den nach der Abnahme erklärten Verzicht auf das Mängelrecht[107]. In dem Übernahmeprotokoll zwischen BU-GmbH und X-GmbH vereinbaren die Parteien keinen Haftungsausschluss sondern bestimmen, dass die Stahlbauarbeiten keine Mängel aufweist. Zwar hat der Besteller (die BU-GmbH) bei dem Werkvertrag keine Untersuchungs- oder Rügepflicht, doch wenn diese Untersuchungen durchgeführt wurden, muss er als Handelskaufmann diese Untersuchung gemäß der Sorgfalt eines ordentlichen Kaufmanns §347 HGB machen. Da die BU-GmbH ihre Untersuchungen während Abnahme durchgeführt hat, wird die analoge Anwendung des Handelskaufrechts §§373 ff. HGB in Betracht gezogen. Als ordentlicher Kaufmann verliert die BU-GmbH ihre Rechte aufgrund des Mangels der Stahlbauarbeiten an die X-GmbH im Sinne von §§347, 377 analog HGB. Da die BU-GmbH ihre Untersuchungspflicht nicht ordnungsgemäß erfüllt hat, gelten die Stahlbauarbeiten als mangelfrei[108].

Aus der Sicht des TBK hat E nur gegen B einen Anspruch wegen Mangels aus dem Kaufvertrag, B hat nur gegen die BU-GmbH im Rahmen des Gesellschaftsvertrages einen Anspruch wegen Mangels und die BU-GmbH hat wegen des Mangels keinen Anspruch gegen die X-GmbH, auch nicht im Rahmen des Gesellschaftsvertrages und im Hinblick auf die Vorschriften des Handelsrechts.

## IV. RECHTE UND PFLICHTEN AUS EINEM VORKAUFVERTRAG

Die BU-GmbH hat mit C einen Vorkaufvertrag über die zwei gewerblichen Abteilungen abgeschlossen, hingegen schließt B mit Dritten einen Kaufvertrag über alle Wohnungen ab. Es gibt bei dem Vertrag zwischen B und der BU-GmbH keine Vorschrift, ob die BU-GmbH oder B alleine die Gesellschaft vertreten dürfen. Nach § 714 BGB knüpft die Vertretungsbefugnis an die Geschäftsführungsbefugnis an. Demnach sind gemäß §§ 709, 714 BGB grundsätzlich alle Gesellschaftern gemeinsam zur Vertretung befugt (Gesamtvertretungsmacht). Da die BU-GmbH und B keine besondere Vertretungsbefugnis haben, handeln beide Parteien ohne Vertretungsmacht.

B kann mit Dritten einen Kaufvertrag über alle Wohnungen abschließen. Wenn B im Namen der Gesellschaft handeln würde, wäre der Vertrag zwischen

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107 Palandt, Bürgerliches Gesetzbuch,§639 BGB, st.1054.

108 Aus der Sicht des Handelsgesetzbuchs der Türkei Art. i.V.m. OR der Türkei Art.2 gilt diese Lösung auch.

B und Dritten schwebend unwirksam und bräuchte eine Genehmigung der BU-GmbH (§§177 BGB). Wenn B als Eigentümer in eigenem Namen handeln würde, wäre der Vertrag zwischen B und Dritten gültig und Dritte könnten nach §929 BGB Eigentum erwerben[109]. Die BU-GmbH könnte mit C einen Vorkaufvertrag über die zwei gewerblichen Abteilungen abschließen. Für die Feststellung, ob die BU-GmbH im eigenen Namen oder im Namen der Gesellschaft handelt, ist im Ergebnis die Vertragsauslegung verantwortlich (133,157 BGB). Wenn die BU-GmbH im eigenen Namen handeln würde, wäre der Vorkaufvertrag mit der BU-GmbH gültig, obwohl die BU-GmbH das Eigentum der Wohnung noch nicht erwirbt. Dies liegt daran, dass der Vertrag ein Verpflichtungsgeschäft ist. Ein Kaufvertrag darf abgeschlossen werden, ohne das Eigentum der Abteilung erworben zu haben. Wenn die Kaufsache im Sinne des §929 BGB allerdings nicht übereignet werden kann, gilt dies als Verstoß gegen den Kaufvertrag und die andere Partei (hier C) hätte einen Anspruch aus §280 ff. BGB.

C hätte einen Anspruch von der BU-GmbH aus 280 ff. BGB. Laut §275 Abs. 1 BGB ist der Anspruch auf die Leistung ausgeschlossen, soweit sie für jeden, inklusive den Schuldner, unmöglich ist[110]. Wenn der Schuldner überhaupt keine Leistung erbringt, stellt sich zunächst die Frage, ob der Schuldner aus den §275 BGB genannten Gründen nicht leisten kann[111]. Die BU-GmbH kann mit C keinen Kaufvertrag abschließen, denn die BU-GmbH kann die zwei Abteilungen nicht mehr erwerben, da Dritte das Eigentum der gewerblichen Abteilungen erworben haben. Für die Feststellung, ob es sich bei diesem Vertrag um Rechtsgeschäftliche oder um rechtsgeschäftsähnliche Schuldverhältnisse im Sinne des §311 BGB handelt, ist durch Vertragsauslegung (§133,157 BGB) zu ermitteln. Da die Parteien in Zukunft den Abschluss des Kaufvertrages vereinbaren werden, ist dieser Vertrag im Sinne des §311 Abs. 2 Nr. 1 BGB als rechtsgeschäftsähnliches Schuldverhältnis anzunehmen.

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109 Demgegnüber ist dieses Verhältnis ein Verstoß gegen den Gesellschaftsvertrag und deswegen hat die Gesellschaft einen Anspruch gegen B nach §280 ff. BGB.

110 “Unmöglichkeit liegt dann vor, wenn sich die geschuldete Sache im Eigentum und/ oder Besitz eines nicht herausgabebereiten Dritten befindet. Allein die Tatsache, dass der Schuldner nicht Eigentümer und Besitzer der geschuldeten Sache ist und auch keinen Anspruch auf ihre Übertragung besitzt, reicht allerdings nicht zur Feststellung der Unmöglichkeit. Diese liegt erst dann vor, wenn feststeht, dass der Schuldner die Verfügungsmacht nicht mehr erlangen und zur Erfüllung des geltend gemachten Anspruchs auch nicht auf die Sache einwirken kann. Macht der Gläubiger den Erfüllungsanspruch geltend, ist es Sache des Schuldners, darzulegen und gegebenenfalls zu beweisen, dass die Erfüllung rechtlich oder tatsächlich nicht (mehr) möglich ist.” Juris PraxisKommentar zum BGB, Bd. 2.1: Schuldenrecht, §§241 bis 432, §275 Rn.29 st.355.

111 Brox/Walker, Allgemeines Schuldrecht, st.222.

Laut der türkischen Literatur[112] und Art. 29 TBK[113] darf eine Partei durch den Vorvertrag von der anderen Partei den Abschluss des vereinbarten Vertrags verlangen. Dieser Vertrag ist durch die Auslegung als Vorvertrag anzunehmen, denn die Parteien vereinbaren, in Zukunft einen Kaufvertrag abzuschließen. Bestimmte Pflichtverletzungen sind im Rahmen des §280 BGB nur in vorvertraglichen Schuldverhältnissen möglich. Dies ist bei dem grundlosen Abbruch von Vertragsverhandlungen oder bei der Verhinderung eines wirksamen Vertragsschlusses der Fall[114]. Demgegenüber haftet der Schuldner laut §280 Abs. 1 Satz 2 BGB nicht, wenn er die Pflichtverletzung nicht zu vertreten hat. Da B ohne Zustimmung der BU-GmbH kraft seiner Eigentumsmacht diese Kaufverträge abgeschlossen und alle diese Wohnungen und Abteilungen übereignet hat, haftet die BU-GmbH nicht. C hat keinen Anspruch gegen die BU-GmbH aus §280 ff. BGB. Wenn die BU-GmbH andererseits im Namen der Gesellschaft handeln würde, würde sie ohne Vertretungsmacht handeln. Das Ergebnis daraus ist, dass dieser Vertrag schwebend unwirksam wird und die Genehmigung von B benötigt (§177 ff. BGB). Die BU-GmbH haftet gegen C nach §179 BGB.

## C. RECHTE UND PFLICHTEN DER PARTEIEN AUS EINEM MISCHVERTRAG[115], DER AUS KAUFVERTRAG UND WERKVERTRAG BESTEHT

Laut OR ist der Vertrag zwischen B und der BU-GmbH als Mischvertag anzunehmen, da sich eine Partei zur Errichtung eines Gebäudes und die andere Partei sich als Vergütung zur Übereignung der vereinbarten Wohnungen verpflichtet. Da die Vergütung anders als durch Geldleistung bestimmt wird, gilt bei dieser Vertragsart kein Werkvertrag, sondern ein gemischter Vertrag.

### I. RECHTE UND PFLICHTEN AUS EINEM ARCHITEKTENVERTRAG ALS WERKVERTRAG

Die BU-GmbH und A schließen einen Architektenvertrag ab, der ein Werkvertrag ist. Der Werkvertrag bringt ein Schuldverhältnis zu Stande, das ein relatives Rechtsverhältnis ist, aufgrund dessen eine Person der anderen etwas schuldet oder ihr gegenüber zur Leistung und/oder zur Rücksicht

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112 Oğuzman/Seliçi/Oktay-Özdemir, Eşya Hukuku, 12. Auflage, 2009, 320 ff.

113 Art. 29 TBK “Bir sözleşmenin ileride kurulmasına ilişkin sözleşmeler geçerlidir.” auf die gleiche Weise, Art. 22 OR “Durch den Vertrag kann die Verpflichtung zum Abschluss eines künftigen Vertrages begründet werden.”

114 Juris PraxisKommentar zum BGB, Bd. 2.1: Schuldenrecht, §§241 bis 432, §280 Rn.43ff. st.387.

115 Der Vertrag zwischen B und der BU-GmbH wird aus der Sicht des OR als Mischvertrag, der aus Tausch- und Werkvertrag besteht, angenommen.

verpflichtet wird. A steht nicht in der Vertragsbeziehung zwischen B und der BU-GmbH und daher nicht in Vertragsbeziehung mit B. B steht auch nicht in Vertragsbeziehung mit A und der BU-GmbH und daher nicht mit A. Deswegen haben B und A kein Recht und/oder keine gegenseitige Pflicht aus dem Schuldverhältnis.

## II. RECHTE UND PFLICHTEN AUS STAHLBAUARBEITEN ALS WERKVERTRAG

X-GmbH und BU-GmbH schließen am 10.04.2016 einen Vertrag mit notarieller Urkundung ab. Dieser Vertrag ist auch einen Mischvertrag, der aus Tausch- und Werkvertrag besteht, denn die X-GmbH wird als Unternehmer zur Errichtung der Stahlbauarbeiten verpflichtet und die BU-GmbH verpflichtet sich als Vergütung zur Übereignung der Wohnungen. Vertragsbeziehungen existieren nur zwischen B und der BU-GmbH sowie zwischen BU-GmbH und X-GmbH. Dies ist besonders für Mängelrechte von Bedeutung. Mängelrechte sind in den beiden Vertragsverhältnissen zwischen X-GmbH bzw. BU-GmbH und B rechtlich grundsätzlich unabhängig voneinander[116].

## III. RECHTE UND PFLICHTEN AUS DEM KAUFVERTRAG

Am 01.03.2017 schließen B und E einen Kaufvertrag über eine Wohnung ab, die wegen fehlerhafter Stahlbauarbeiten einen Mangel aufweist. E teilt diesen Mangel unverzüglich B mit und fordert zur Mangelbeseitigung auf. 15 Tage später verlangt E die Minderung[117] des Kaufpreises, da der Mangel innerhalb einer gesetzten Frist nicht behoben wurde. E ist gegenüber B aufgrund des Kaufvertrags nach §441 Abs. 1,3 BGB berechtigt, den Kaufpreis durch Erklärung zu mindern[118] und den Minderungsbetrag nach §441 Abs. 4 Satz 1 BGB zurückzuverlangen. Nach Art. 201 OR und Art. 223 TBK gibt es bei dem Kaufvertrag als Prüfungs- und Rügelast[119] eine Obliegenheit, die sowohl für den kaufmännischen wie für den nichtkaufmännischen Verkehr

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116 Messerschmidt/Voit, Privates Baurecht, Kommentar zu §§ 631 ff. BGB, st.114.

117 Wie vorhin erklärt wurde ist die Minderung (§§ 437 Nr. 2 Alt. 2, 441 BGB) als Gestaltungsrecht des Käufers konzipiert und eine automatische Minderung des Kaufpreisanspruchs findet nicht statt. Die Minderung setzt also insbesondere auch den erfolglosen Ablauf einer Frist zur Nacherfüllung voraus. Hingegen ist die Fristsetzung in bestimmten Fällen entbehrlich, die durch das Gesetz zunächst in §§323 Abs. 2, 323 Abs. 2 Nr. 3 BGB geregelt ist. Wenn die Nacherfüllung unmöglich (§ 326 Abs. 5 BGB) oder für den Käufer unzumutbar (§ 440 S. 1 BGB) ist, ist die Fristsetzung weiter entbehrlich.

118 “Hat ein Verbraucher Nacherfüllung verlangt und ist diese nicht innerhalb angemessener Frist erfolg, kann darin ein <besonderer Umstand> gesehen werden, der dann eine Fristsetzung entbehrlich macht” Medicus/Lorenz, Schuldrecht II Besonderer Teil, Rn.149.

119 “Trotz des Wortlauts des Gesetzes handelt es sich nicht um eine Pflicht, sondern lediglich um eine Obliegenheit.” Basler Kommentar Obligationenrecht I, Art. 1-529 OR, Art. 201, st.1195.

gilt. Der Käufer, der diese Obliegenheit unterlässt, erleidet einen rechtlichen Nachteil, welcher darin besteht, dass die gekaufte Sache als genehmigt gilt[120]. Umfang und Intensität der Prüfung ergeben sich aus Verkehrssitte und Usancen. Mängel, die bei einer übungsgemäßen Untersuchung nicht erkennbar sind, bleiben außer Betracht[121]. Versäumt der Käufer die rechtzeitige Prüfung und/oder Rüge, so greift bei offenen Mängeln die gesetzliche Fiktion, wonach die Sache als genehmigt gilt. Dagegen müssen versteckte Mängel sofort nach ihrer Entdeckung reklamiert werden. Andernfalls gelten sie ebenfalls als genehmigt[122]. Da E seine Untersuchungsobliegenheit versäumt, gilt die Wohnung im Hinblick auf OR und TBK als genehmigt, solange es keine versteckten Mängel gibt[123]. Demgegenüber hat E im Hinblick auf BGB, OR und TBK kein Recht gegen BU-GmbH und X-GmbH, denn beim Kaufvertrag handelt es sich um ein zweiseitiges Rechtsgeschäft und BU-GmbH und X-GmbH stehen nicht in Vertragsbeziehung mit B und E.

B hat aufgrund der Minderung des Kaufpreises einen Anspruch gegen die BU-GmbH wegen Rechtsmangels und wegen des Mangels an dem Gebäude als Sachmangel aus §633 Abs. 3 BGB i.V.m. §634 Abs. 4 BGB, §280ff. BGB.

## IV. RECHTE UND PFLICHTEN AUS DEM VERTRAG IM HINBLICK AUF DAS HANDELSRECHT UND ALS KAUFMANN

Ob die BU-GmbH ein Recht gegen die X-GmbH auf Grund des Mischvertrages aus §631ff. BGB in Verbindung mit §280 ff. BGB hat, ist zu untersuchen. Da beide Parteien im Sinne §6 HGB kraft ihrer Rechtsform Kaufleute sind und dieses Geschäft zum Betrieb ihrer Handelsgewerbe gehören, ist dieses Verhältnis im Sinne des §343 HGB als beiderseitiges Handelsgeschäft[124] anzunehmen. Der Vertrag zwischen X-GmbH und BU-GmbH ist ein Mischvertrag und für die Stahlbauarbeiten gelten die Vorschriften §631ff. BGB, denn die Stahlbauarbeiten sind als ein Bestandteil des Werkvertrages anzunehmen. Obwohl die BU-GmbH keinen Rüge- und Untersuchungspflicht hat, hat die BU-GmbH alle Kontrollen durchgeführt und bei dem Übernahmeprotokoll

120 Basler Kommentar Obligationenrecht I, Art. 1-529 OR, Art. 201, st.1195.

121 Basler Kommentar Obligationenrecht I, Art. 1-529 OR, Art. 201, st.1196, BGE 76 II 224.

122 Huguenin, Obligationenrecht Allgemeiner und Besonderer Teil, st.712.

123 “Die Frist, innerhalb welcher der Kaufgegenstand auf Mangel zu untersuchen ist, richtet sich vor allem nach der Natur des Kaufgegenstands, der Art des Mangels und den Gepflogenheiten der Branche in den jeweiligen Breitengraden. “ Huguenin, Obligationenrecht Allgemeiner und Besonderer Teil, st.711.

124 “Das HGB unterscheidet einseitige und beiderseitige Handelsgeschäfte. Beide Gruppen fallen unter §343 HGB. Beidederseitige Handelsgeschäfte sind solche, die für alle Beteiligten (auf beiden Seiten) die Merkmale des §343 erfüllen. Einseitige Handelsgeschäfte sind diejenigen, die nur für einen Beteiligten Handelsgeschäfte sind.” Münchener Kommentar zum BGB, Bd. 5: Handelsgesetzbuch, §§343-406, §343 Rn. 2, st.29.

festgestellt, dass die Stahlbauarbeiten keine Mängel aufwiesen, obwohl die Stahlbauarbeiten eigentlich mangelhaft waren. Es heißt, dass die BU-GmbH ihre Untersuchungen nicht ordnungsgemäß erfüllt hat. Andererseits muss die BU-GmbH, da sie kraft ihrer Rechtsform Kaufmann ist, als Handelskaufmann diese Untersuchung gemäß der Sorgfalt eines ordentlichen Kaufmanns[125] §347 HGB erledigen. Bei der Übernahmeprotokoll[126] zwischen BU-GmbH und X-GmbH vereinbaren die Parteien keinen Haftungsausschluss, sondern sie entscheiden, dass die Stahlbauarbeiten keine Mängel aufweisen. Als Kaufmann verliert die BU-GmbH wegen der Mängel bei der Stahlbauarbeit ihre Rechte gegen die X-GmbH im Sinne §§347, 377 analog HGB. Sie hat ihre Untersuchungspflicht[127] nicht ordnungsgemäß erfüllt, da sie die Stahlbauarbeit für mangelfrei erklärte. Laut Art. 201 OR und Art. 223 TBK gibt es eine Prüfungs- und Rügelast. Als Kaufmann verliert die BU-GmbH ihre Rechte aufgrund des Mangels bei den Stahlbauarbeiten an die X-GmbH. Da sie ihre Untersuchung nicht ordnungsgemäß erfüllte, gelten die Stahlbauarbeiten als mangelfrei.

## V. RECHTE UND PFLICHTEN AUS DEM VORKAUFVERTRAG

Die BU-GmbH hat mit C einen Vorkaufvertrag über die zwei gewerblichen Abteilungen abgeschlossen, hingegen schließt B mit Dritten einen Kaufvertrag über alle Wohnungen ab. B kann mit Dritten einen Kaufvertrag über alle

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125 “Aus heutiger Sicht ist §347 HGB eine überflüssige Vorschrift. Nach §276 Abs. 1 S. 1 BGB hat der Schuldner Vorsatz und fahrlässigkeit zu vertreten, wenn nicht dem Schuldverhältnis eine andere Haftung zu entnehmen ist. Fahrlässigkeit liegt vor, wenn die im Verkehr erforderliche Sorgfalt ausser acht gelassen wird. (§276 Abs. 2 BGB). Dieser Fahrlässigkeitmassstab wird nach Verkehrskreisen bestimmt, weshalb sich von selbst versteht, dass der im Rahmen von Handelsgeschäften agierende Kaufmann die von einem Kaufmann zu erwartende Sorgfalt aufzubringen hat. Die einzige Bedeutung der Vorschrift besteht im Aufruf zur Konkretisierung kaufmännischer Sorgfaltsmassstäbe. §347 HGB wird als Bestätigung des allgemeinen Grundsatzes verstanden, dass im Unternehmensbereich andere, nämlich strengere Sorgfaltsanderungen gestellt werden als im Privatbereich” Münchener Kommentar zum BGB, Bd. 5: Handelsgesetzbuch, §§343-406, §347 Rn.2, st.169/170.

126 Ob dieses Übernahmeprotokoll im Sinne des §639 BGB als eine Vereinbarung, durch die die Rechte der BU-GmbH wegen Mangels ausgeschlossen werden, oder im Sinne von §377 HGB analog die Stahlbauarbeit als genehmigt anzunehmen ist, ist durch Auslegung des Übernahmeprotokolls gemäß §§133,157 BGB zu klären. §639 BGB gilt für alle einschlägigen Vereinbarungen unabhängig vom Zeitpunkt ihres Zustandekommens, also auch für den nach der Abnahme erklärten Verzicht auf Mängelrecht.

127 Zwar hat der Besteller (die BU-GmbH) bei dem Werkvertrag keine Untersuchungs- oder Rügepflicht, aber wenn sie diese Untersuchungen gemacht hat, muss sie diese Untersuchung als Handelskaufmann wie ein ordentlicher Kaufmann machen. Da die BU-GmbH ihre Untersuchungen während der Abnahme gemacht hat, kommt die analoge Anwendung des Handelskaufrecht §§373 ff. HGB in Betracht.

Wohnungen abschließen, denn B ist Eigentümer des Grundstücks und erwirbt nach §946, 94 BGB als Grundstückeigentümer das Eigentum des Gebäudes. Als Eigentümer darf B alle Wohnungen an Dritte übereignen und diese können nach §929 BGB das Eigentum erwerben. Demgegenüber ist dieses Verhältnis ein Verstoß des Vertrages zwischen B und der BU-GmbH.

Die Parteien vereinbaren als Vergütungsschuld die Übereignung der zwei gewerblichen Abteilungen im ersten Stock und die sechs Wohnungen in anderen Stöcken an die BU-GmbH. Für diese Vergütungsschuld werden die Vorschriften des Kaufs (§433 ff. BGB) durch den Tausch (§480 BGB) angewendet. Da Dritte nach §929 BGB das Eigentum erwerben, kann B die BU-GmbH entsprechend des Vertrages nicht mehr zufrieden stellen. Als Ergebnis hat die BU-GmbH einen Anspruch gegen B nach §280 ff. BGB.

Die BU-GmbH könnte mit C einen Vorkaufvertrag über die zwei gewerblichen Abteilungen abschließen. Obwohl die BU-GmbH das Eigentum der Wohnungen noch nicht erwirbt, ist der Vorkaufvertrag der BU-GmbH gültig. Da der Vertrag ein Verpflichtungsgeschäft ist, darf man einen Kaufvertrag abschließen, ohne Eigentum zu erwerben. Demgegenüber ist es ein Verstoß gegen den Kaufvertrag, wenn man die Kaufsache im Sinne des §929 BGB nicht übereignen kann. In diesem Fall hätte die andere Partei einen Anspruch aus §280 ff. BGB.

C hätte einen Anspruch von der BU-GmbH aus 280 ff. BGB. Laut §275 Abs. 1 BGB ist der Anspruch auf die Leistung ausgeschlossen, soweit sie für jeden, inklusive den Schuldner, unmöglich zu leisten ist[128]. Wenn der Schuldner überhaupt nicht leistet, stellt sich zunächst die Frage, ob der Schuldner aus den in §275 BGB genannten Gründen nicht leisten kann[129]. Die BU-GmbH kann mit C keinen Kaufvertrag abschließen, denn sie kann das Eigentum der zwei Abteilungen nicht mehr erwerben, und nicht mehr an C übereignen, da Dritte die gewerblichen Abteilungen als Eigentum erworben haben. Für die Feststellung, ob es sich bei diesem Vorvertrag um Rechtsgeschäftliche oder rechtsgeschäftsähnliche Schuldverhältnisse im Sinne des §311 BGB handelt, ist durch Vertragsauslegung (§133,157 BGB) zu ermitteln. Da die Parteien in

[128] “Unmöglichkeit liegt dann vor, wenn sich die geschuldete Sache im Eigentum und/oder Besitz eines nicht herausgabebereiten Dritten befindet. Allein die Tatsache, dass der Schuldner nicht Eigentümer und Besitzer der geschuldeten Sache ist und auch keinen Anspruch auf ihre Übertragung besitzt, reicht allerdings nicht zur Feststellung der Unmöglichkeit. Diese liegt erst dann vor, wenn feststeht, dass der Schuldner die Verfügungsmacht nicht mehr erlangen und zur Erfüllung des geltend gemachten Anspruchs auch nicht auf die Sache einwirken kann. Macht der Gläubiger den Erfüllungsanspruch geltend, ist es Sache des Schuldners, darzulegen und gegebenenfalls zu beweisen, dass die Erfüllung rechtlich oder tatsächlich nicht (mehr) möglich ist.” Juris PraxisKommentar zum BGB, Bd. 2.1: Schuldenrecht, §§241 bis 432, §275 Rn.29, st.355.

[129] Brox/Walker, Allgemeines Schuldrecht, st.222.

Zukunft den Abschluss des Kaufvertrages vereinbaren, ist dieser Vertrag im Sinne des §311 Abs. 2 Nr. 1 BGB als rechtsgeschäftsähnliche Schuldverhältnisse und daher als Vorvertrag anzunehmen.

Die Bedeutung des Vorvertrages ist im Hinblick auf OR Art. 22 und TBK Art. 29 zu untersuchen. Der Vertrag zwischen der BU-GmbH und C ist im Sinne von Art. 22 Abs. 1 OR und Art. 29 TBK ein Vorvertrag. Es gibt laut OR und TBK und anhand der Vertragsfreiheit die Möglichkeit des Abschlusses eines künftigen Vertrages und diesen dann zum Gegenstand eines Vertrags zu machen, da es sich bei dem Vertrag notwendigerweise um ein schuldrechtliches Geschäft und daher nicht um ein Verfügungsgeschäft handelt. Dieser Vorvertrag ist von deklaratorischer Natur[130]. Da die BU-GmbH ihre Leistung nicht erfüllen kann, kommt eine Schadenersatzfolge in Betracht. Wenn der Schuldner beweisen kann, dass er die Unmöglichkeit[131] nicht zu vertreten hat, so kommt Art. 119 Abs. 1 OR zur Anwendung; der Schuldner wird alsdann frei[132]. Laut §280 Abs. 1 Satz 2 BGB haftet der Schuldner nicht, wenn er die Pflichtverletzung nicht zu vertreten hat. Da B ohne Zustimmung der BU-GmbH kraft seiner Eigentumsmacht diese Kaufverträge abgeschlossen und alle diese Wohnungen und Abteilungen übereignet hat, haftet die BU-GmbH nicht. C hat keinen Anspruch gegen die BU-GmbH aus §280 ff. BGB.

## Fazit

In dieser Arbeit wurde im Rahmen des türkischen, schweizerischen und deutschen Rechtssystems versucht, die anwendbaren Regeln für die herrschende Bauvertragsart des türkischen Bauwesens, der ‚Bauvertrag als Gegenleistung der Übereignung des Eigentums eines Gebäudeteils‘ zu definieren. Es wird festgestellt, dass ein solcher Bauvertrag in allen Rechtssystemen anhand der Auslegung der Rechtsprechung und Literatur unterschiedlich ausgelegt und definiert wird. Im Hinblick auf diese Auslegungen und Sichtweisen wird versucht, die Rechte und die Schuld der jeweiligen Parteien zu bestimmen.

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## ABKÜRZUNGEN

| | |
|---|---|
| Abs. | : der Absatz |
| Art. | : der Artikel |
| Bd. | : das Band |

130 Basler Kommentar Obligationenrecht I, Art. 1-529 OR, Art. 22, st. 223.

131 “Art. 119 OR regelt die Rechtsfolgen der **nachträglichen** rechtlichen, tatsächlichen, teilweisen oder vollkommenen, dauernden also nicht vom Schuldner zu verantwortenden Unmöglichkeit.” Basler Kommentar Obligationenrecht I, Art. 1-529 OR, st.735.

132 Huguenin, Obligationenrecht Allgemeiner und Besonderer Teil, st.234.

| | |
|---|---|
| BGB | :Bürgerliches Gesetzbuch |
| BGE | : die Bundesgerichtsentscheidung |
| BGH | : der Bundesgerichtshof |
| BGHZ | : die Entscheidungen des Bundesgerichtshofs in Zivilsachen |
| BGr | : die Bundesgerichtsentscheide |
| d.h. | : das heißt |
| ff. | : folgende Seiten |
| GbR | : Gesellschaft bürgerlichen Rechts |
| HGB | : Handelsgesetzbuch |
| i.V.m. | : in Verbindung mit |
| OR | : Obligationengesetzbuch der Schweiz |
| Rn. | : die Randnummer |
| st. | : die Seite |
| TBK | : Obligationengesetzbuch der Türkei |

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# CRIMINALIZING THE DENIAL OF THE SO-CALLED ARMENIAN GENOCIDE AND ITS EXAMINATION UNDER FREEDOM OF EXPRESSION

*Sözde Ermeni Soykırımı İnkârının Cezalandırılması ve İfade Özgürlüğü Bağlamında Değerlendirilmesi*

**Judge Ceren Sedef EREN***

*Graduate Thesis Article*

**Abstract**

There is a new trend in European domestic legislations to criminalize the denial of genocides and crimes against humanity which started with specifically the criminalization of the denial of the Holocaust in several European countries, and continued with the expansion of criminalization by the inclusion of genocides and/or crimes against humanity in general, with the efforts to fight against hate speech across Europe. However, making speech a subject of the criminal law as an offence brings some problems as it also falls within the area of another fundamental value of European democracies which is the freedom of expression. The purpose of this study is to demonstrate the danger that criminalization of the denial of the so-called Armenian genocide poses to European democracies. In order to achieve that purpose, the analyse of genocide denial laws is made with the inference that the main reasons behind the criminalization of the Holocaust denial in Europe which the European Court of Human Rights also described as a "clearly established fact", is incapable of justifying the criminalization of the denial of the so-called Armenian genocide. This discussion is followed by the assessment of the possibility of the Switzerland Criminal Code which criminalizes the denial of genocides, to cause potential violence in the case of the denial of the so-called Armenian genocide, to reach the conclusion that criminalizing the denial of the so-called Armenian genocide seriously endangers the enjoyment of freedom of expression in Europe.

**Keywords** : Freedom of Expression, Potential Victimization, Genocide Denial, So-called Armenian Genocide, Criminalizing expressions

**Özet**

Avrupa'da nefret söylemiyle mücadele kapsamında, Yahudi soykırımı inkârının birkaç ülkede cezalandırılmasıyla başlayan ve genel olarak tüm soykırım ve insanlığa karşı suçların cezalandırılmaya başlanmasıyla devam eden yeni bir süreç yaşanmaktadır. Bununla birlikte söylemlerin bir ceza hukuku konusu haline getirilmesi, başka bir Avrupa temel değeri olan ifade özgürlüğüyle çatıştığından sorunlara sebep olabilmektedir. Bu çalışmanın amacı, sözde Ermeni soykırımı inkârının cezalandırılmasının Avrupa demokrasileri yönünden teşkil ettiği tehlikeyi ortaya koymaktır. Bu doğrultuda öncelikle soykırım inkâr yasaları incelenerek Avrupa İnsan Hakları Mahkemesinin de "açıkça kanıtlanmış gerçeklik" olarak kabul ettiği Yahudi soykırımının inkâr edilmesinin Avrupa'da cezalandırılmasına ilişkin amaçların, sözde Ermeni soykırımı inkârını cezalandırmayı meşru kılamayacağı gösterilmeye çalışılacaktır. Daha sonra İsviçre Ceza Kanunu'nun genel olarak soykırım inkârını cezalandıran hükmünün, sözde Ermeni soykırımı söz konusu olduğunda potansiyel mağduriyete yol açma riski tartışılarak sözde Ermeni soykırımı inkârını cezalandırmanın Avrupa'da ifade özgürlüğünü ciddi biçimde tehdit ettiği sonucuna varılacaktır.

**Anahtar Kelimeler** İfade Özgürlüğü, Potansiyel Mağduriyet, Soykırım İnkârı, Sözde Ermeni Soykırımı, İfadelerin Cezalandırılması

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## INTRODUCTION[1]

The European Court of Human Rights (ECtHR) released its *Perinçek* v. *Switzerland* (*Perinçek*) decision on 15 October 2015. The Court found that there has been a violation of freedom of expression due to the prosecution and punishment of the applicant because of his statements about denying the so-called Armenian genocide.[2] It decided that the punishment of the applicant was not necessary in a democratic society apart from its case law about the denial of Holocaust directly falling out of the protection of freedom of expression.[3] However, the Court has not actually made a detailed assessment about the lawfulness of the interference and decided that the interference with the applicant's freedom of expression was sufficiently foreseeable and therefore, "*prescribed by law*" within the meaning of article 10 (2) of the European Convention on Human Rights (ECHR).[4]

In its case law about potential victimization, ECtHR examined the quality of the law in question even if it was not implemented on the applicant and developed this case law by determining the distinctive characteristics of the cases from *actio popularis*. Therefore, the Court also takes into account the possible restraining effects of a law - whether or not it actually was applied on individuals - by considering the chilling effect that the law is likely to have. In this context, the purpose of this study will be to analyse whether article 261 (4) of the Switzerland Criminal Code which criminalizes the denial of a genocide or other crimes against humanity, be addressed as creating potential victimization on freedom of expression in denial of the so-called Armenian genocide cases. The final goal will be to demonstrate that the prohibition of the denial of the so-called Armenian genocide in Europe would seriously violate the exercise of freedom of expression.

In order to achieve the purpose determined, first, the genocide denial laws in Europe will be examined mainly focusing on the Holocaust denial, to be able to see the factors that led the parliaments of the European countries to criminalise the Holocaust denial. It will also include parts on analyses of both domestic and international courts' decisions. After assessing whether these factors can justify the criminalization of the so-called Armenian genocide, the

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1 This article is the updated version of my LLM thesis that I submitted to the University of Kent, Human Rights Law section as a Jean Monnet Scholarship Programme scholar.

2 Usage of the term "*the so-called Armenian genocide"* has been chosen in this study due to the principle of nullum crimen sine lege and also the insufficiency in knowledge about the events that is claimed to amount to constitute genocide in accordance with the academic dispute on this issue.

3 *Perinçek v. Switzerland (Perinçek),* App. No. 27510/08, Judgment of 15/10/2015, ECtHR, §280.

4 *Perinçek, §140*.

dangers that the possible criminalization of this issue in Europe exposes will be put forward by considering the inconveniences of the implementation of article 261 (4) of the Switzerland Criminal Code on the Armenian issue, and by demonstrating that it could give rise to potential victimization under the case law of ECtHR.

## I. GENOCIDE DENIAL LAWS IN EUROPE

European Union (EU) has adopted the "*Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law*" (FD) on 28 November 2008 which entered into force on the day of its publication in the Official Journal of the EU, 6 December 2008.[5] This piece of EU legislation requires the member states to criminalize the denial of genocides.[6] Article 1 of the FD is as follows:

"*Offences concerning racism and xenophobia*

*1. Each Member State shall take the measures necessary to ensure that the following intentional conduct is punishable:*

…

*(c) publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group;*

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5 It repealed the first EU attempt about harmonising the criminalization to combat racism and xenophobia which was "*The Joint Action of 15 July 1996 concerning action to combat racism and xenophobia"*. The provision about the conduct *"deny"* in this legislation was as follows: *"A. In the interests of combating racism and xenophobia, each Member State shall undertake, in accordance with the procedure laid down in Title II, to ensure effective judicial cooperation in respect of offences based on the following types of behaviour, and, if necessary for the purposes of that cooperation, either to take steps to see that such behaviour is punishable as a criminal offence or, failing that, and pending the adoption of any necessary provisions, to derogate from the principle of double criminality for such behaviour: …*
*(c) public denial of the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 April 1945 insofar as it includes behaviour which is contemptuous of, or degrading to, a group of persons defined by reference to colour, race, religion or national or ethnic origin;",* http://eur-lex.europa.eu/legal-content/GA/TXT/?uri=celex:31996F0443, accessed on 28/2/2020.

6 "*Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law"* [2008] OJ L 328/55, http://data.europa.eu/eli/dec_framw/2008/913/oj, accessed on 28/2/2020.

*(d) publicly condoning, denying or grossly trivialising the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group.*

*2. For the purpose of paragraph 1, Member States may choose to punish only conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting.*

*...*

*4. Any Member State may, on adoption of this Framework Decision or later, make a statement that it will make punishable the act of denying or grossly trivialising the crimes referred to in paragraph 1(c) and/or (d) only if the crimes referred to in these paragraphs have been established by a final decision of a national court of this Member State and/or an international court, or by a final decision of an international court only.*"

According to the Commission Report on the implementation of FD among member states which was issued on 2014, nearly half of the member states do not have specific regulations criminalizing the conducts stipulated in article 1 (1) subparagraphs (c) and (d) of the FD, while the others adopt regulations varying either on the requirement of incitement to violence or hatred, or the crimes referenced. It is reported that countries like United Kingdom, Denmark, Netherlands and Finland which are among the ones that didn't specifically criminalize denial, submitted national case law applicable to Holocaust denial and/or trivialisation which can be applied to the conduct covered by this article. The optional qualification envisaged in article 1 (2) has also made a contribution to this unstable appearance.[7] Another important issue for the subject of this study is the provision in article 1 (4) of the FD that provides a preferential right to the member states to limit the interpretation of the crimes envisaged in article 1 (1) (c) and/or (d), to the crimes that have been established by a national court of the member states and/or an international court.[8] It has been stated that this clause permits a state to precisely tailor the desired scope of the crime and its main shortcoming is that it fails to ensure the equal treatment of victim-groups, for instance by encompassing the crimes committed during the

[7] Report From the Commission to the European Parliament and the Council on the implementation of FD COM/2014/027 final, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52014DC0027, accessed on 28/2/2020.

[8] France limited the application of FD as it has been envisaged in article 1 (4) due to appeals by a group of historians.

Holocaust given that they were established by the Nuremberg International Tribunal, and yet excluding the Armenian massacres merely because the latter has never been adjudicated by a court of law.[9] Another conclusion can also be reached which is that FD sets ambiguity as the principle since it allows for the court decision qualification to be optional by this clause and it is highly doubtful if it fulfils the necessities of criminal law with this method.[10] Therefore, with the high amount of parliamentaries of the EU member states that recognized the "*1915 events*" as constituting genocide, this ambiguity is likely to create problems in the so-called Armenian genocide cases.

In the preparation phase of this legislation, the Spanish Constitutional Court (SCC) has declared its decision on the constitutionality of the provision that criminalized the dissemination of ideas or theories which deny or justify genocide.[11] The case was about the conviction of a bookshop owner who was selling books that either denied or justified the Holocaust and it was pending on the Provincial Court of Barcelona.[12] The SCC first rejected the perception of a "*militant democracy*" by stating that their constitutional system is based on the broadest assurance of fundamental rights which cannot be restricted on the grounds that they may be used for anti-constitutional purposes.[13] Accordingly, SCC didn't acknowledge the "*clearly established facts*" case law of the German practice which will be examined below, in relation to the Holocaust and emphasized that it was not its task to decide about historical events.[14] On the assessment about whether mere denial of Holocaust may be considered as a discourse of hatred which the ECtHR also decided it to be out of the protection of freedom of expression, SCC stated: "*It is appropriate to point out that the mere dissemination of conclusions in respect of the existence or non-existence*

9 Lobba, P. *"Criminalizing Negationism Beyond the Holocaust, Some Comments on the EU Framework Decision 2008/913/JHA on Racism and Xenophobia"*, http://www.lph-asso.fr/, accessed on 28/2/2020.

10 In the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems issued by the Council of Europe with the aim of preventing the misuse or abuse of computer systems to disseminate racist and xenophobic propaganda, the denial of the genocides to be criminalized was limited to the ones that were recognised as such by final and binding decisions of the International Military Tribunal or of any other international court established by relevant international instruments and whose jurisdiction is recognised by that party.

11 The Spanish Criminal Code refers to genocide in general, not mentions a specific event like Holocaust.

12 Constitutional Court of Spain, Judgment 235/2007, (7 November 2007), https://www.tribunalconstitucional.es/ResolucionesTraducidas/235-2007,%20of%20November%207.pdf, accessed on 28/2/2020.

13 Ibid, § 4.2.

14 Ibid, § 4.3.

*of specific facts, without issuing value judgments on these or their unlawful nature, affects the scope of scientific freedom ... our Constitution confers greater protection to scientific freedom than to freedom of expression and information, the ultimate purpose being based on the fact that only in this way is historical research possible, which is always, by definition, controversial and debatable, as it arises on the basis of statements and value judgments the objective truth of which it is impossible to claim with absolute certainty.*"[15] While the Court found the criminalization of the dissemination of ideas that "*deny*" genocide unconstitutional, it has reached a different conclusion about the "*justification*", on the ground that it expresses a value judgment that indirectly incites to commit this crime.[16] In his dissenting opinion, Senior Judge Pascual Sala Sánchez stated that the incriminated conduct "*deny*" should be interpreted in a way that only permits the prosecution when it is carried out in a way that could imply incitement to violence or hatred which would also be in line with the obligations stemming from the then proposal for FD. However, it seems that the SCC was aware of the danger that the permission to criminalize the denial of a genocide would constitute, even with the requirement to be inciting to hatred or violence, as this requirement was again to be interpreted by jurisdiction. In line with its rejection of a perception of militant democracy, the Court chose to eliminate the chilling effect that the criminalization of the mere denial of genocide would create on freedom of expression rather than focusing on the danger that the conduct "*denial*" would implicitly serve for.

The Spanish Court's approach on genocide denial can be deemed as transitional between two opposite perceptions on the relationship between criminalizing genocide denial and freedom of expression. According to the United States approach with its unique implementation on freedom of expression, the government is not allowed to make "*viewpoint discrimination*" by distinguishing protected from the unprotected speech on the basis of the point of view espoused, also including hate speech. Holocaust denial is under the guarantee of the First Amendment as well, on the ground that according to the principles of freedom of expression, if the government may not prohibit the speeches of the flat-earthers, then it should also not be able to prohibit the denial of the factuality of the Holocaust.[17] The limit that the U.S. Supreme Court has set on hate speech containing the advocacy of a lawless act, is the existence of a clear, present and imminent danger of lawless action unlike the European approach that will be analysed below, which finds the possible

[15] Ibid, § 8.1.

[16] Ibid, § 9.

[17] Steiner, H. J., Alston, P. and Goodman R. (2008). International Human Rights in Context: Law, Politics, Morals: OUP 3rd ed., pp. 652-653.

danger enough to prohibit.[18] These two perceptions also distinct on the effect of the speech on the people that is directed against, as the U.S. courts did not see a problem in the proposal of the American Nazi Party's leader to march with his followers wearing full Nazi regalia in Skokie, Illinois which was mostly populated by the survivors of the Holocaust.[19]

Meanwhile, the United Nations Human Rights Committee (HRC) issued the General Comment No.34 about article 19 of the International Covenant on Civil and Political Rights (ICCPR) which stipulates freedom of expression. The Committee stated: "*Laws that penalize the expression of opinions about historical facts are incompatible with the obligations that the Covenant imposes on States parties in relation to the respect for freedom of opinion and expression. The Covenant does not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events.*"[20] It refers to the "*so-called memory laws*" like the Gayssot Law of France which criminalizes Holocaust denial, in this statement.[21] Whether the obligations stemming from these two different law sources (FD and ICCPR) contradict with each other is a question.

In order to analyse this issue further, the historical background of Holocaust denial laws in European countries which have an important amount of case law about this offence, will be examined followed by the part about ECtHR's case law on this subject.

**A. Federal Republic of Germany**

As the country that the Nazi regime came to power in, criminalizing Holocaust denial had been a delicate topic in Germany with the establishment of the new republic and adoption of the constitution, "*Basic Law*". There was not a specific regulation that directly criminalized the denial of Holocaust until 1994 and prosecutions for denying it took place under the general provisions of the criminal code like insult, defamation or disparagement of the memory of the deceased persons, and even the production or dissemination of writings that sought to impair the existence of the German Federal Republic or destroy its democratic freedoms.[22]

The decision of the Federal Constitutional Court of Germany (GCC) about Holocaust denial before the amendment in 1994 which did not concern

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18 Lewy, G. (2014). Outlawing Genocide Denial: The Dilemmas of Official Historical Truth: The University of Utah Press, p. 141.

19 Steiner, H. J., Alston, P. and Goodman R. (2008), p. 653.

20 General Comment No. 34, UN Doc. CCPR/C/GC/34/CRP.5, 12 September 2011, § 49 http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf, accessed on 28/2/2020.

21 Ibid, footnote 116.

22 Lewy, G. (2014), p. 10.

prosecution but was about an administrative proceeding, provides the basis for the "*clearly established fact*" case law of both the GCC and ECtHR in Holocaust denial cases. GCC had an established case law on freedom of expression about the distinction between statements of fact and expressions of opinion before the Holocaust denial cases. It said that it is irrelevant whether an opinion is valuable or worthless, correct or false, or whether it is emotional or rational; if the opinion in question contributes to the intellectual struggle of opinions on an issue of public concern, it falls under the protection of freedom of expression. However, about the statements of fact, GCC said that this principle does not apply in the same way to them as false information is not a protected good, and the deliberate utterance of untruth is not protected by this guarantee. Furthermore GCC added that statements of facts are under the protection of the constitution as they form the basis of an opinion.[23]

In its first decision about Holocaust denial, the applicant was the Munich/ Upper-Bavarian section of the National Democratic Party of Germany (NDP). NDP was complaining about the order issued by the municipal authorities that prohibited the participants and the speakers of the assembly -that was organized by NDP to discuss the alleged Jewish blackmailing of German politics- from denying the persecution of Jews during the Third Reich. The sanction was to dissolve the assembly in case of non-compliance. GCC stated that a deliberate lie or a statement of fact whose falsehood was already clearly established before the statement was made, is not protected at all in line with its established case law mentioned above. About the Holocaust denial being whether a statement of fact or an expression of opinion, the Court concluded that Holocaust denial was found to be a false statement of fact whose falsehood was undoubtedly established by numerous reports of witnesses, historical research and not least by the Auschwitz trial of 1964/65 in Frankfurt.[24]

Grimm states that defining the Holocaust denial as a false statement of fact would be sufficient enough for the Court to end the case since they are not under the protection of freedom of expression. However, according to him, the Court continued its assessment due to avoid the impression that it had chosen an easy way to circumvent the crucial question, or because it was aware of the difficulty of distinguishing between opinions and statements of facts.[25] In its further assessment, it tried to balance the two rights enshrined in the constitution which are the freedom of expression and the personality rights of the Jewish people living in Germany (the honour of the Jews living

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[23] Kommers D.P. (1997). The Constitutional Jurisprudence of the Federal Republic of Germany: Duke University Press 2nd ed., pp. 179-180.

[24] *Grimm D. (2009)."The Holocaust Denial Decision of the Federal Constitutional Court of Germany":* Extreme Speech and Democracy: OUP, ch 28, pp. 558-559.

[25] Ibid, p. 560.

in Germany, the memory of the Jews who had lost their lives in concentration camps). Affirming that the persecution of Jewish people during the Nazi era had become part of the identity of the present generation of Jews in Germany and denial of the Holocaust therefore denies their identity, GCC concluded that these considerations weighed more heavily than the interest in uttering an opinion which contained an evidently false statement of fact. Consequently, it rejected the NDP's complaint about the administrative order.[26]

The transformation of historical revisionism[27] to an extreme denialism in which the whole facts of Holocaust were denied,[28] and the approach of German courts to this occurrence as a growing danger coming from right-wing radicalism, not least the new wave of anti-Semitic incidents such as the arson attack on the Jewish synagogue of Lübeck on 25 March 1994, has led the German parliament to enact the law that explicitly criminalized the denial of Holocaust in 1994.[29] Section 130 (3) of the German Criminal Code states that "*whosoever publicly or in a meeting approves of, denies or downplays an act committed under the rule of National Socialism of the kind indicated in section 6 (1) of the Code of International Criminal Law, in a manner capable of disturbing the public peace shall be liable to imprisonment not exceeding five years or a fine.*" Therefore, not only the denial of genocide that had been committed by the Nazi regime is criminalized, but the denial of all the other acts committed by them is also criminalized with the condition of the denial to be capable of disturbing the public peace.

After the enactment of this law, in the case of Paul Latussek who in a meeting also available to journalists, made a speech that classified the Auschwitz as a lie and claimed that number of victims was far smaller than alleged, the first instance court in Erfurt acquitted the suspect on the grounds that he could not be punished for using the admittedly risky words "*lie*" and "*Auschwitz*" in his speech. However, the high court reversed this verdict on appeal on the grounds that the accused very clearly had denied the historical truth of Auschwitz by questioning the number of victims, and the critical reception that the speech had received among some of the delegates showed that it had disturbed the public peace. On retrial, Latussek was found guilty on disturbing the peace by publicly trivialising the Nazi genocide, in 2005.[30]

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26 Ibid, pp. 560-561.

27 "*... aims to redistribute accountability for the war and limit Hitler's responsibility, relativizing mass extermination but not denying the indisputable fact of the Holocaust." Fronza, E. (2011). The Criminal Protection of Memory: Some Observations About the offense of Holocaust Denial: Genocide Denials and the Law: OUP, p. 161.*

28 Ibid, p. 161.

29 Lewy, G. (2014), p. 24.

30 Ibid, pp. 25-26.

Another case about Holocaust denial is the case of Ludwig Bock who was accused of denying the reality of Auschwitz in the course of defending his client Günter Deckert, an NDP functionary, by submitting numerous documents designed to show that nobody had been murdered in the gas chambers of Auschwitz. The first instance court found Bock guilty and imposed a fine on him by stating that he had trivialised Nazi crimes in violation of article 130 (3) and also endangered the public peace by making the Jewish citizens to think that the persecution of their parents and grandparents was not acknowledged. The high court upheld the verdict by stating that the penalty of a fine was appropriate as Bock had trivialised the Holocaust and this was not as severe as outright denial.[31]

This reasoning of the high court about emphasizing outright denial as being more dangerous than trivialising Holocaust is particularly important in understanding the context of criminalizing the Holocaust denial in Germany. Lawrence Douglas criticizes the Australian approach in criminalizing the Holocaust denial as he thinks it turned Holocaust denial into a form of collective insult which brackets the question about lying about history, since the truthfulness of the insult provides no defense to the charge of insult. He argues that this practice treats the Holocaust denial as a matter of group psychology and theology by lacking the judgment about the bald falsification of history.[32] The German practice seems to emphasize the factuality of Holocaust more than the insulting character of the offence "*deny*". However, it is arguable whether the real intention in doing that is the protection of the historical truth.

Another case worth mentioning here is the case of Fredrick Töben, an Australian citizen, arrested and indicted for Holocaust denial during a visit to Germany. He was found guilty of having sent an open letter containing Holocaust denial theses. However, he was not found guilty by the first instance court for having publicized this letter and other articles containing Holocaust denial claims, on his internet site. The high court reversed this verdict on the ground that in order to disturb the public peace, it was not necessary to establish the existence of a "*concrete danger*" but it was enough to show that a danger might ensue. Therefore the high court concluded that even though Töben's publications were in English, they were also addressed to German people and could have been read by anyone in Germany with access to the Internet.[33] This reasoning of the German courts basically forms the distinction between the German and the United States approaches on the relationship between freedom of expression and genocide denial, resulting in the latter to

[31] Ibid, pp. 28-29.

[32] Douglas, L. (2011). From Trying the Perpetrator to Trying the Denier and Back Again: Genocide Denials and the Law: OUP, pp. 53-54.

[33] Lewy, G. (2014), pp. 35-36.

reject the criminalization of Holocaust denial.

Analysing the case law, one can draw a conclusion that Holocaust denial in Germany is acknowledged as carrying the elements of disturbing the public peace in itself automatically as the German courts do not show any attempt to justify the existence of that condition. This is due to the fact that even the mere Holocaust denial without any defamatory expressions is seen as maliciously intended. Douglas argues that Holocaust denial must not be understood simply as an attempt to paper over atrocity post hoc, but rather it is an act fully consonant with the original methods of the perpetrators and even an instrument of extermination.[34]

Kahn also states that Holocaust denial was identified as a symbolic affirmation of Nazism, even a Nazi propaganda in Germany. He thinks that the greatest harm flowing from Holocaust denial was not its falsity, but the implicit stamp of approval it gave to neo-Nazi activity.[35] Kübler refers to the specific circumstances of Germany by claiming that the regard for the survivors of the Holocaust should be sufficient reason to allow the prohibition of maliciously denying the Holocaust and that such a justification carries more weight than the argument generally used by the German courts which accepts that untrue statements of fact are barred from free speech protection.[36] In my opinion, the case law of the German courts about Holocaust to be a clearly established fact provides the only possible legal basis for criminalizing the mere denial since the utterances with value judgements can always be hindered by the general provisions like defamation or disparagement of the memory of the deceased persons. Accordingly for some academics arguing in favour of criminalizing Holocaust denial in Germany.[37] what is at stake in Germany is more the integrity of a state whose legitimacy depends upon its confessional embrace of the past rather than the protection of the principles of public speech or the survivors. There is the fear that the democratic foundations the new republic is established on after the Nazi regime, can be destroyed with this racist as well as

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34 "*From the vans marked with the symbol of the Red Cross that carried Zyklon-B, to the use of code words such as " Umsiedlung " ("resettlement") and "Evakuierung" ("evacuation"), denial was itself an instrument of extermination. Thus the latter-day act of challenging the existence of "homicidal gas chambers" constitutes something more than a characteristic rhetorical ploy of deniers; it is a gesture that recapitulates the perpetrators' original attempt to decoy gas chambers as innocuous public showers." Douglas, L. (2011), p. 56*.

35 Kahn, R. A. (2004). Holocaust Denial and the Law : A Comparative Study: Palgrave Macmillan Press, p.15.

36 Kübler, F. (1998). How Much Freedom for Racist Speech?: Transnational Aspects of a Conflict of Human Rights: Hofstra Law Review 27 (2), pp. 366-367.

37 Douglas, L. (1998). Policing the Past: Holocaust Denial and the Law: Cencorship and Silencing : Practice of Cultural Regulation: Getty Research Institute for the History of Art and the Humanities, p.73.

antidemocratic intent in Holocaust denial.[38] Therefore, prohibiting Holocaust denial is also deemed as a tool for this militant democracy that does not want to go through a disaster like the Nazi era in anyway.

**B. Republic of Austria**

Sharing the past of Nazi regime with Germany, Austria also became one of the countries that adopted a militant attitude against the national socialist stance, beginning with blocking the former Nazis from political life and prohibiting the Nazi party in 1945.[39] This prohibition law was amended in years and it also outlawed the promotion of Nazism by enumerating the various forbidden ways of it like publication of writings or financial support. Accordingly, Holocaust denial explicitly had been criminalized in 1992 as a respond to rising neo-Nazi violence.[40]

Even before the explicit criminalization, Holocaust denial was seen as a promotion of national socialism and had been punished on the grounds that Holocaust being a historical fact, not requiring proof by way of documentary evidence and the existence of a concrete danger was not necessary for conviction. This practice of the Austrian courts continued after explicit criminalization.[41] An Austrian politician from a far-right party was convicted for stating that it is nice to be permitted to have doubts about the gas chambers after the public prosecutor decided not to proceed in his prosecution for his former statements about the gas chambers to be a topic that should be debated seriously and investigated rather than be reduced to a "*yes*" or "*no*" answer. It manifests the Austrian courts' strict application of the prohibition law, even more than the German courts.[42]

The reasons that led Austria to explicitly criminalize Holocaust denial does not seem much different than the ones about Germany. It is also deemed as a militant stance of a country that has a Nazi past like Germany or Czech Republic.[43] Even the mere denials including the ones allegedly to be a historical work, are assumed as having the character of a Nazi propaganda and led the countries that have experienced the same trauma to take measures of this kind for ensuring civil and social peace.[44] There are views that conceptualize the act

38 Pech, L. (2011). The Law of Holocaust Denial in Europe Toward a (qualified) EU-wide Criminal Prohibition: Genocide Denials and the Law: OUP, p. 190.

39 Kahn, R. A. (2011). Holocaust Denial and Hate Speech: Genocide Denials and the Law: OUP, p. 80.

40 Levy, G. (2014), pp. 51-52.

41 Ibid, pp. 55-62.

42 Ibid, p. 62.

43 Pech, L. (2011), p. 190.

44 Weil, P. (2009). The Politics of Memory: Bans and Commemorations: Extreme Speech and Democracy: OUP, p. 575.

of denying as a way to commit the actual denied crime as well.[45] Therefore, the criminalization of the Holocaust denial in Austria is also strongly related to its special background stemming from a specific part of its history.

**C. French Republic**

According to Imbleau, France is considered the birthplace of Holocaust denial[46] and consequently the criminalisation of it in France was quicker than Germany and Austria. The denial movement, or negationism as it is referred to in France, had already begun in 1950s. However, there was a solid increase in incidents considered to be related to the rebirth of extreme right in France in 1970s.[47] Rousso enumerates some of the denial incidents that he thinks the most important players were involved and had an effect on the public opinion since 1970 in France. He mentions about the interview that the former Commissioner General For Jewish Questions at the Nazi collaborator Vichy government who was a refugee in Spain since the end of the Nazi occupation, gave to an important newspaper in 1978 including his statement that "*At Auschwitz, only lice were gassed*". He also speaks of the interviews in which Robert Faurisson, famous negationist who was an Associate Professor of contemporary literature in the University of Lyon II, denied the existence of the gas chambers in several newspapers on the same year, and the incident which Henri Roques, an extreme right militant close to Faurisson, successfully defended a dissertation based on negationist claims in the University of Nantes in 1985 to a Committee chaired by a known militant for one of Europe's "*New Right*" movements.[48] Faced with these rising denialist movements by extreme ideologies, historians created the term "*negationist*" in order to prevent the using of the much abused term "*revisionist*" in 1987.[49]

Due to harsh anti-Semitic stance of the National Front, a far right political party in France, and the infamous remark of its leader Jean-Marie Le Pen, about the gas chambers being merely "*a detail of history*" in 1987, also the desecration of Jewish headstones in the Jewish cemetery of Carpentras as the last straw, French Parliament outlawed the Holocaust denial as an offence in 1990.[50] Named after the deputy that introduced the bill to the Parliament, Gayssot Law envisaged criminal sanction for those who "*contest the existence of one or more crimes against humanity, as defined in article 6 of the Statute*

45 Lewy, G. (2014), p. 64.
46 Imbleau, M. (2011). Denial of the Holocaust, Genocide, and Crimes Against Humanity: Genocide Denials and the Law: OUP, p. 257.
47 Lewy, G. (2014), p. 9.1.
48 Rousso, H. (2006). The Political and Cultural Roots of Negationism in France: translated by Golsan, L. and Golsan, R. J. :South Central Review 23 (1), pp. 75-76.
49 Ibid, p. 67.
50 Lewy, G. (2014), p. 93.

*of the International Military Tribunal annexed to the London agreement of 8 August 1945 which have been committed either by members of an organization declared criminal pursuant to article 9 of the Statute or by a person found guilty of such crimes by a French or international Court*".

Before the enactment of this law, French courts were dealing with Holocaust denial under the provisions of tort law which the courts considered themselves as bound by the claims of the parties and not having the authority to decide about the reality of the Holocaust.[51] After the enactment of Gayssot Law, Robert Faurisson was found guilty of violating it by calling the existence of the gas chambers a fairy tale, on the ground that according to this law, there was no need to prove the historical reality of the Holocaust, but the only question was whether the defendant had or had not denied crimes against humanity.[52] French courts also adopted the aspect that the Holocaust was an inevitable historical fact after the explicit criminalization. After his conviction was upheld by the high court, Faurisson made a submission to the HRC with the complaint that the Gayssot Law violated his freedom of expression. HRC rejected this complaint on the ground that the statements made by him, read in their full context, were of a nature as to raise or strengthen anti-Semitic feelings, and therefore the restriction served the respect of the Jewish community to live free from fear of an atmosphere of anti-Semitism.[53] HRC also seems to be acknowledging the racist character of the Holocaust denial in this specific consideration. However, the judges in their concurring opinions emphasised that they were concerned about the French courts' application of the Gayssot Law in the case of Robert Faurisson, not the examination of this law in abstract.[54]

According to Imbleau, Gayssot Law clearly establishes the *actus reus* of the crime in the very denial of an event previously established by legislation and assumes that the denial was made with an illegitimate intent (the *mens rea*).[55] This reasoning reduces the *mens rea* merely to the contestation of a law which can be deemed dangerous according to the principles of criminal law, but Imbleau states that France chose this approach as it was rendered necessary since other legislation commonly used to combat hatred or hate speech was considered not adequate when dealing with Holocaust denial litigation.[56] He also adds that in order to prevent the imposition of an official version of the

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51 Ibid, p. 92.

52 Ibid, p. 95.

53 *Faurisson v. France (Faurisson),* Com. No. 550/1993, 8 November 1996, HRC, § 9.6 http://hrlibrary.umn.edu/undocs/html/VWS55058.htm, accessed on 2/3/2020.

54 Ibid, concurring opinions of Elizabeth Evatt, David Kretzmer and Eckart Klein, § 9; concurring opinion of Rajsoomer Lallah, § 8.

55 Imbleau, M. (2011), p. 257.

56 Ibid, p. 248.

history, the method that refers to international bodies may be adopted.[57]

Since the Gayssot Law does not specifically mention about Holocaust but instead, refers to the crimes against humanity committed either by members of an organization declared criminal pursuant to article 9 of the Statute of the International Military Tribunal or by a person found guilty of such crimes by a French or International Court, there are some opinions that finds the legitimacy of this law in the juridical character of it. David Fraser states the following about Gayssot Law:

"*The law is notable for legal self-referentiality. The statute defines the Holocaust in terms of crimes against humanity judged by the courts at Nuremberg and afterward. It defines the offense solely in relation to this legal frame. Holocaust denial is denial of the law. The history that is rendered official is not legislative; it is a judicial version of history. Supporters have insisted on its unique juridical progenitor and the judicial form as its true source of legitimacy.*"[58]

As the French state party put forward in their statements in *Faurisson* about the Holocaust denial to be qualified only as the principal vehicle of anti-Semitism,[59] Holocaust denial is deemed as including racist intents automatically in France as well. Apart from partially sharing the same dark past with Germany and Austria, the militant democratic instincts are less visible but the focus on Holocaust denial's in-itself racist character and its association with far-right are more important in France which are also the roots of the militant stance in Germany and Austria. Likewise, the historical reality of the Holocaust is also a clearly established fact according to the French courts, basically on the ground that Holocaust is established by a court decision which is envisaged in the Gayssot Law itself. However, it is taken into account by the courts in the first place in Germany and Austria.

### D. ECtHR's Case Law on Holocaust Denial

ECtHR, and before it was set up as a court The European Commission of Human Rights (Commission), had dealt with Holocaust denial in a similar way with the countries above. In the first case that came before the Commission about the conviction of four neo-Nazis for distributing leaflets that denied the existence of the Holocaust in Austria with the complaint that it violated their freedom of expression, the Commission stated that in view of the historical experience of Austria during the National Socialist era and the danger the

57 Ibid, pp. 254-255.

58 Fraser, D. (2011). Law's Holocaust Denial: State, Memory, Legality: Denials and the Law: OUP, p. 21.

59 *Faurisson,* § 9.7.

National Socialist thinking may constitute for Austrian society, the measures taken can be justified as being necessary in a democratic society in the interests of national security, territorial integrity as well as for the prevention of crime.[60] In *Honsik v. Austria*, the Commission again found the conviction of the applicant who published articles that denied Holocaust, necessary in a democratic society on the ground that the applicant is essentially seeking to use the freedom of information enshrined in article 10 of the ECHR, as a basis for activities which are contrary to the text and spirit of the ECHR and which, if admitted, would contribute to the destruction of the rights and freedoms set forth in the ECHR.[61]

The Commission and then the ECtHR continued this reasoning by considering that the sanctions, criminal or administrative, implied on the applicants were necessary in a democratic society in the case of Holocaust denial, due to legitimate aims like prevention of crimes or protection of the reputation and rights of Jews.[62] Artūrs Kučs states that this reasoning of the Commission and ECtHR reflects a readiness to grant national authorities an extremely ample "*margin of appreciation*" which might be explained by the inclination to pay due respect to the specific historical past of each country and renders it evidenced by the fact that the Commission had always found the applications regarding the restrictions on Holocaust denial necessary in a democratic society.[63]

In the case of *Lehideux and Isorni v. France* which concerned the conviction of the applicants due to a text published in a newspaper praising Marshal Philippe Pétain's policies in the World War II, ECtHR for the first time declared the denial of the Holocaust categorically to be out of the protection of article 10 by stating: *"... it does not belong to the category of clearly established historical facts – such as the Holocaust – whose negation or revision would be removed from the protection of Article 10 by Article 17*."[64] In *Garaudy v. France*, ECtHR found the case inadmissible in accordance with article 17 for the first time, which the applicant was convicted of having written a book with the title "*The Founding Myths of Modern Israel*" that denied the existence of

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60 Lewy, G. (2014), p. 115.

61 *Honsik v. Austria,* App. No. 25062/94, Judgment of 18/10/1995, Commission.

62 See *D. I. v. Germany,* App. No. 26551/95, Judgment of 29/6/1995, Commission; *Nationaldemokratische Partei Deutschlands, Bezirksverband München-Oberbayern v. Germany,* App. No. 25992/94, Judgment of 29/11/1995, Commission; *Marais v. France,* App. No. 31159/96, Judgment of 24/7/1996, Commission; *Nachtmann v. Austria,* App.. No. 36773/97, Judgment of 9/9/1998, Commission; *Witzsch v. Germany,* App. No. 41448/98, Judgment of 20/4/1999, ECtHR.

63 Kučs, A. (2014). Denial of Genocide and Crimes against Humanity in the Jurisprudence of Human Rights Monitoring Bodies: Journal of Ethnic and Migration Studies 40 (2), pp. 309-310.

64 *Lehideux and Isorni v. France,* App. No. 24662/94, Judgment of 23/9/1998, ECtHR, § 47.

the Holocaust. According to ECtHR, Holocaust is not the subject of debate between historians, but on the contrary, is clearly established. It further goes on by stating that the aim and the result of the approach that the applicant adopted in his book does not constitute historical research, but the real purpose being to rehabilitate the National-Socialist regime and as a consequence, accused the applicants themselves of falsifying history. It also emphasized that denying crimes against humanity is one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. Therefore, it concluded that such acts are incompatible with democracy and human rights because they infringe the rights of others and their proponents indisputably have designs that fall into the category of aims prohibited by article 17.[65] It applied the same reasoning after two years in the case of *Witzsch v. Germany* which also concerned Holocaust denial[66] and didn't change its case law since then.[67]

Levy states that ECtHR, taking account of the specific historical experience of each country, has granted a wide margin of appreciation to states in line with the tradition and continuing practice of European states about Holocaust denial.[68] It adopted the GCC's "*clearly established fact*" case law about Holocaust denial which doesn't have a precedent in its case law unlike GCC and which actually doesn't even have any starting point for this reasoning. However, ECtHR also acknowledges that Holocaust denial is a form of anti-Semitism and a clear danger for democracy with the other common European values that the whole system of the ECHR is established on. Therefore, it makes use of article 17, the abuse clause that finds its roots in the perception of "*militant democracy*" which is actually intended to be a cure for resurgent of the Nazi-like totalitarian regimes. Actually, as Cannie and Voorhoof puts forward, ECtHR have so far consistently made effective use of the abuse clause only to respond to activities or statements related to National Socialism, or in particular regarding Holocaust denial, revisionist speech and other types of anti-Semitism inspired by this ideology.[69] In this context, it is obvious that ECtHR embraces all the justifications of the states above about criminalizing Holocaust denial and doesn't even accept it to be covered by the freedom of expression any more.

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65 *Garaudy v. France,* App. No. 65831/01, Judgment of 24/6/2003, ECtHR.

66 *Witzsch v. Germany,* App. No. 7485/03, Judgment of 13/12/2005, ECtHR.

67 *M'Bala M'Bala v. France,* App. No. 25239/13, Judgment of 20/10/2015, ECtHR; The Court stated that the programme of a comedian which was claimed to be a satirical and provocative performance, was in fact became a demonstration of hatred, antiSemitism and support for Holocaust denial. Therefore the Court rejected the application as incompatible ratione materiae with the provisions of the ECHR.

68 Levy, G. (2014), p. 118.

69 Cannie, H. and Voorhoof, D. (2011): The Abuse Clause and Freedom of Expression in the European Human Rights Convention: Netherlands Quarterly of Human Rights 29 (1), p. 63

## II. OUTLAWING THE DENIAL OF THE SO-CALLED ARMENIAN GENOCIDE IN EUROPE

In this section, an assessment will be made about whether the reasons that are put forward to justify the criminalization of the denial of the Holocaust -which is the only specific genocide that the European states outlawed the denial of- can justify outlawing the denial of the so-called Armenian genocide. The reasons that are being used to legitimize the criminalization of the denial of the Holocaust in Europe based on the research above can be listed as follows:

1. Holocaust denial in Europe is deemed as a form of anti-Semitism that the extremist ideologies use as a means to propagate about their anti-democratic ideals.

2. It is acknowledged that this relationship between Holocaust denial and extremist ideologies constitutes a danger to democracy in countries with a Nazi past.

3. Holocaust is a clearly established fact based on numerous documentations, eye-witnesses and judiciary decisions.

One can expect the first reason to be the agreement on Holocaust being a clearly established fact, however, the real ground for criminalizing Holocaust denial in my opinion and generally in literature, is the relationship between Holocaust denial and the anti-Semitic ideologies in the countries with a Nazi past. Levy also states that he is inclined to believe that the criminalization of the Holocaust denial in Germany involves the singularity of the Holocaust in the self-image of all Germans and the emphasis on the unique fate of German Jews.[70] Therefore, the justification that the Holocaust being a clearly established fact unnecessary to be proven again, seems like a supportive ground for the difficulty of demonstrating the hidden racist intent in bare denials and functions as a legal ground in judgments.

### A. Hidden Racist Intent

On the first reason about the denial to be made with a hidden racist intent, a distinction should be made between the contexts of Holocaust and the so-called Armenian genocide denials. Anti-Semitism is an old conception and was a reality of the European history even before the Holocaust. Göran Therborn declares the three epochs of European anti-Semitism as beginning with the oedipal origin of Christianity, as a break-off from Judaism ensued during the Crusades as medieval Christian anti-Semitism and getting more powerful with the rise of nationalism and the biological racism, which became a key ideology of the European imperialism surging in the last third of the nineteenth century

[70] Levy, G. (2014), p. 46.

in the third epoch.[71] Brustein states that religious, economic, racial, and political roots of anti-Semitism appear to have been instrumental in the formation of anti-Jewish narratives emerging between 1879 and 1939 which also gained credence from the effects of declining economic well-being, increased Jewish immigration, growth of leftist support, and identification of Jews with the leadership of the political left. According to him, anti-Semitism as measured by acts and attitudes, reached its highest points between the two world wars, particularly in Germany and Romania and in a lesser degree in France and Great Britain.[72] Therefore, racism towards Jewish people in Europe has a long history rooted on various dimensions and concluded in the emergence of the term "*anti-Semitism*".

About the same point on the context of the so-called Armenian genocide, whether one can talk about a concept of racism towards Armenians in the Armenian-Turkish relations in history is a highly doubtful one. On the contrary, Armenian- Turkish relations had been relatively good compared to other ethnic or religious communities in the Ottoman Empire, that they were said to have significant benefits being a part of the Empire and they served at all levels of the government including to be "*vezir*", the head of the government.[73] It is even stated that among the conquered Christian population of the Ottoman Empire, Armenians were the most admired and known as the "*millet-i sadıka*", the "*loyal community*".[74] Therefore, the problem in Turkish-Armenian relations is a rather new conflict not a rooted racism, that started with the breakdown of the Ottoman Empire with the effect of the 19th century nationalism and continued with the Armenians' efforts, including terrorism[75], to ensure a universal recognition of the "*1915 events*" as genocide, while Turkey as the successor of the Empire, not acknowledging this accusation. This certainly does not mean that there are not any extremist opinions racist against Armenians or may be using the denial of the so-called Armenian genocide with racist intents now, but the question is whether the historical background of Turkish-Armenian relationship can support an assumption to deem the bare denial as carrying hidden racist motives like in the denial of the Holocaust. The answer to this question is "*no*" due to explanations above.

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71 Therborn, G. (2012). Three Epochs of Anti-Semitism in Europe: European Societies 14 (2), p. 161.

72 Brustein, W. I. (2009). Roots of Hate: Anti-Semitism in Europe before the Holocaust: CUP, p.337.

73 Zeytinoğlu, G. N., Bonnabeau, R. F. and Eşkinat R. (2012). Ethnopolitical Conflict in Turkey: *Handbook of Ethnic Conflict: International Perspectives: Springer, p. 266.*

74 Ibid, p. 265.

75 Dugan, L., Huang, J. Y., LaFree, G. and McCauley, C. (2008). Sudden Desistance from Terrorism: The Armenian Secret Army for the Liberation of Armenia and the Justice Commandos of the Armenian Genocide: Dynamics of Assymetric Conflict 1 (3).

Hochmann envisages four possibilities about the intent in genocide denial. He states:

"*In my first hypothesis, an individual willingly uses denial as a diverted way of expressing hate speech. In the second case, the denier chooses denial as a way to get famous. In the third hypothesis, the racist opinions of an individual involve his acceptance of denial. In the fourth hypothesis, a national system of denial produces a real bona fide denial, at least in parts of the population educated in state schools.*"[76]

He refers to the denial of the so-called Armenian genocide in his fourth hypothesis about the possibility of a national system of denial to produce *bona fide* deniers. He gives the example of the prosecution in Switzerland about the denial of the so-called Armenian genocide which ended with the acquittal of the accused on the ground that he was not aware of the falsity of his statements due to strong national orientation of the Turkish school system and states that this judgement thus seems to release *bona fide* deniers when the denial doctrine is adopted by a state[77]. He maintains that these deniers' intent is *bona fide* as they don't know the reality and they are not hateful as they don't have racist intents.[78] I do not share the same view with Hochmann about *bona fide* deniers in the Armenian issue to be the product of official state denial, or with the Swiss courts about the denial of the so-called Armenian genocide to be a result of the educational system of Turkey. However the conclusion that I am trying to reach is that even the perception that acknowledges the "*1915 events*" as genocide, is of the view that not all the deniers of the so-called Armenian genocide are acting with a racist intent which is different in the case of Holocaust as it is generally accepted that all Holocaust deniers have a hidden racist intent[79].

**B. Danger to Democracy**

After establishing that the relationship between extremist ideologies and the denial of the so-called Armenian genocide is not as strong as to necessitate the criminalization like in the denial of the Holocaust, the second point about the justification of outlawing Holocaust denial should be discussed about the denial of the so-called Armenian genocide which is the possibility of danger that this relationship might constitute to European democracies. This can be deemed as the reason that led the European countries with a Nazi past to punish even the mere Holocaust denials seemingly as a historical research, to eliminate the slightest possibility of a Nazi regime propaganda. About the applicability of the abuse clause on the denial of the so-called Armenian genocide by

[76] Hochmann, T. (2011). The Denier's Intent: *Genocide Denials and the Law: OUP, p. 9.*
[77] Ibid, p. 34.
[78] Ibid, p. 10.
[79] Ibid, p. 20.

ECtHR, Pech states that as the European Court has linked Holocaust denial with the notions of racial defamation and of incitement to hatred, and since it is highly doubtful that those questioning the so-called Armenian genocide are animated by a racist intent or hatred of the Armenian people, it would be ill advised to apply the article 17 on this issue. He also adds that there is no objective of rehabilitating a regime comparable to the National Socialist regime. He continues with the only justification left being the eventual theoretical threat to the public order that such speech could cause and the high impossibility in demonstrating convincingly the "*necessary*" character of any public interference, in any country other than Turkey as a result.[80] It is indeed unrealistic to claim that even the hypothetical denials with a hidden racist intent on the so-called Armenian genocide may endanger the existence of democracy in European countries.

Can there be another legitimate reason that is strong enough to justify the criminalization of the denial of the so-called Armenian genocide in Europe that can allegedly outweigh the importance of the freedom of expression in a democracy, like in the denial of Holocaust, is another question that comes to mind. Fraser tries to answer this question in the context of France by stating first, that all memory laws in France are about French memory. The Gayssot Law criminalizes the denial of Holocaust as France has a responsibility on one hand, for the killing of French Jews and on the other, the rise of Holocaust denial as a French phenomenon, while the *loi Taubira*[81] and the provisions relating to *pieds noirs* and *harki* history can be placed easily as a matter of taxonomy within a set of debates about French history and the current competing political and social understandings of its colonial past and heritage. Therefore according to him, these laws can be fitted into some understanding of "*Frenchness*".[82] About the Armenian issue to whether it can be fitted in to some kind of "*Frenchness*", he concludes that even the significant amount of Armenian population living in France cannot automatically justify the existence of memory laws about "*1915 events*" as there are many other immigrant groups in France, all have their histories with significant events. About the possible grounds that can legitimize the memory laws on the so-called Armenian genocide, he mentions the suggested reasons that France was involved in "*1915 events*" in the World War I as one of the Great Powers while French politicians positioned themselves as the protectors and advocates of the Armenian population of Turkey even before 1915, and lastly, France having this responsibility universally as the home of

80 Pech, L. (2011), p. 220.

81 It defines both slave trade and slavery itself practiced from the 15th century as crimes against humanity.

82 Fraser, D. (2011), p. 29.

human rights.[83] Nevertheless, he concludes that despite arguments about Great Power complicity, Christian solidarity, and human rights universalism, "*1915 events*" is a distinctly foreign event as the issues are complex and intertwined that not only is the plan to exterminate the Jewish population of Europe different in nature, type, and extent from the so-called Armenian genocide, but it is also part of the dark legacy of Europe and France, and the so-called Armenian genocide does not share this fundamental and distinguishing characteristic.[84] It is important to note that Fraser talks about the memory law that recognized the "*1915 events*" as genocide, not about the one that would criminalize the denial of it. Therefore, I think the reasons that he mentions about the "*Frenchness*" of the memory law he thinks as not sufficient enough to justify the so-called Armenian genocide recognition, are more doubtful in whether they can justify the criminalization of its denial. If we turn back to the objection of the second point about Holocaust denial endangering democracy in European states by giving extremist opinions the chance to find a stage to propagate about their anti-democratic ideals that would and did in the past, destroy the fundamental values of the European democracies, we see no allegedly superior purpose that would outweigh the importance of the freedom of expression in the case of the so-called Armenian genocide.

### C. Clearly Established Fact

On the last point about Holocaust being a "*clearly established fact*", another major difference exists between Holocaust and the so-called Armenian genocide which is the non-existence of a final judgment of a competent court that determines the "*1915 events*" as "*genocide*" in its legal meaning due to the principle of *nullum crimen sine lege*.[85] As I stated above, the inevitable

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83 Ibid, pp. 40-41.

84 Ibid, p. 46.

85 The term "*genocide"* did not even exist in the time of "1915 events" until Raphael Lemkin invented the term in his book in 1944. *"New conceptions require new terms. By "genocide" we mean the destruction of a nation or of an ethnic group. This new word, coined by the author to denote an old practice in its modern development, is made from the ancient Greek word genos (race, tribe) and the Latin cide (killing), thus corresponding in its formation to such words as tyrannicide, homocide, infanticide, etc. Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves." Lemkin, R. (1944).* Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress: Publications of the Carnegie Endowment for International Peace, p. 79.
The term "*genocide*" was first envisaged as a crime in the "*Convention on the Prevention and Punishment of the Crime of Genocide"* adopted by the General Assembly of the United Nations on 9 December 1948.

factuality of Holocaust which is also based on the decisions of the International Military Tribunal, rather has the role of providing, at least a legal basis for the criminalization of the bare denial of Holocaust. Badinter states that the application of the abuse clause by ECtHR on Holocaust denial is perfectly true, as it is not the odiousness of revisionism that makes its punishment legitimate but it is the desire to bring the basest accusations against a community that has been the victim of these crimes against humanity that encourages hatred of that community.[86] Again, the real reason in punishing Holocaust denial is to prevent the incitement to hatred for that community that was and still is the basis of a certain ideology that demolished democracy in Europe in the past, not lying about Holocaust despite it is a clearly established fact known by everyone.

About denial laws to establish an official truth, Hochmann states that such statutes do not protect the truth, as for instance, exaggerating the number of victims cannot be sentenced based on these statutes.[87] This reasoning perfectly shows that it is not the purpose of those statutes to protect the truthfulness of Holocaust. Either way, can one speak about the impossibility of criticising court decisions is another argument. Robert Hayden defines this premise as creating some kind of "*secular heresy*" if it means that it should be a crime to contest the conclusions that judiciaries reach. He states:

"*A pronouncement that is immune from criticism is thereby infallible, but infallibility is unknown in secular politics. It is also otherwise unknown in secular law. Indeed, the very fact that the Council of Europe's language, if taken literally, leads to this result, means that the judgment of the international tribunal has more the character of dogma than of a judicial decision. The immunity from criticism afforded to the judicial pronouncement is strong evidence that "genocide denial" laws are meant to punish secular heresy, since, uniquely, heresy laws act to ensure that a dogma may not be subjected to challenge.*"[88]

It is true that reducing the denial laws' legitimacy to protection of the factuality of these events and their legal definitions determined by courts, would be to tear apart the real ground for the existence of these laws which is the prevention of hate crimes in the first place. However, the non-existence of any court decision about "*1915 events*" that defines it as genocide, makes it even more controversial to criminalize the denial of the so-called Armenian genocide as there is no competent authority to determine the existence of this crime, which the criticism and contestation of its consideration can be

86 Badinter, R. Is this the end for the historical memory laws?(2012), http://www.lph-asso.fr/, accessed on 13/7/2016.

87 Hochmann, T. (2011), p. 35.

88 Hayden, R. M. (2008). Genocide Denial Laws as Secular Heresy: A Critical Analysis with Reference to Bosnia: Slavic Review, Summer 67 (2), p. 404.

punished. The impossibility of punishing criticism or contestation of the parliaments' considerations on these issues is even more obvious as it is not in their authority to decide on the "*genocide*" character of any event and it would be in violation of the principle "*separation of powers*" to think otherwise. This was also the French Constitutional Council's (FCC) reasoning on its decision about the unconstitutionality of the law on the punishment of denials of the existence of genocides recognised by French law. The mentioned law envisaged a term of imprisonment of one year and a fine of 45,000 Euro for those who contests or minimise in an excessive manner, the existence of one or more crimes of genocide as defined under article 211 (1) of the Criminal Code which are recognised as such under French law. Since it was the only other genocide that was officially recognized by the French Parliament,[89] this law was resulting in the criminalization of the denial of the so-called Armenian genocide. The FCC began its constitutionality assessment by stating first, that law has the vocation of laying down rules and must accordingly have a normative scope according to all constitutional standing related to the subject matter of the law.[90] About punishing the abuse of the exercise of freedom of expression which cause disruption to public order and the rights of third parties, it stated that nonetheless, freedom of expression and communication is all the more precious since its exercise is a precondition for democracy and one of the guarantees of respect for other rights and freedoms and that the restrictions imposed on the exercise of this freedom must be necessary, appropriate and proportional having regard to the objective pursued.[91] Accordingly the Council concluded:

"*Considering that a legislative provision having the objective of 'recognising' a crime of genocide would not itself have the normative scope which is characteristic of the law; that nonetheless, Article 1 of the law referred punishes the denial or minimisation of the existence of one or more crimes of genocide" recognised as such under French law"; that in thereby punishing the denial of the existence and the legal classification of crimes which Parliament itself has recognised and classified as such, Parliament has imposed an unconstitutional limitation on the exercise of freedom of expression and communication…*"[92]

As the Gayssot Law clearly refers to the juridical character of the Holocaust, FCC confined itself with the assessment that the so-called Armenian genocide

89 "*Loi "Arménie*" of 29 January 2001.

90 Constitutional Council of French Republic, Decision No 2012-647, (28 February 2012), § 4 https://www.conseil-constitutionnel.fr/en/decision/2012/2012647DC.htmaccessed on 3/3/2020.

91 Ibid, § 5.

92 Ibid, § 6.

does not have this feature. However, we can also infer the conclusion from this judgment that the FCC considered the benefits to be gained from the free debate of opinions on the Armenian issue to outweigh the possible danger to peace, public order and democracy which is deemed as the opposite in Holocaust denials. It should be reiterated that the real debate is not the factuality or the legal definition of events; but they form a reliable legal objection for judiciaries in their decisions.

French Parliament has adopted the same legislation that criminalizes the denial of genocides without the condition of being decided by a judiciary on October 2016 again. Yet, FCC again has ruled that this provision is unconstitutional due to similar justifications in its decision in 2012. It first observed that these provisions are not necessary to effectively contain incitement to hatred or violence, which is already covered by the French Law regarding freedom of the press. It continued secondly with the fact that the contested article would allow speech to be subject to a criminal complaint on the grounds that it denies facts, even if these facts have not been recognised legally as criminal in nature at the time the speech was uttered. FCC considered that the result would be uncertainty with regard to the lawfulness of acts or statements that could be the subject of historical debates. Lastly it also rejected this provision on the ground that they placed unnecessary and disproportionate restrictions on the freedom of expression. [93]

Due to non-juridical character of the Armenian events, Swiss courts came up with another ground for the pronouncement of the Armenian issue as a "*clearly established fact*". In the case about a Turkish politician denying the so-called Armenian genocide in an assembly in Switzerland, Lausanne District Police Court found him guilty of the offence under article 261 (4) of the Criminal Code which criminalized the denial of genocides in general. In the efforts to refer to the so-called Armenian genocide as an established historical fact, the Court first put forward that the term "*genocide*" in article 261 (4) cannot be confined to the genocides that were established by a court decision or only to Holocaust, as the historical interpretation of the provision enables the Court to consider otherwise since the legislators of that provision also quoted the alleged genocides of Kurds and Armenians by way of example and some legal theorists supported that view. About the so-called Armenian genocide to be an established historical fact in Switzerland, the Court first referred to the non-binding federal parliamentary motion that recognized the so-called Armenian genocide in 2003. Then, the Court found it sufficient ground to deem the so-called Armenian genocide as an established historical fact in the Swiss

[93] Constitutional Council of French Republic, Decision No 2017-30, (27 January 2017): Conseil constitutionnel - Annual Report 2017, https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/bilan/annual_report_2017.pdf, p.33 accessed on 3/3/2020.

public opinion as the University of Lausanne has used the so-called Armenian genocide as an example on humanitarian law in a published work with the school history textbooks also dealing with this issue and the governments of Vaud and Geneva to have been recognised the so-called Armenian genocide. The Court also mentiones some international repercussions like France, The European Parliament and the Council of Europe having recognised the Armenian events as genocide with a relevant committee rapporteur's report in the United Nations stating that the "*1915 events*" must be considered as genocide.[94]

On appeal of this verdict, Criminal Cassation Division of the Vaud Cantonal Court stated that it must be recognized that the so-called Armenian genocide is deemed to be an established historical fact as the courts are not required to rely on the work of historians to acknowledge its existence, since this particular case is specifically covered by the legislation and the intentions of those who enacted it, on the same basis as the genocide of the Jews in the Second World War. Then it added as the so-called Armenian genocide is acknowledged by the Parliament to be an established fact, there was nothing exceptional about this case that would call for additional investigative measures and a historical approach to assess whether a genocide had taken place. On the appeal on grounds of nullity that the appellant complained of the insufficiency in the investigation about the opinions which deemed it doubtful to call the Armenian events as genocide, the Court stated these grounds must be dismissed since they are solely concerned with questions of fact whose resolution would not be likely to influence the judgment and it is not necessary for the courts to act as a historian on the question of the so-called Armenian genocide, since the parliamentary debates show that its existence is considered to be established.[95]

On the appeal of the convicted again, the Swiss Federal Court first tried to assess if there is a comparable consensus regarding the events denied by the appellant by stating that the question is less directly concerned with the assessment of whether the massacres and deportations attributed to the Ottoman Empire are to be characterised as genocide than with the general assessment of this characterisation, both among the public and within the community of historians. The Federal Court then, referred to the grounds given by the Police Court about the consensus on the "*1915 Events*" to be deemed as genocide, both among academic scholars that are experts on the subject and the international organisations. The rejection of the appellant's objection about the insufficiency in investigation among academics, was based on the lack of any specific evidence to be submitted by him and his incapability to controvert the

94 *Perinçek*, § 22.
95 Ibid, § 24.

consensus set forth by the Court. The answer to appellant's statement about the existence of states that did not recognize the so-called Armenian genocide was even more controversial which is as follows:

"*It should be pointed out in this connection, however, that even the UN's Resolution 61/L.53 condemning Holocaust denial, adopted in January 2007, received only 103 votes from among the 192 member States. The mere observation that certain States refuse to declare in the international arena that they condemn Holocaust denial is manifestly insufficient to cast doubt on the existence of a very general consensus that the acts in question amount to genocide. Consensus does not mean unanimity. The choice of certain States to refrain from publicly condemning the existence of a genocide or from voting for a resolution condemning the denial of a genocide may be dictated by political considerations that are not directly linked to those States' actual evaluation of the way in which historical events should be categorised, and in particular cannot cast doubt on the existence of a consensus on this matter, especially within the academic community.*"[96]

This means that the Federal Court acknowledges the possibility of some states to act with certain political intents in not recognizing a genocide but ignores the fact that this may happen the same way for some states in recognizing also. On the appellant's last objection about the support from Switzerland for the establishment of a panel of historians to investigate the Armenian issue, to contradict with the Court's perception of it as an established historical fact, the Court stated that this attitude of openness to dialogue cannot be construed as denial of the existence of a genocide. Whether this support is in contradiction with the "*established historical fact*" qualification of the so-called Armenian genocide is not clear due to the method on the assessment of this qualification adopted by the Court, however, it is definitely in contradiction with the criminalization of "*denial*" as it can only be a monologue, not a dialogue if the other side of the debate is not allowed to talk.

As we reiterated above, the fact that the real intention in criminalizing the denial of the Holocaust not being the contestation of its factuality, causes the criminalization of the denial of the so-called Armenian genocide which also lacks the legal ground of having a juridical character, to end up in justifications that are full of contradictions and in violation with the principles of criminal law. Reducing the justification of the ground, being an established historical fact to parliamentary and some international organizations' recognitions, or to be expecting the appellant to controvert the existence of the consensus reached by the courts themselves while rejecting his demands for further investigation on the issue, would have been highly objectionable if the courts hadn't searched

[96] Ibid, § 26.

for another condition which is the discriminative motive in denial.

**D. Criminalizing Denial with Discriminative Motive**

Hochmann argues that a requirement of bad faith or hateful intent could be enacted in order to offer greater protection of speech in criminalizing denial, like the FD did.[97] He adds that making such a requirement may be a good means, just like in Switzerland, for limiting the scope of the offense, especially if the lawmaker is less confident that any denial or grossly trivializing of any crimes of genocide, crimes against humanity or war crimes is susceptible of provoking the evil consequences the lawmaker wishes to avoid.[98] The case of the Turkish politician in Swiss courts should be analysed on this issue to see if this additional requirement can indeed be a guarantee for the protection of the freedom of expression in the case of the so-called Armenian genocide.

Article 261 (4) of the Switzerland Criminal Code states:

"*any person who publicly denigrates or discriminates against a person or group of persons on the grounds of their race, ethnic origin or religion in a manner that violates human dignity, whether through words, written material, images, gestures, acts of aggression or other means, or any person who on the same grounds denies, grossly trivialises or seeks to justify a genocide or other crimes against humanity;*

…

*shall be punishable by a custodial sentence of up to three years or a fine.*"

The provision stipulates the requirement that the intent in denial should be discriminative. In the enactment preparations of this provision, the Swiss government stated that in order to prevent unjustified restrictions on sociological or ethnological studies, the emphasis should be put on incitement to racial hatred and discrimination, contempt and denigration which were the main and truly blameworthy element of racial superiority theories that led to racial hatred and xenophobia.[99] Therefore, the courts in the case examined above, also looked for the subjective condition of the offence which is the discriminative intent. The Police Court started this assessment by questioning if Perinçek, the convicted, was aware of the stance of the international community qualifying the Armenian events as genocide which the Switzerland parliament also recognised, and concluded that he cannot claim that the genocide didn't exist since he was aware of the counter arguments on the subject. The Court continued by stating that genocide denial was, if not an article of faith, at least a political slogan with distinct nationalist overtones since the convicted

97 Hochmann, T. (2011), p. 35.
98 Ibid, p. 36.
99 *Perinçek,* § 34.

mentioned that he would never change his position, even if a neutral panel should one day conclude that the so-called Armenian genocide did indeed take place. Lastly the Court decides:

"*Legal theory is unanimous in considering that there has to be a racist motive. It is clear that Dogu Perinçek's motives appear to be racist and nationalistic. This is a very long way from historical debate. As noted by the prosecution, Dogu Perinçek speaks of an imperialist plot to undermine Turkey's greatness. To justify the massacres, he resorts to the laws of war. He has described the Armenians as being the aggressors of the Turkish people. He is a follower of Talat Pasha – the defendant is a member of the eponymous committee – who, together with his two brothers, was historically the initiator, instigator and driving force of the Armenian genocide.*"[100]

The Court of Cassation agrees with the lower court's justification and states that the convicted coupled the term "*genocide*" with "*international lie*" in his speech which was made at public meetings with strong nationalist overtones that bore little relation to serious historical debates devoid of racist prejudices. It went on to say that the appellant, who is aware of the widespread acceptance of this proposition, was merely seeking to make a political rather than a historical point as he claimed, and it was not by chance that these statements were made at meetings to commemorate the 1923 Treaty of Lausanne.[101] The Federal Court accepted these grounds for the existence of racist motive as well, but it also assessed the danger in denying the so-called Armenian genocide which the other courts hadn't, by stating that the Armenian community constitutes a people, or at the very least an ethnic group which identifies itself in particular through its history, marked by the events of 1915 and it follows that denial of the Armenian genocide or the representation of the Armenian people as the aggressor, in itself constitutes a threat to the identity of the members of this community.[102]

In order to analyse, the speeches of the Turkish politician in question should be given. These were as follows:

"*Let me say to European public opinion from Bern and Lausanne: the allegations of the 'Armenian genocide' are an international lie. Can an international lie exist? Yes, once Hitler was the master of such lies; now it's the imperialists of the USA and EU! Documents from not only Turkish but also Russian archives refute these international liars. The documents show that imperialists from the West and from Tsarist Russia were responsible for the situation boiling over between Muslims and Armenians. The Great*

100 *Perinçek*, § 22.
101 Ibid, § 24.
102 Ibid, § 26.

*Powers, which wanted to divide the Ottoman Empire, provoked a section of the Armenians, with whom we had lived in peace for centuries, and incited them to violence. The Turks and Kurds defended their homeland from these attacks. It should not be forgotten that Hitler used the same methods – that is to say, exploiting ethnic groups and communities – to divide up countries for his own imperialistic designs, with peoples killing one another. The lie of the 'Armenian genocide' was first invented in 1915 by the imperialists of England, France and Tsarist Russia, who wanted to divide the Ottoman Empire during the First World War. As Chamberlain later admitted, this was war propaganda. ... The USA occupied and divided Iraq with the Gulf Wars between 1991 and 2003, creating a puppet State in the north. They then added the oilfields of Kirkuk to this State. Today, Turkey is required to act as the guardian of this puppet State. We are faced with imperialist encirclement. The lies about the 'Armenian genocide' and the pressure linked to the Aegean and Cyprus are interdependent and designed to divide us and take us hostage. ... The fact that successive decisions have been taken that even refer to our liberation war as a 'crime of humanity' shows that the USA and EU have included the Armenian question among their strategies for Asia and the Middle East ... For their campaign of lies about the 'Armenian genocide', the USA and EU have manipulated people with Turkish identity cards. In particular, certain historians have been bought and journalists hired by the American and German secret services to be transported from one conference to another. ... Don't believe the Hitler-style lies such as that of the 'Armenian genocide'. Seek the truth like Galileo, and stand up for it."*[103]

*The Kurdish problem and the Armenian problem were therefore, above all, not a problem and, above all, did not even exist ...*[104]

*... even Lenin, Stalin and other leaders of the Soviet revolution wrote about the Armenian question. They said in their reports that no genocide of the Armenian people had been carried out by the Turkish authorities. This statement was not intended as propaganda at the time. In secret reports the Soviet leaders said – this is very important – and the Soviet archives confirm that at that time there were occurrences of ethnic conflict, slaughter and massacres between Armenians and Muslims. But Turkey was on the side of those defending their homeland and the Armenians were on the side of the imperialist powers and their instruments ... and we call on Bern, the Swiss National Council and all parties of Switzerland: Please take an interest in the truth and leave these prejudices behind. That is my observation, and I have read every article about the Armenian question and these are merely*

[103] Ibid, § 13.
[104] Ibid, § 14.

*prejudices. Please leave these prejudices behind and join (??), what he said about these prejudices, and this is the truth, there was no genocide of the Armenians in 1915. It was a battle between peoples and we suffered many casualties ... the Russian officers at the time were very disappointed because the Armenian troops carried out massacres of the Turks and Muslims. These truths were told by a Russian commander ...*[105]

The justification about the convicted to be aware of the counter arguments on the issue is determined as showing the unlawful intent of the convicted, however, this perception reduces the unlawfulness of the conduct to contest an official truth formed on highly doubtful bases again which is in violation of the principles of criminal law. The courts also mention that the speech of the convicted with distinct nationalistic overtones doesn't contribute to any serious historical debate devoid of racist prejudices. In order to declare it unlawful, the speech should be abusively intended and the justifications of the courts about the distinct nationalistic quality of the speech are not sufficient in any way to demonstrate the discriminative motive behind the act as it cannot be taken for granted that Turkish nationalism is automatically racist like Nazi ideology. Also, the speech in question is already a political slogan which is not unlawful in itself, composed of the personal opinion of the convicted on the issue, not an attempt to contribute to a serious historical debate which is also not related with the focus point of the decision which is the discriminative motive. ECtHR, on Perinçek's application about his conviction to violate article 10 of the ECHR, also stated that the applicant's statements, read as a whole and taken in their immediate and wider context, cannot be seen as a call for hatred, violence or intolerance towards the Armenians. It added that it is true the expressions were virulent and that the applicant's position was intransigent, but it should be recognised that they apparently included an element of exaggeration as they sought to attract attention.[106]

The comment on the speech to be of an imperialist plot to undermine Turkey's greatness seems to be clearly a wrong assessment, as the convicted in fact, tries to honour his country for fighting against the countries that he thinks as imperialists. On the other hand, the statement of the court about the convicted to resort to the laws of war to justify the massacres is particularly strange for a branch of judiciary to make ground for the punishment as the question appears about where exactly should one resort to justify his acts due to rule of law. The justification of coupling the term "*genocide*" with "*international lie*" also cannot be deemed relative to the existence of any discriminative motive as the convicted especially states that it is the lie of countries that he deems

[105] Ibid, § 16.
[106] Ibid, § 239.

imperialist and he even refers to the peace between the Turkish and Armenian people continued for centuries. The only possible ground determined by the courts to demonstrate the discriminative motive can be the statements of the convicted about not changing his opinion even if a neutral panel should one day decide on the genocide character and the identification of the Armenians as the aggressors of the Turkish people. However these statements do not take place in the speeches of the convicted that was the reason of his prosecution and the courts shouldn't extend the inquiry to search for the hidden racist intent by including his statements out of the context of the speeches that are the subject of prosecution, like the other courts do in Holocaust denials. Either way, as the court doesn't mention the background of these statements, it is not clear whether the convicted was trying to express his belief in the impossibility of a neutral panel to conclude on the "*genocide*" character one day.

ECtHR, under the assessment of the existence of a legitimate aim, also stated that the overall tenor of his statement "*international lie*" shows that this accusation was rather aimed at the countries he deems as imperialists. However, it added that it can agree with the interference to be intended to protect the dignity of present-day Armenians and their descendants since in his statements, the applicant referred to the Armenians involved in the events as "*instruments*" of the "*imperialist powers*" and accused them of carrying out massacres of the Turks and Muslims.[107] It must be noted that both the Swiss courts' and the ECtHR's perception as to determine the applicant's statements about the killings of Turks and other Muslims by Armenians in "*1915 events*" to be showing the discriminative motive and degrading against Armenians, is not understandable or acceptable, even more in light of the fact that the whole purpose of these prosecutions in criminalizing the denial of the so-called Armenian genocide, is to prevent the denial of the killings of their descendants in "*1915 events*" from being offensive and causing emotional stress on Armenians.

Nevertheless, ECtHR found that there has been a breach of article 10 in the case of *Perinçek* due to elements analysed by itself; that the applicant's statements bore on a matter of public interest and did not amount to a call for hatred or intolerance, that the context in which they were made was not marked by heightened tensions or special historical overtones in Switzerland, that the statements cannot be regarded as affecting the dignity of the members of the Armenian community to the point of requiring a criminal law response in Switzerland, that there is no international law obligation for Switzerland to criminalise such statements, that the Swiss courts appear to have censured the applicant for voicing an opinion that diverged from the established ones

[107] Ibid, § 156.

in Switzerland and that the interference took the serious form of a criminal conviction.[108] Therefore ECtHR rejected all the arguments of the state party and third parties in the case about the applicability of the grounds that are used for the justification of criminalizing Holocaust denial, in the denial of the so-called Armenian genocide in this specific case.

Lobba states that, according to this judgment of ECtHR, the possibility of prosecuting the denial of the so-called Armenian genocide has been considerably restricted as this prospect is hindered by the allegedly unsettled debate over the legal characterisation of those events and moreover, it is doubtful that a conviction based solely on the denial of such qualification will be considered as imposed by a pressing social need. He adds that this conduct may still be validly punished inasmuch as expressions amount to a justification of the crimes, tangible symptoms of harm are ascertained such as the author's goal to incite to hatred or violence, or, if the conduct satisfies general provisions against hate speech.[109]

It can be inferred that the Swiss courts failed to justify their decision on the existence of discriminative motive on this specific case and that guarantee didn't function proper as to protect the enjoyment of freedom of expression. Lewy also states that the way the Swiss courts have handled the matter of the racist motive in these cases is unsatisfactory.[110] However, ECtHR didn't make a consideration about outlawing denial of the so-called Armenian genocide to contradict with article 10 in general. Therefore, ECtHR will continue to examine all the possible cases about this issue in merits and most likely search for the existence of the elements that Lobba stated. However, it should also be noted that the historical dispute about the intent of the Ottoman Empire is also valid on the reasons of mass deportations which to speak of is seen as justifying genocide.[111] Therefore the arguments put forward about the conduct "*denial*" should also be deemed relevant about "*justification*" as far as the expressions concern a wartime security measure due to law of war.

It should be analysed now if there is an actual necessity to criminalize explicitly the denial of the so-called Armenian genocide due to alleged insufficiency in general hate crime provisions like in Holocaust denial, and most importantly, if it is considered as there does not exist a necessity, whether this situation can cause the freedom of expression to be damaged. As examined above, the Swiss courts failed in justifying the prosecution of Perinçek because they actually tried to assess the requirements for prosecution in the same way

108 Ibid, § 280.

109 Lobba, P. The Fate of the Prohibition Against Genocide Denial, http://www.lph-asso.fr/, accessed on 21/7/2016.

110 Lewy, G. (2014), 88.

111 Ibid, p. 88.

it has been done in the cases of Holocaust denial. As we also determined above, the contexts of these two incidents are widely different that the same methods in the assessment of the requirements in justifying, concluded in the violation of article 10. However, as is clear from the submissions of the third parties in *Perinçek*, namely the Armenian and French governments, Switzerland-Armenia Association, CCAF (representing Armenian diaspora in France), Turkish Human Rights Association, Truth Justice Memory Centre and the International Institute for Genocide and Human Rights Studies, FIDH, LICRA, Centre for International Protection and a group of French and Belgian academics, it is demanded that the denial of the so-called Armenian genocide should be assessed with the same methods and considerations used in Holocaust denial.[112] Especially the submissions about the necessity of examination by judiciary whether a serious historical method is followed in statements is highly arguable as the competence of judges are highly suspicious to determine the appropriate historical method. The example of Islam Bernard Lewis, the famous American scholar and a specialist on the Ottoman Empire, to be prosecuted according to Gayssot Law, for declaring in an interview given to Le Monde, that "*genocide involves a deliberate policy to destroy and Turkish documents about the tragic events of World War I show an intent to banish, not to exterminate*", demonstrates the danger in accepting this requirement to be assessed by courts. The criminal case against him was dismissed since the Gayssot Law was applicable only to crimes committed by the Nazi regime in World War II, however, in the civil suit, the court decided in a symbolic penalty due to lack of objectivity and prudence in his expressions and the failure to mention arguments that contradicted his thesis.[113]

In this context, application of the same methods in assessment of the requirements to prosecute used in Holocaust denial cases, to cases of the denial of the so-called Armenian genocide is highly likely to violate freedom of expression like it did in the *Perinçek* case, as criminalizing Holocaust denial has a long history about the assessment of these requirements, concluded in the criminalization to be deemed necessary since the general provisions about defamation or hate crimes were considered not sufficient to fight against the alleged dangers formed by even the mere denial. The Armenian issue neither has a long assessment history nor can it be said that the alleged dangers in Holocaust denial are present about it. It is convenient to refer to Aristotle's theory of justice here which is formulated as "*like cases must be treated alike, and differently situated cases must be treated differently in accordance with their difference*".[114] Therefore, criminalizing the conduct "*denial*" which

[112] *Perinçek*, §§ 177, 179, 181, 184, 186, 191, 192, 193, 195.
[113] Lewy, G. (2014), pp. 97-98.
[114] De Witte, B. (2010). From a Common Principle of Equality to European Antidiscrimination

appeared specifically in the context of Holocaust, in the context of the so-called Armenian genocide, even by explicitly requiring that conduct to be discriminatively motivated, will most probably conclude in contradictory judgments and violate freedom of expression. The work should begin with implementing those general provisions which seems more appropriate than outlawing denial, like it was done in Holocaust denial first.

**E. Political Repercussions**

The political repercussions of criminalizing the denial of the so-called Armenian genocide should also be examined due to its importance in possible denial cases. The Armenian-American political scientist Simon Payaslian stated that the aim of the struggle for the recognition of the so-called Armenian genocide also covers the help to obtain the return of historical Armenian lands to their rightful owners which are in the borders of Turkey now as well as to heal the emotional wounds, obtain monetary compensation and to secure official legitimacy for purposes of public policy regarding recognition.[115] Therefore, it should be borne in mind especially while assessing the intent element, that there is a major political side of this issue still heated, which is deemed as a national security concern for Turkey.

Bertil Dunér determines some reasons for this recognition issue to be so decisively brought to the fore as; the general perception that Turkey is not a highly esteem country with its history is not being highly regarded as well, the relative strength of the Armenian lobby compared to Turkish counter-lobby and also the unwillingness for Turkey's EU membership and the usage of this recognition issue as a means for the prevention of it.[116] These political aspects of this subject are also capable of leading people to question the impartiality and the real purpose of European countries in this incident. It cannot be talked about the impartiality of countries in the political arena surely; however, people might think that these subjective considerations can have an impact on judiciary as well, while deciding on denial cases. For example, the Lausanne District Police Court's expression as to characterize Perinçek as "*displaying a certain arrogance towards the court in particular and to the Swiss laws in general*", in the assessment of the penalty to be taken into account as a negative element[117] is highly controversial, as it is doubtful if displaying arrogance can be considered certainly as a negative element like acting disrespectful directly.

Law: American Behavioral Scientist 53 (12), p. 1717.

115 Levy, G. (2014), p. 131.

116 Dunér, B. (2004). What can be done about historical atrocities? the Armenian case: The International Journal of Human Rights 8 (2), p. 225.

117 *Perinçek*, § 22.

It is certainly not to say that the Police Court's impartiality was broken in this decision, however the expressions should be picked carefully in light of the fact that the opposite side of the debate can feel to be biased against according to reasons mentioned above, and the perception of the parties to the case about the impartiality of the courts, is deemed as important as the courts' impartiality in reality.

In his article in *The Guardian* about the bill that would criminalize the denial of the so-called Armenian genocide in France in 2012, Timothy Garton Ash mentions about the remarkable correlation between the appearance of such proposals in the French parliament and the proximity of national elections, in which some half a million voters of Armenian origin play a significant part. He continues by stating that what happened to Armenians was officially recognised as genocide in French law in December 2001, just before the presidential and parliamentary elections and a bill similar to this one was passed in the lower house in 2006 (but rejected by the upper) in the run-up to the elections of 2007 and there was elections again in 2012 ahead of the law criminalizing the denial again.[118] These discussions are capable of casting a shadow on the courts' priority as to provide neutrality in denial cases as well, since they are capable of raising doubts about the aim in outlawing the denial of the so-called Armenian genocide which should be to prevent hate crimes in reality.

Accordingly, the possible effects of these political aspects should also be taken into account both before an attempt to outlaw the denial of the so-called Armenian genocide and deciding on these cases.

## III. ARTICLE 261 (4) OF THE SWITZERLAND CRIMINAL CODE TO CREATE POTENTIAL VICTIMIZATION

After establishing that the same assessment methods applied in Holocaust denial cases to be applied in the cases of the denial of the so-called Armenian genocide will conclude in the violation of freedom of expression with a high possibility since the necessities to explicitly criminalize the Holocaust denial are not admissible in the denial of the so-called Armenian genocide; the last question about the possibility of article 261 (4) of the Switzerland Criminal Code to constitute potential victimization under the case law of ECtHR, will be assessed in this section.

### A. Potential Victimization under the Case Law of ECtHR

The individuals that claim to be a victim of a violation of the rights set forth

[118] Ash, T. G. (2012) In France, genocide has become a political brickbat: The Guardian (London, 18 January): https://www.theguardian.com/commentisfree/2012/jan/18/france-genocide-political-brickbat, accessed on 3/3/2020.

in ECHR, must have been directly affected by the impugned measure to be able to have the "*victim status*" envisaged under article 34 of the ECHR, as the system doesn't allow individuals to undertake an *actio popularis*.[119] However, ECtHR has actually accepted the possibility of potential victimization in highly exceptional circumstances which the applicant can claim to be a victim of a violation owing to the risk of a future violation, and can provide reasonable and convincing evidence of the likelihood that a violation affecting him/her personally will occur, as the mere suspicion or conjecture is not deemed sufficient.[120] Therefore, if the existence of a law in abstract is deemed capable of effecting individuals' rights in concrete, the individuals can have the potential victim status according to this case law.[121]

In the case of *Klass and Others v. Germany*, the applicants were complaining of the effect of the law that permits restricting measures on the secrecy of mail, post and telecommunications without obliging the authorities in every case to notify the persons concerned after the event, and in that it excludes any remedy before the courts against the ordering and execution of such measures.[122] ECtHR stated that it finds it unacceptable that the assurance of the enjoyment of a right guaranteed by the Convention could be thus removed by the simple fact that the person concerned is kept unaware of its violation. Therefore, it accepted the victim status of the persons by referring to their potential affection by secret surveillance, since otherwise article 8 that the applicants were claiming to be violated, had the risk of being nullified.[123]

In the case of *Dudgeon v. United Kingdom*, the applicant Mr Dudgeon was complaining of the violation of his right to respect for private life due to the existence of a law that had the effect of prohibiting homosexual practices by a threat of criminal penalty in Northern Ireland. The applicant was interrogated by the police about his sexual life but didn't get prosecuted on account of the complained law.[124] ECtHR considered that the impugned legislation constitutes a continuing interference with the applicant's right, since in the personal circumstances of the applicant, the very existence of this legislation continuously and directly affects his private life as; either he respects the law and refrains from engaging in prohibited sexual acts, even in private with consenting male partners, to which he is disposed by reason of his homosexual

119 Schabas, W. A. (2015). The European Convention on Human Rights: A Commentary: OUP, pp. 737-738.
120 Ibid, p. 743.
121 Gözübüyük, A. Ş. and Gölcüklü, F. (2011). Avrupa İnsan Hakları Sözleşmesi ve Uygulaması: Turhan Kitabevi, p. 40.
122 *Klass and Others v. Germany,* App. No. 5029/71, Judgment of 6/9/1978, ECtHR, § 10.
123 Ibid, § 36.
124 *Dudgeon v. United Kingdom,* App. No. 7525/76, Judgment of 22/10/1981, ECtHR, § 33.

tendencies, or he commits such acts and thereby becomes liable to criminal prosecution.[125] The Court reached the same conclusion about the "*victim status*" of the applicant in the case of *Norris v. Ireland*, which concerned an identical legislation like in the case of *Dudgeon v. United Kingdom*, also not implemented on the applicant.[126]

The Court also reached the same conclusion about the enactment of a law that had the effect of prohibiting anyone from concealing their face in public places by stating that an individual may nevertheless argue that a law breaches his or her rights in the absence of a specific instance of enforcement, and thus claim to be a "*victim*" if he or she is required either to modify his or her conduct or risk being prosecuted; or if he or she is a member of a category of persons who risk being directly affected by the legislation.[127] This reasoning is also accepted by the Constitutional Court of Austria on the capability of individuals to apply against a law directly, since it cannot be deemed rational to expect people to commit a crime to be able to get a procedure that they can contest.[128] Therefore, ECtHR takes into account the direct effects of the law that is deemed in contradiction with the Convention even if it is not implemented on individuals.

There is another decision of the Court about potential victimization which is particularly suitable for comparison in this section as it deals with the enjoyment of freedom of expression to name the "*1915 events*" as genocide in Turkey. In the case of *Altuğ Taner Akçam v. Turkey*, the applicant who is a history professor with his research interest including the "*1915 events*", was complaining of the provision of article 301 in the Turkish Criminal Code which made it a crime to denigrate "*Turkishness*", to lead to an ongoing threat of prosecution in connection with his academic work on the Armenian issue.[129] The law in question was not implemented on the applicant as the investigation about him was concluded with the non-prosecution decision of the public prosecutor on the ground that the utterances in question were under the protection of the freedom of expression.[130] ECtHR stated that in such instances, the question whether the applicants were actually the victims of any violation of the Convention involves determining whether the contested legislation is in itself compatible with the Convention's provisions.[131] ECtHR accepted the

125 Ibid, § 41.
126 *Norris v. Ireland,* App. No. 10581/83, Judgment of 26/10/1988, ECtHR, § 32.
127 *S.A.S. v. France,* App. No. 43835/11, Judgment of 1/7/2014, ECtHR, § 57.
128 Holzinger, G. (2009). Avusturya Anayasa Hukukunda Anayasa Şikayeti ve Bireysel Başvuru: Anayasa Yargısı Dergisi 26, p. 71.
129 *Altuğ Taner Akçam v. Turkey,* App. No. 27520/07, Judgment of 25/10/2011, ECtHR, § 3.
130 Ibid, § 10.
131 Ibid, § 67.

applicant's potential victim status on the grounds that the applicant was directly affected by the law as he had shown to be actually concerned with a public issue that was involved in the generation of the specific content targeted by article 301 and due to its case law about the capability of individuals to contend that a law violates his/her rights in the absence of an individual measure of implementation, if he/she is required either to modify his/her conduct because of it or risk being prosecuted. It also took into account the chilling effect of the law on the exercise of the freedom of expression.[132]

In the assessment of whether there has been an interference with the applicant's freedom of expression, the Court took into account the profession of the applicant, the compulsive modifying effect of the prosecution risk on the applicant's conduct, the insufficiency of the safeguards taken by the government to decrease the risk of being prosecuted on ground of article 301, the established case law of the Court of Cassation about the interpretation of denigrating "*Turkish Nation*" and the stance of the judiciary about the same subject, and considered that there had been an interference with the applicant's freedom of expression.[133]

Finally, the Court concluded that the law in question does not meet the "*quality of law*" required by the Court's settled case law, since its unacceptably broad terms result in a lack of foreseeability as to its effects.[134]

### B. Article 261 (4) of the Switzerland Criminal Code on the so-called Armenian genocide

ECtHR rejected the notion of the so-called Armenian genocide to constitute a "*clearly established fact*" in *Perinçek*. Therefore, the only possible basis for the application of article 261 (4) should be the demonstration of clear discriminative motive in expressions, which should be assessed in the unique context of "*1915 events*" and the debate that surrounds it. However, if Swiss courts continue to apply this article in the same way as they did in Perinçek's case, the interpretation and application of this article by Swiss courts will most probably lead to potential victimization as there are many people, both from Turkic origin or others in Switzerland, who believe in the Armenian events to not to amount to constitute genocide. The professions of these people or the research methods they use in reaching this perception should be irrelevant as the purpose of this provision is not to protect official truth or determine the appropriate research methods and the judiciary cannot be deemed competent to determine the appropriate historical research methods.

132 Ibid, §§ 67,68.
133 Ibid, §§ 71-84.
134 Ibid, § 95.

Nevertheless, there are also many prestigious historians that have questioned the appropriateness of calling "*1915 events*" genocide like, Bernard Lewis[135], Andrew Mango,[136] Gunther Lewy[137], Justin McCarthy[138], Edward J. Erickson[139], Roderic Davison, Stanford Shaw, Halil İnalcık, İlber Ortaylı[140], Kemal Çiçek[141], Murat Bardakçı[142] or Yücel Güçlü[143] whose perceptions of the "1915 events" would be under serious danger that can amount to potential victimization as well as the other researchers' freedom to historical research whose research interest includes the Armenian issue in Switzerland.

There had been two prosecutions brought against some of the persons who signed the Turkish petition to Swiss parliament about the demand to refuse to recognise the events of 1915 and the following years as genocide before Perinçek's case. Despite the declaration of a Ministry of Justice official that the denial law would not be invoked against scholars in 1993, there was also a criminal investigation launched against the Turkish historian Yusuf Halaçoğlu, the then president of the Turkish Historical Society, for allegedly denying the so-called Armenian genocide in a talk in Winterthur in 2005, and another one against the magazine "*Weltwoche*" for publishing an article with the title "*It Was Not Genocide*" by the former Oxford Professor Norman Stone, in 2008.[144] None of these incidents concluded in a conviction other than Perinçek's case and no convictions has been given from the Swiss courts about this provision in the context of the so-called Armenian genocide since then; however, it can be considered that there is still a possibility -not to be ignored- of getting investigated and prosecuted for denying the so-called Armenian genocide with lawful intentions in Switzerland, as the Swiss authorities did not seem to take into account the existence of the unlawful intent before they act in Perinçek's case. This situation might lead people to face the dilemma of modifying their conduct or risk getting prosecuted which creates a chilling-effect on their freedom of expression.

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135 Lewis, B. (1968). The Emergence of Modern Turkey: OUP.

136 Mango, A. (1999). Atatürk: The Biography of the Founder of Modern Turkey: The Overlook Press.

137 Ibid, p. 89.

138 McCarthy, J. et al. (2006). The Armenian Rebellion at Van: University of Utah Press.

139 Erickson, E. J. (2006). Armenian Massacres: New Records Undercut Old Blame: Insight Turkey, 8(3).

140 The advertisement of sixty-nine famous academics on Ottoman studies that the ones above were amongst, was published in New York Times in 1985. It suggested that whether the Armenian conflict constituted genocide or not should be left for the scholars to decide. The New York Times, May 19, 1985.

141 Çiçek, K. (2005). Ermenilerin Zorunlu Göçü 1915–1917: Turk Tarih Kurumu.

142 Bardakçı, M. (2013). Talât Paşa'nın Evrak-I Metrûkesi: Everest Press.

143 Güçlü, Y. (2009). Armenians and the Allies in Cilicia, 1914–1923 University of Utah Press.

144 Levy, G. (2014), p. 90.

## CONCLUSION

Criminalizing the conduct "*denial*" emerged in the unique context of Holocaust in Europe, since it is widely accepted that Holocaust denial is a form of anti-Semitism with a hidden racist intent behind, that is used as a means for propagation of their anti-democratic ideals by extremist ideologies. This connection is considered to be capable of endangering democracy especially in European countries with a Nazi past which the fight against this danger by applying general provisions like defamation or disparagement of the memory of the deceased persons was deemed insufficient to prevent these ideologies from accomplishing in their ideals that would destroy democratic order in Europe like it did in the past.

None of these characteristics of the denial of Holocaust which is also heavily criticised if it can really preclude the alleged dangers by restricting freedom of expression, is valid in the context of the so-called Armenian genocide. Even by adding the requirement of an explicit discriminative motive, the denial cases of the so-called Armenian genocide will most probably conclude in contradictory and groundless judgments if the courts assesses these two different concepts with the same methods like the Swiss courts did in Perinçek's case.

The lack of any superior purpose that would outweigh the importance of freedom of expression in a democracy in criminalizing the denial of the so-called Armenian genocide unlike Holocaust, causes the legitimacy and the necessity of these denial laws to be questioned as it is also not tested whether general provisions on hate crimes or defamation can be efficient in the Armenian issue. On the other hand, the political repercussions of this ongoing conflict are capable of having a negative effect on possible denial cases as well. Therefore, the benefits to be gained from criminalizing the denial of the so-called Armenian genocide seems to be doubtful, even more in the face of the high possibility of damages that the freedom of expression and scientific and historical research will get by criminalizing.

This potential damage reveals itself in the possible potential victimization caused by article 261 (4) of the Switzerland Criminal Code which has the effect of criminalizing the denial of the so-called Armenian genocide, due to its chilling effect on freedom of expression. In this context, ECtHR should examine this and alike provisions' compatibility with the ECHR in the first individual application more detailed in the legality of the interference assessment regardless of the interference to be concluded in a conviction or not. Otherwise, expansion of these general genocide denial laws and the continuation of the wrong implementation of these provisions may seriously endanger the exercise of the freedom of expression in Europe.

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# THE LEGAL AID IN TURKISH ADMINISTRATIVE PROCEDURE LAW IN THE LIGHT OF THE ECHR CASE-LAW

*İham İçtihatları Işığında Türk İdari Yargılama Hukukunda Adli Yardım*

**Res. Asst. Onur KAPLAN***

*Research Article*

**Abstract**

The ability of individuals to apply to the judicial way is important in terms of guaranteeing their fundamental rights and freedoms. In particular, the existence of this legal guarantee becomes more meaningful in terms of legal relations between the individuals and administration who have the privilege of using public power while performing their duties assigned by positive legal rules. At this point, besides the independence and impartiality of the judiciary, accessing the judicial path also appears as a requirement of the right to a fair trial. So that the right to a fair trial can find application in the legal relations between individuals as well as in public law relations between the administration and individuals. In this sense, it should be stated that the legal aid institution in Turkish administrative procedure law has an important value in terms of the right of access to court within the framework of the right to a fair trial. Nevertheless, the decisions of the European Court of Human Rights (ECHR) should be examined to better understand the legal aid institution and ensure the conceptual integrity within the framework of the right to a fair trial. In this direction, the study will examine how the legal aid institution's theoretical foundation is determined, and in the light of judicial decisions, how it relates to the fundamental rights and freedoms of individuals**.**

**Keywords** Right to a Fair Trial, Right to Access to Court, Legal Aid, Administrative Regime, Administrative Case

**Özet**

Bireylerin yargısal yola başvurabilmesi, temel hak ve hürriyetlerinin güvence altına alınması noktasında önem arz etmektedir. Özellikle, bu yasal güvencenin varlığı, pozitif hukuk kurallarıyla kendisine verilen görevleri yerine getirirken kamu gücünü kullanma ayrıcalığına sahip olan idare ve bireyler arasındaki hukuki ilişkiler açısından daha anlamlı hale gelmektedir. Bu noktada yargının bağımsızlığı ve tarafsızlığı yanında yargısal yola erişebilmek de adil yargılanma hakkının bir gereği olarak karşımıza çıkmaktadır. Öyle ki adil yargılanma hakkı, bireyler arasındaki hukuki ilişkilerin yanında idare ile bireyler arasındaki kamu hukuku ilişkilerinde de uygulama alanı bulabilmektedir. Bu anlamda Türk idari yargılama hukukunda adli yardım müessesinin adil yargılanma hakkı çerçevesinde mahkemeye erişim hakkı bakımından önemli bir değer taşıdığı ifade edilmelidir. Bununla birlikte adil yargılanma hakkı çerçevesinde adli yardım müessesesinin daha iyi kavranabilmesi ve kavramsal bütünlüğün sağlanabilmesi adına, İnsan Hakları Avrupa Mahkemesinin vermiş olduğu kararların da irdelenmesi gerekmektedir. Bu doğrultuda çalışmada, adli yardım müessesinin teorik temelinin ne olduğu belirtilerek, yargı kararları ışığında, bireylerin temel hak ve hürriyetleriyle bağıntısının ne şekilde kurulduğu irdelenecektir.

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## INTRODUCTION

The modern human rights doctrine does not only deal with human rights at an abstract level with unreasonable demands[1]. Besides, human rights do not only correspond to an "*abstract value*" but also "*particular social practices to realize those values*[2]". In this sense, in a system where the rule of law exists, the concept of "*right*" will have gained a real meaning[3]. The rule of law, as a modern concept, represents an ideal order in which "*the fundamental rights and freedoms of individuals*" are protected[4]. The right to a fair trial within this order, represents an "*important element*" in terms of the exercise of other fundamental rights and liberties of individuals[5]. Especially, as a result of the increasing duties imposed on the modern state, the fundamental freedoms of individuals "*can be affected*" by the administrative activities carried out. However, the fundamental nature of human rights also requires that any illegal administrative action be taken against them[6]. In this sense, some legal mechanisms have been envisaged to provide the right of access to the court to eliminate the damages arising from these activities, one of which is legal aid.

In some international human rights treaties, it is seen that the legal aid institution has found application especially in the field of criminal law[7]. For example, International Covenant on Civil and Political Rights (ICCPR[8]) Article 14, paragraph (3) (Art.14/3) "*In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (…) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not*

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1 Beitz, Charles R., The Idea of Human Rights, Oxford University Press, New York, 2009, p.30.

2 Donnelly, Jack, Universal Human Rights in Theory and Practice, 3. Edition, Cornell University Press, Ithaca and London, 2013, p.11.

3 According to, The Universal Declaration of Human Rights (UDHR) Preamble, paragraph (3) "*Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law". See for full text: (https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf), Date of access:03.03.2020. See also; Sellers, Mortimer, "An Introduction to the Rule of Law in Comparative Perspective", (Ed. Sellers, Mortimer/Tomaszewski, Tadeusz), Springer, Dordrecht, 2010, p.1.*

4 Özenç, Berke, Hukuk Devleti Kökenleri ve Küreselleşme Çağındaki İşlevi, İletişim Yayınları, Istanbul, 2014, p.231.

5 İnceoğlu, Sibel, İnsan Hakları Avrupa Mahkemesi Kararlarında Adil Yargılanma Hakkı, 4. Edition, Beta Yayıncılık, Istanbul, 2013, p.1.

6 Erdoğan, Mustafa, İnsan Hakları Teorisi ve Hukuku, 3. Edition, Hukuk Yayınları, Ankara, 2019, p.116.

7 Capelletti, Mauro, "Legal Aid in Europe: A Turmoil", American Bar Association Journal, Vol.60, No.2, 1974, p.207.

8 See for full text: (https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf), Date of access:03.03.2020.

*have legal assistance, of this right; and to have legal assistance assigned to him, in any cases where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it*". Again, it is seen that the UDHR Art.11/1, "*Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence*". However, it is possible to come across international treaties that evaluate the concept of legal aid within a broader framework: for example, 1951 Convention Relating to the Status of Refugees[9] Art.16/2, "*A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the Courts, including legal assistance and exemption from cautio judicatum solvi*". In this respect, it can be stated that the scope of the "*right to a fair trial and the field of application*" are handled in different ways in international human rights treaties.

However, in regional human rights treaties; in particular, when the provisions of the ECHR Art.6/1 and Art.6/3 are evaluated together, "*Everyone charged with a criminal offence has the minimum rights: (...) (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require*". This provision parallels the International Covenant on Civil and Political Rights Art.14 provision in this sense[10].

In the same direction, when looking at the 47th article of the European Charter of Fundamental Rights; "*Everyone is entitled to a fair and public hearing within a reasonable time limit by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice*[11]". In this sense, as stated in the European Agreement on the Transmission of Applications for Legal Aid[12] Art.1, individuals may also benefit from legal aid in terms of administrative issues. Likewise, when African Charter on Human and Peoples' Right Art.6 and Art.7/1[13] and the American

9 See for full text: (https://www.unhcr.org/3b66c2aa10), Date of access:03.03.2020.

10 Endicott, Timothy, Administrative Law, 4. Edition, Oxford University Press, Oxford, 2018, p.181.

11 In parallel with this provision, it is seen that the decisions made by the Court of Justice of the European Union (ECJ) are emphasized that the legal aid institution is an essential element in terms of providing access to the court. Varadi, Agnes, "The Concept of Legal Aid in the Most Recent Case Law of ECJ", Hungarian Yearbook of International Law and European Law, 2015, p.462.

12 See for full text: (https://rm.coe.int/1680077322), Date of access:11.03.2020.

13 African Charter on Human and Peoples Rights Art.6 "*Every individual shall have the*

Convention on Human Rights Art.8/1[14]; it can be mentioned that the right to a fair trial has the opportunity to apply on a larger scale and that the legal aid institution can be applied within this scope. In this context, it can be stated that the positive obligation of the state is at the forefront in the Inter-American and African regional human rights treaties in terms of the right to a fair trial and to benefit judicial protection[15]. Therefore, when evaluated from "*the right to a fair trial*", it can be mentioned that "*the legal aid*" institution can find application in terms of "*administrative procedure law*" and this has a legal basis in human rights treaties.

In this sense, it can be said that the right to a fair trial has a close relationship with individuals' other fundamental rights and freedoms. Indeed, in a legal system where there is no right to a fair trial, the concept of the state of law constitutes an "*illusion*[16]". So, in this context, "*European Convention on Human Rights* ("*Convention*") *is one of the best contexts in which to analyses the rule of law as an international law concept*[17]". However, Art.6 of the Convention assurance can be applied "*in the presence of a dispute regarding civil rights and obligations or a criminal charge*". Therefore, the content of the expression "*being related to civil rights and obligations*" should be determined. It should be stated whether the Art.6 of the Convention can find application in terms

*right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained". African Charter on Human and Peoples Rights Art.7/1 "Every individual shall have the right to have his cause heard. This comprises: a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; b) the right to be presumed innocent until proved guilty by a competent court or tribunal; c) the right to defence, including the right to be defended by counsel of his choice; d) the right to be tried within a reasonable time by an impartial court or tribunal".*

14 The American Convention on Human Rights Art.8/1 "*Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature".*

15 Burbano-Herrera, Clara/Viljoen, Frans, "Interim Measures Before the Inter-American and African Human Rights Commissions: Strengths and Weaknesses", Human Rights and Civil Liberties in the 21st Century (Ed. Haeck, Yves/Brems, Eva), Springer, Dordrecht, 2014, p.166.

16 See. Madsen, Mikael R., "The Protracted Institutionalization of the Strasbourg Court: Legal Diplomacy to Integrationist Jurisprudence", The European Court of Human Rights between Law and Politics (Ed. Christoffersen, Jonas/Madsen, Mikael R.), Oxford University Press, USA, 2011, p.54.

17 Lautenbach, Geranne, The Concept of the Rule of Law and The European Court of Human Rights, Oxford University Press, Oxford, 2013, p.3.

of disputes between the administration and the individual[18]. In this direction, before examining the legal aid concept in administrative procedure law within the framework of the rule of law principle, it is necessary to explain the connection of this concept with its right to a fair trial.

**1. Theoretical Basis of the Right of a Fair Trial-Legal Aid Relation: Under the Art.6 of the Convention**

In fact, in terms of legal disputes arising from the decisions made by the administrative authorities, it can be mentioned that the provision of Art.6 of the Convention does not apply in general[19]. However, the meaning given by the national legal systems to the concept of civil rights and obligation in domestic law is not binding in terms of the European Court of Human Rights ("*ECHR*"), and in this sense it emerges as an autonomous concept[20]. Indeed, although the content of the right to a fair trial in terms of various international treaties may be uncertain[21]; it can be stated that the right should not be handled in the narrow sense of the ECHR in terms of dynamic interpretation. In this regard, "*state of being related to civil rights and obligations*" could be the subject in terms of legal relations between the administration and private persons[22]. In this context, it can be mentioned that there is a legal relationship regarding civil rights and obligations, for example, concerning granting of building permits or operating license[23] or regarding professional activities[24]. Especially considering the concept of "*right to good administration*" within the framework of ECHR-EU case law relationship[25]; it is possible for individuals to make a request

18 Endicott, p.181. Also see; Sever, Tina, "Procedural Safeguards Under The European Convention on Human Rights in Public (Administrative) Law Matters", Danube: Law, Economics and Social Issues Review, Vol.9, No.2, 2018, p.99.

19 Wade, H. W. R./Forsyth, Christopher F., Administrative Law, 11. Edition, Oxford University Press, Oxford, 2014, p.379.

20 Wright, Jane, Tort Law and Human Rights, Hart Publishing, Oxford, 2001, p.150; İnceoğlu, İnsan Hakları Avrupa Mahkemesi Kararlarında Adil Yargılanma Hakkı, p.21.

21 Keller, Helen/Ulfstein, Geir, "Introduction", UN Human Rights Treaty Bodies Law and Legitimacy (Ed. Keller, Helen/Ulfstein, Geir), Cambridge University Press, Cambridge, 2012, p.8.

22 Seerden, René/Stroink, Frits, "Administrative Law in the Netherlands", Administrative Law of the European Union, its Member States and the United States: A Comparative Analysis (Ed. Seerden, René/Stroink, Frits), Intersentia, Antwerpen, 2002, p.175.

23 ECHR. Sine Tsaggarakis A.E.E. v. Greece, App. No.17257/13, 23.05.2019, para.37 et seq. (https://hudoc.echr.coe.int/eng#{%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22], Hereafter: HUDOC Database), Date of access:03.03.2020.

24 İnceoğlu, Sibel, "Adil Yargılanma Hakkı", İnsan Hakları Avrupa Sözleşmesi ve Anayasa (Ed. İnceoğlu, Sibel), 3. Edition, Beta Yayıncılık, Istanbul, 2013, p.210.

25 Schwarze, Jurgen, "Judicial Review of European Administrative Procedure", Law and Contemporary Problems, Vol.68, No.1, 2004, p.88.

for the good functioning of the administration, as well as to benefit from an effective judicial remedy in cases where this functioning is not provided. In this context, it can be stated that the right to a fair trial can be applied in terms of administrative procedure law[26].

The right to a fair trial, which has an important place in terms of the use of other civil and political rights, includes, above all, the "*right to appeal to an independent and impartial tribunal*" to the extent that it has a legal interest by individuals and requires a positive action by the state to ensure this[27]. Therefore, it is observed that those who cannot pay the costs of lawsuits are provided with the opportunity to benefit from the legal aid institution in order to make it easier for people to file a lawsuit within the scope of the right to legal remedies[28]. In other words, "*Legal aid is often an essential element for the effective protection of rights. This is particularly true in instances in which the person needs of financial support finds him- or herself already in a structurally weaker position than the other party, for example in cases in which a citizen faces the government*[29]". In this sense, there is a tight connection between the right to access to court and the legal aid institution in the context of the right to a fair trial[30]. Because the right to a fair trial in a legal order that does not have the right to access to the court will not express any value in terms of individuals[31]. According to the Constitutional Court of the Republic of Turkey (abbreviated as "*TCC*"), it is seen that the applications of those who claim that the heavy conditions of the lawsuit; have been evaluated within the scope of the right to access the court as an element of the right to a fair trial[32]. Therefore,

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26 Lavrysen, Laurens, "Protection by the Law: The Positive Obligation to Develop a Legal Framework to Adequate Protect ECHR Rights", Human Rights and Civil Liberties in the 21st Century (Ed. Haeck, Yves/Brems, Eva), Springer, Dordrecht, 2014, p.113.

27 Palmer, Ellie, Judicial Review, Socio-Economic Rights and the Human Right Act, Hart Publishing, Oxford, 2007, p.20.

28 Turkish Council of State 10th Chamber ("*Danıştay 10. Daire*", Hereafter:"*D10D.*"), Docket No. (E.) 2008/1136, Judgment No. (K.) 2011/4131, Decision Date (T.) 10.10.2011, Journal of Turkish Council of State (Danıştay Dergisi), Issue:130, p.372. These abbreviations will be taken as basis in terms of the references made in the continuation of the study.

29 Gruodyté, Edita/Kirchner, Stefan, "Legal aid for intervenors in proceedings before the European Court of Human Rights", International Comparative Jurisprudence, Vol.2, No.1, 2016, p.36.

30 ECHR. Golder v. United Kingdom, App. No:4451/70, 21.02.1975, Series A, No.18, para.25-26, HUDOC Database, Date of access:03.03.2020; ECHR. Airey v. Ireland, App. No:6289/73, 09.10.1979, Series A, No.32, para.26, HUDOC Database, Date of access:03.03.2020. See also. Lavrysen, p.119.

31 Dembour, Marie-Bénédicte, Who Believes in Human Rights? Reflections on the European Convention, Cambridge University Press, Cambridge, 2006, p.21.

32 The Constitutional Court of the Republic of Turkey ("*TCC.*") Application of (App. of) Sadegül Baykuş and Devrimci Sağlık İşçileri Sendikası, App No:2014/2197, 21.09.2017, para.35, (https://kararlarbilgibankasi.anayasa.gov.tr, Hereafter: TCC Decisions Database),

it can be mentioned that the legal aid institution should be in legal order to say that the right to a fair trial is provided in real terms and that the state has a positive obligation in this regard[33]. In particular, it is understood the necessity of such practice in the face of high judicial expenses and some defenses require effective legal aid[34].

**2. The Concept of Legal Aid in the Light of Right to a Fair Trial in Positive Law**

It is observed that human rights are not only comprehensively coded in international law anymore, but they also appear in the country's legal system[35]. Accordingly, it is seen that the concept of legal aid in the context of the right to a fair trial is regulated in various national constitutions[36]. Therefore, it can be said that, there is a positive basis in some national legal systems in parallel with the international documents of the legal aid institution within the scope of the right to a fair trial[37]. Accordingly, when considered in terms of Constitution of the Republic of Turkey ("*Constitution of 1982*")[38], the right to access to the court, which is one of the elements of the right to a fair trial, regulated in Art.36

Date of access:03.03.2020.

33 Van As, Hennie, "Legal Aid in South Africa: Making Justice Reality", Journal of African Law, Vol.49, No.1, 2005, p.54.

34 Stavros, Stephanos, "Fair Trial in Emergency Situations", The International and Comparative Law Quarterly, Vol.41, No.2, 1992, p.355. See also; ECHR. Mikhaylova v. Russia, App. No:46998/08, 19.11.2015, para.78, HUDOC Database, Date of access:03.03.2020.

35 Tambakaki, Paulina, Human Rights, or Citizenship?, Birkbeck Law Press, USA, 2010, p.3.

36 For example, according to Art.49 of the Venezuelan Constitution of 1999, "*All judicial and administrative actions shall be subject to due process, therefore: Legal assistance and defense are inviolable rights at all stages and levels during the investigation and proceedings". See for full text: (https://www.constituteproject.org/constitution/Venezuela_2009.pdf?lang=en), Date of access:03.03.2020. According to Art.48 of the Constitution of the Russian Federation in 1993, "Everyone shall be guaranteed the right to qualified legal assistance. In the cases envisaged by law, legal assistance shall be provided free of charge". See for full text: (https://www.constituteproject.org/constitution/Russia_2014.pdf?lang=en), Date of access:03.03.2020. In accordance with Art.27 of the Croatian Constitution of 1991, "The Bar, as an autonomous and independent service, shall provide everyone with legal aid, in conformity with law". See for full text: (https://www.constituteproject.org/constitution/Croatia_2013.pdf?lang=en), Date of access:03.03.2020. See also; ECHR. Granos Organicos Nacionales S.A. v. Germany, App. No:19508/07, 24.09.2012, para.17-18, HUDOC Database, Date of access:03.03.2020. Also see. Rønning, Olaf H., "Legal Aid in Norway", Outsourcing Legal Aid in the Nordic Welfare States (Ed. Rønning, Olaf H./Hammerslev, Ole), Palgrave Macmillan, Switzerland, 2018, p.22.*

37 See also; Bedos, Jean Luc, "Acil Haklar: Fransa'da Yurttaşların Hukuki Bilgilere Erişimi" (transl. by Kaya, Cemil), Union of Turkish Bar Associations Review (TBBD), No.83, 2009, p.397.

38 See for full text: (https://global.tbmm.gov.tr/docs/constitution_en.pdf), Date of access:03.03.2020.

of the Constitution of 1982[39]; to be fully realized, it is stated that financial convenience should be provided to the persons who are unable to pay the necessary trial expenses without any financial difficulties or in accordance with the principle of the social state[40]. In this context, the realization of the social state principle will be made possible by the legal aid institution[41]. For example, individuals may benefit from legal aid in certain cases in terms of lawsuits arising from disputes arising from the cadastral procedures established by the administration in accordance with Art.25 of Cadaster Law No.3402[42] or the procedures established regarding the legal status of foreigners in accordance with Art.81 of Foreigners and International Protection Law No.6458[43].

As for the Turkish administrative procedure law, the concept of legal aid is included in Art.334 of the Law No. 6100 on the Civil Procedures Law ("Law No. 6100[44]"), depending on the reference made by Art.31 of the Law No. 2577 on the Administrative Procedure Law ("Law No. 2577[45]"). In accordance with this article, it was stated that "*those who lack the ability to pay the necessary trial or follow-up expenses partially or completely without making the livelihood of himself and his family considerably difficult*", "*beneficial associations and foundations*" and "*foreigners depending on the condition of reciprocity*" can benefit from legal aid[46]. In this context, a decision must be made by the administrative court in order for a natural person to be included in the category of "*those who lack the ability to pay the necessary trial or follow-up expenses partially or wholly without making the livelihood of himself and his family considerably difficult*"[47]. In this sense, to benefit from "*legal aid*", which is also called "*the right of poor persons*[48]" in comparative law and to

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39 Constitution of 1982 Art.36 "*Everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through legitimate means and procedures. No court shall refuse to hear a case within its jurisdiction".*

40 TCC. App. of Rıdvan Uzuntok, App. No:2014/17300, 21.11.2017, para.43, TCC Decisions Database, Date of access:03.03.2020.

41 TCC. App. of Rıdvan Uzuntok, para.42.

42 RG.09.07.1987-19512.

43 RG.11.04.2013-28615.

44 RG.04.02.2011-27836.

45 RG.20.02.1982-17580.

46 For the distinctions made in this issue, see; Atalay, O., Pekcanıtez Usûl Medenî Usûl Hukuku, 15. Edition, Istanbul, 2017, p.2415.

47 See also; Turkish Council of State Plenary Session of the Administrative Law Chambers ("*Danıştay İdari Dava Daireleri Kurulu", Hereafter:"DİDDK.") E.2018/722, K.2018/1125, 21.03.2018, (https://www.lexpera.com.tr), Date of access:03.03.2020; D10D. E.2009/16671, K.2013/2098, 11.03.2013, (https://www.lexpera.com.tr), Date of access:03.03.2020; D10D. E.2009/3442, K.2013/1174, 15.02.2013, (https://www.lexpera.com.tr), Date of access:03.03.2020; D10D. E.2010/3571, K.2013/901, 12.02.2013, (https://www.lexpera.com.tr), Date of access:03.03.2020.*

48 Petrescu, Oana-Măriuca, "Ensuring Equal Legal Aid to the Citizens in the European

fall into the category in question, individuals must make clear requests to the court in this direction and present documents indicating that they are not in a position to cover their costs[49].

Considering the decisions made by the TCC, it is seen that, in the request of the individuals who are understood to lack the power to pay the judicial expenses without making their livelihood substantially difficult, it is necessary to decide on the acceptance of the legal aid request that does not clearly lack support[50]. Therefore, in order for the legal aid request to be accepted; "*(i). the applicant cannot pay the necessary trial costs partially or completely, without significantly undermining his or her family's livelihood, (ii). their demands should not be groundless*[51]". In other words, Art.31 of Law No. 2577 states that the provisions of the Civil Procedure Law will be applied in cases where there is no provision in this law, in the cases of experts, discovery, evidence, judgment expenses and legal aid, but the nature of administrative disputes referred by the administrative judge and it is clear that it should be applied to the extent that it complies with the administrative procedure[52]. Based on the case file, the Turkish Council of State ("*Council of State*") has decisions that reveal that the person's poverty can be understood[53]. In this context, it can be stated that the Council of State accepts requests for legal aid in cases where its conditions "*coexist*": (i). has no clear violation of its claims and defenses, (ii). documentation of the condition of poverty[54].

### 3. Explaining the Purview of the Legal Aid

Legal aid can be expressed as a legal opportunity for the persons, if required by the economic and social situation[55]. However, it can be stated in the ECHR

Procedural Law", Acta Juridica Hungarica, Vol.55, No.1, 2014, p.57.

49 Atalay, Pekcanıtez Usûl, p.2423-2424.

50 TCC. App. of Tuncay Gürsen, App. No:2016/35379, 15.01.2020, para.16, TCC Decisions Database, Date of access:03.03.2020.

51 TCC. App. of Sabri Çetin, App. No:2103/3007, 06.02.2014, para.31, TCC Decisions Database, Date of access:03.03.2020.

52 D2D. E.2018/4013, K.2019/1520, 28.03.2019, (http://www.kazanci.com/kho2/ibb), Date of access:20.02.2020.

53 D15D. E.2012/335, K.2013/1490, 21.02.2013, (https://www.lexpera.com.tr), Date of access:03.03.2020; D15D. E.2013/311, K.2013/1491, 21.02.2013, (https://www.lexpera.com.tr), Date of access:03.03.2020.

54 D15D. E.2013/100, K.2013/1943, 14.03.2013, (https://www.lexpera.com.tr), Date of access:03.03.2020.

55 In this sense, depending on the socio-economic situation of individuals, the field of application of legal aid may arise in the form of benefiting from the assistance of a lawyer or meeting the costs of the trial. See; Karan, Ulaş, Uluslararası İnsan Hakları Hukuku ve Anayasa Hukuku Işığında Eşitlik İlkesi ve Ayrımcılık Yasağı, On İki Levha Yayıncılık, Istanbul, 2017, p.416-417.

judgments that the expression "*findings and the particular circumstances of the present case*[56]" is at the forefront. In other words, the legal opportunity in question will not be evaluated in a way that will be applied to every person and in any case, and will be handled by considering the economic and social situation of the person[57]. Especially, if the person is under a burden that would not be expected to be legally folded, then this person's failure to benefit from legal aid will violate the provisions of Art.6/1 of the Convention[58]. Undoubtedly, if there is an illegitimate request, the absence of legal aid in this case will not violate the provision of Art.6 of the Convention[59].

It should be noted that in countries that adopt the administrative regime, the administration's ability to establish certain procedures using public force requires that individuals whose rights or interests are affected have access to the court[60]. Essentially, within the framework of the rule of law, individuals need to have access to the judicial remedy against the administration's actions. In addition, in some cases, individuals may be able to benefit from legal aid under Art.6 of the Convention in order to effectively defend their claims by actively participating in the administrative proceedings[61]. Indeed, the *Siałkowska v. Poland* decision by ECHR emphasized this issue; "*an effective exercise of the right of access to a court required that the legal aid system should be organized in such a way as to make access to legal aid both transparent and effective*[62]". Accordingly, although some conditions are envisaged, such as the possibility of winning the case in terms of benefiting from legal aid[63], an evaluation should be made by the judicial body, primarily considering the economic situation of individuals. In this respect, the decision of İlbeyi Kemaloğlu and Meriye Kemaloğlu v. Turkey, which was given by the ECHR on this issue, was the subject of the applicants' death when her seven-year-old son died after trying to return home alone due to bad weather conditions. Requests for assistance were rejected by the administrative court "*without any particular reason, only*

56 ECHR. Hood v. The United Kingdom, App. No:27267/95, 18.02.1999, para.78, HUDOC Database, Date of access:03.03.2020.

57 ECHR. McVicar v. The United Kingdom, App. No:46311/99, 07.08.2002, para.33, HUDOC Database, Date of access:03.03.2020.

58 ECHR. McVicar v. The United Kingdom, para.32-33.

59 ECHR. Gnahore v. France, App. No:40031/98, 19.09.2000, para.41, HUDOC Database, Date of access: 03.03.2020.

60 ROUSSET, Michel, L'idée de puissance publique en droit administratif, Paris, Librairie Dalloz, 1960, p.173.

61 ECHR. P., C. and S. v. The United Kingdom, App. No:56547/00, 16.10.2002, para.90-91, HUDOC Database, Date of access:03.03.2020.

62 ECHR. Siałkowska v. Poland, App. No:8932/05, 22.03.2007, para.78, HUDOC Database, Date of access:03.03.2020.

63 See; Akıncı, Müslüm, İdari Yargıda Adil Yargılanma Hakkı, Turhan Kitabevi, Ankara, 2008, p.206.

*by referring to the relevant legislation*[64]". As regards this case, ECHR found that the decision in question was inconsistent with Art.6/1 of the Convention and disproportionately limited its right to access the court[65]. In the decision of *Mehmet and Suna Yiğit v Turkey* issued by ECHR, it was decided that the rejection of the request for legal aid was disproportionate and therefore illegal because the applicants did not have any assets in terms of the dispute arising from the imperfect action of the administration[66]. Therefore, all conditions must be examined to determine whether the restrictions imposed on the right to access courts weaken the core of this right, whether these restrictions pursue a legitimate purpose and whether there is a reasonable relationship[67].

In Turkish law, it is accepted that the judicial aid institution can also find application in terms of administrative cases when considering the decisions of TCC, (i). the necessity to decide by evaluating the legal aid request, (ii). it is seen that a judgment is reached by considering whether the person is exposed to any judicial expenses which cannot be tolerated[68]. With the reference to the Art.312 and Art.339 of the Law No. 6100, it is possible for the person who benefited from legal aid from the evaluation of the provisions of the legislation; to collect the judicial expenses, to openly or partially exempt from the trial expenses[69]. In this sense, in the lawsuit filed by the Council of State with the request for the cancellation of the medical board report stating that the disability situation is not severely disabled, it was decided that "*whether the collection of the costs of the trial would result in the victimization of the beneficiary of legal aid*" should be examined[70]. In another decision of the Council of State -Law No.3816 on State Coverage of Treatment Costs of Citizens Who Lack the Ability to Pay by Granting Them Green Card issued[71]- it is understood that there are no immovable and movable property registered on applicants. In this case, since it was understood that the condition of poverty required for the acceptance of the request for legal aid was fulfilled, it decided that the

64 ECHR. İlbeyi Kemaloğlu and Meriye Kemaloğlu v. Turkey, App. No:19986/06, 10.07.2012, para.40, HUDOC Database, Date of access:03.03.2020.

65 ECHR. İlbeyi Kemaloğlu and Meriye Kemaloğlu v. Turkey, para.52-53.

66 ECHR. Mehmet and Suna Yiğit v. Turkey, App. No:52658/99, 17.07.2007, para.36-37; see; Doğru, Osman/Nalbant, Atilla, İnsan Hakları Avrupa Sözleşmesi Açıklama ve Önemli Kararlar Cilt-I, 2. Edition, Legal Yayıncılık, Istanbul, 2013, p.630;

67 De Moor-van Vugt, Adrienne, "Administrative Sanctions in EU Law", Review of European Administrative Law, Vol.5, No.1, 2012, p.31.

68 TCC. App. of Elif Dandan and İpek Melis Dandan, App. No:2014/9973, 05.04.2018, para.69, TCC Decisions Database, Date of access:03.03.2020.

69 D15D. E.2015/5251, K.2015/6403, 22.10.2015, (https://www.lexpera.com.tr), Date of access:03.03.2020.

70 D15D. E.2016/2380, K.2016/2544, 12.04.2016, Journal of Turkish Council of State, Issue:142, p.263.

71 RG.13.08.1992-21314.

plaintiffs should be decided to accept the request for legal aid, while there was no lawfulness[72] in the rejection of the request for legal aid. Also, regarding the application for legal aid in an administrative case, the court's unjustified delay may lead to a violation of the right to a fair trial in terms of the person who cannot benefit from legal aid[73].

As stated above, the concept of legal aid, which has an important place in terms of the right to a fair trial, has also been extensively addressed in the ECHR decisions[74]. Although the concept of legal aid in terms of comparative law is generally addressed within the framework of criminal law[75], it also has legal value in terms of administrative procedure law. In this sense, since it is possible to examine some administrative disputes within the civil rights and obligations, it can be stated that the concept of legal aid can be examined within the scope of Art.6/3 of the Convention. Considering that the ECHR constitutes one of the most important regional legal mechanisms in terms of human rights[76], it is necessary to evaluate the judgments of the court comparatively while examining the concept of legal aid. Therefore, in the continuation of the study, how the institution in question was handled in the decisions of the ECHR and the Council of State will be examined.

### 4. The Importance of Legal Aid in Administrative Cases

The concept of administrative law in terms of human rights "*is characterized by a very strong insistence that all acts of public officials be clearly intra vires, fully authorized by a legitimate rule or statute*[77]". However, the use of public power in administrative acts and the fact that the administration is in a more privileged position than individuals in this sense reveals the importance of the institution in question. Indeed, given the purpose of the administrative judiciary to ensure that the administration is acting in accordance with the law in general, it is an important place for individuals to have access to the court[78].

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72 D10D. E.2008/2007, K.2010/1843, 09.03.2010, Journal of Turkish Council of State, Issue:125, p.346.

73 ECHR. Sürmeli v. Germany, App. No:75529/01, 08.06.2006, para.71, HUDOC Database, Date of access:03.03.2020.

74 See; Karan, p.417.

75 Chhabra, Kirpal Singh, "Legal Aid in Criminal Proceedings", Journal of the Indian Law Institute, Vol.22, No.3, 1980, p.372. Huang-Thio, S. M., "Legal Aid: A Facet of Equality before the Law", The International and Comparative Law Quarterly, Vol.12, No.4, 1963, s.1136.

76 Duxbury, Alison, The Participation of States in International Organisations The Role of Human Rights and Democracy, Cambridge University Press, Cambridge, 2011, p.127.

77 Robertson, David, A Dictionary of Human Rights, 2. Edition, Europa Publications, London, 2004, p.4.

78 Köksal, Mustafa, Adli Yardım (Müzahereti Adliye) Kurumunun İdari Yargıdaki Uygulaması, Terazi Law Journal (Terazi Hukuk Dergisi), Vol.4, No.40, 2009, p.98.

Especially in the present day when the concept of global administrative law has been proposed, some effective judicial guarantees and safeguards must be created in terms of the decision making and implementation processes of the administration[79]. Therefore, it can be mentioned that the legal aid institution plays a role in the realization of the rule of law principle in administrative procedure law.

In terms of administrative cases, reference is made to the general rules of law in terms of legal rules to be applied for legal aid[80]. However, since the administrative procedure has some specific features; the legal institution in question must be interpreted within the administrative judgment process[81]. Therefore, in terms of administrative procedure law, it can be stated that the decisions given by courts about legal aid are interim decisions and can only be appealed with the final decision[82]. In this context, there is no hesitation in examining whether the decision regarding the rejection or acceptance of the request for legal aid, which changes the course of the proceedings, is considered in accordance with the relevant provisions of the law, during the examination of a decision that may be subject to an appeal regarding the dispute by the appellate authority[83]. Undoubtedly, as the Council of State has stated, there is no legal obstacle in the examination of the decision regarding the rejection or acceptance of the request for legal aid, which changed the course of the proceedings at the stage of the examination by a judge, which may be the subject of an appeal regarding the dispute[84]. In this sense, it is of great importance to present the socio-economic situation of the individual in an objective manner and with justifications in terms of the national legal system[85]. As a matter of fact, according to the *Kaba v. Turkey* decision given by ECHR, "*Even though the person who served as an officer in the navy died from cancer, the case of the deceased person's spouse and children were not evaluated sufficiently by*

79 Kingsbury, Benedict/Krisch, Nico et al., "The Emergence of Global Administrative Law", The Emergence of Global Administrative Law, Vol.68, No.3-4, 2005, p.17.

80 D8D. E.2009/3631, K.2009/3579, 01.06.2009, Journal of Turkish Council of State, Issue:122, p.375.

81 See. Latournerie, Roger, Conseil d'Etat'nın Yargılama Yöntemleri Üzerine Bir Deneme (transl. by Yayla, Yıldızhan), İÜSBF Yayınları, Istanbul, 1982, p.109.

82 D10D. E.2008/2007, K.2010/1843, 09.03.2010, Journal of Turkish Council of State, Issue:125, p.346.

83 D10D. E.2008/1136, K.2011/4131, 10.10.2011, Journal of Turkish Council of State, Issue:130, p.373-374.

84 D15D. E.2011/11728, K.2013/867, 06.02.2013, (https://www.lexpera.com.tr), Date of access:03.03.2020.

85 Settem, Ola Johan, Applications of the 'Fair Hearing' Norm in ECHR Article 6(1) to Civil Proceedings: With Special Emphasis on the Balance Between Procedural Safeguards and Efficiency, Springer, Switzerland, 2016, p.424.

*the national court*" is against of Art.6 of the Convention[86]. Similarly, in the *Serin v. Turkey* decision, it was found contrary to Art.6 of the Convention that the person's poverty certificate was not considered enough, and the assessment of the concrete situation was not made by the administrative court[87]. In other words, according to ECHR, "*considering the conditions of the case*", it may be possible to benefit from legal aid based on the poverty document within the framework of the right to access the court[88].

Besides, the person's request for the court to benefit from legal aid does not result in an absolute right[89]. So, if the plaintiff requests, the court is obliged to decide on legal aid, as the court in charge must decide on the matter and ensure the file's status[90]. Likewise, the administrative court should consider whether this is possible within the framework of "*legal aid*" in order to complete the relative fee by the plaintiff[91]. So that the negative situations that occur later in terms of the economic situation of the person may also cause the re-evaluation of the legal aid request[92]. At this stage, whether the request for legal aid is groundless or not should be examined independently before the admissibility examination[93]. Accordingly, the court of the first instance will have to decide on the request for legal aid at the appeal stage[94]. The legal aid request accepted by the interim decision will continue to effect until it becomes the final judgment, according to paragraph 3 of Art.335 of Law No.6100[95]. However, as stated in the TCC decisions, the fact that the application subject for legal aid is groundless; is not determinant in the admissibility of the

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86 ECHR. Kaba v. Turkey, App. No:1236/05, 01.03.2011, para.22-25, see; Doğru/Nalbant, p.630.

87 ECHR. Serin v. Turkey, App. No:18404/04, 18.11.2008, in; Demirkol, Selami, Avrupa İnsan Hakları Mahkemesinin İdari Davalarla İlgili Yargılama Ayrıntıları, Beta Yayıncılık, Istanbul, 2020, p.128.

88 Demirkol, p.129.

89 Akyılmaz, Bahtiyar/Sezginer, Murat, et al., Türk İdari Yargılama Hukuku, Savaş Yayınevi, Ankara, 2018, p.790.

90 D6D. E.1987/331, K.1987/377, 16.04.1987, Journal of Turkish Council of State, Issue:68-69, p.447; D15D. E.2011/10415, K.2012/10747, 15.11.2012, Journal of Turkish Council of State, Issue:133, p.428.

91 D6D. E.2014/2387, K.2014/4122, 27.05.2014, Journal of Turkish Council of State, Issue:137, p.184.

92 Kaplan, Gürsel, İdari Yargılama Hukukuna Giriş, Ekin Yayınevi, Bursa, 2018, p.310.

93 TCC. App. of Mehmet Şerif Ay, App. No:2012/1181, 17.09.2013, para.26, TCC Decisions Database, Date of access:03.03.2020.

94 D4D. E.2010/8142, K.2010/5098, 20.10.2010, Journal of Turkish Council of State, Issue:126, p.188-189; D15D. E.2016/2708, K.2019/312, 05.02.2019, (http://www.kazanci.com/kho2/ibb), Date of access:20.02.2020.

95 D3D. E.2018/4122, K.2019/1668, 08.03.2019, (http://www.kazanci.com/kho2/ibb), Date of access: 20.02.2020.

individual application[96]. In this context, it is not possible to establish a direct relationship between the court decision of the court regarding interim legal aid and the final decision. However, in the decisions made by the court of the first instance, it will be necessary to state that this situation will constitute a reason for disruption in the appeal stage if the relevant person is denied the legal aid request unlawfully despite the necessary conditions[97]. Therefore, "*proper evaluation*" by the competent court that will decide on the legal aid of individuals and decisions in this direction will prevent a possible violation in terms of the person's right to access the court[98]. Accordingly, within the context of the principle of the rule of law, benefiting from the legal aid institution of people who are unable to meet the costs of the trial has an important value in terms of ensuring the compliance of the administration with the law[99].

**CONCLUSION**

Within the framework of the right to a fair trial, the legal aid institution has an important value in the context of the rule of law. It is seen that the concept in question is included in various supranational and national legal texts within the framework of the right to a fair trial. In particular, it is important for people who are in an economic situation who cannot pay the trial expenses to benefit from legal aid and to provide full access to the court. As a result, individuals' civil rights and obligations may be affected as a result of making and implementing administrative actions. In this context, it is a requirement that individuals can benefit from legal aid against the administration, which has the privilege of using public power. The state's positive obligation on this issue is concentrated above all in terms of making necessary arrangements in legal aid and applying them lawfully. On the other hand, when the ECHR judgments are examined within the framework of Art.6 of the Convention, it is seen that the legal aid institution has a broad meaning. Again, it is seen that the provision of Art.31 of the Law No.2577 was arranged in parallel with this. In general, it was stated in the Council of State decisions that the legal aid institution could find application in administrative procédure law, and in most cases the state of use was associated with the right to a fair trial. On the other hand, the narrow interpretation of the economic situation of individuals in some decisions made by the Council of State may cause individuals not to benefit from their right to access the court properly. In this context, it will be

96 TCC. App. of Mahmut Can, App. No:2013/3008, 06.02.2014, para.31, TCC Decisions Database, Date of access:03.03.2020.

97 D15D. E.2011/12209, K.2013/870, 06.02.2013, (https://www.lexpera.com.tr), Date of access:03.03.2020.

98 Gözübüyük, A. Şeref/Tan, Turgut, İdare Hukuku-II: İdari Yargılama Hukuku, 7. Edition, Turhan Kitabevi, Ankara, 2014, p.964.

99 Gözübüyük/Tan, p.964.

more compatible with the concept of rule of law and specifically the right to a fair trial in determining the economic status of individuals, taking into account the legal position of the individuals against the administration.

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# ACTING CONTRARY TO MEASURES REGARDING CONTAGIOUS DISEASES

*Bulaşıcı Hastalıklara İlişkin Tedbirlere Aykırı Davranma*

**By Judge Caner Gürühan, LL.M.***

*Research Article*

**Abstract**

Acting contrary to measures regarding contagious diseases is regulated as an offence in the Turkish Penal Code (TPC). Pursuant to Article 195 of the TPC, any person who contravenes the measures, taken by the competent authorities, with regard to putting someone who is infected with one of the contagious diseases or died because of these diseases in quarantine shall be sentenced to a penalty of imprisonment for a term of two months to one year. The legal value protected by this offence is the protection of public health. Since this offence is not a special offence, it can be committed by anyone. The victim of this offence is all individuals who are part of society. The material subject is the quarantine measures, imposed by the authorities on account of there being a person infected with a contagious disease or having died from such. The conduct that constitutes the material element of the offence is the failure to comply with quarantine measures. This offence can only be committed with intention.

**Keywords** Quarantine, measure, authority, contagious disease, public health

**Özet**

Bulaşıcı hastalıklara ilişkin tedbirlere aykırı davranma Türk Ceza Kanunu'nda (TCK) suç olarak düzenlenmiştir. TCK'nın 195. maddesine göre bulaşıcı hastalıklardan birine yakalanmış veya bu hastalıklardan ölmüş kimsenin bulunduğu yerin karantina altına alınmasına dair yetkili makamlarca alınan tedbirlere uymayan kişi, iki aydan bir yıla kadar hapis cezası ile cezalandırılır. Bu suçla korunan hukuki yarar kamu sağlığının korunmasıdır. Bulaşıcı hastalıklara ilişkin tedbirlere aykırı davranma, özgü suç olmadığı için herkes tarafından işlenebilir. Bu suçun mağduru toplumu oluşturan tüm bireylerdir. Suçun maddi konusu, bulaşıcı hastalıklardan birine yakalanmış veya bu hastalıklardan ölmüş kimsenin bulunduğu yerin karantina altına alınmasına dair yetkili makamlarca alınan tedbirlerdir. Suçun maddi unsurunu oluşturan fiil, bulaşıcı hastalıklara ilişkin tedbirlere aykırı davranmaktır. Bu suç yalnızca kasten işlenebilmektedir.

**Anahtar Kelimeler** Karantina, önlem, yetkili makam, bulaşıcı hastalık, kamu sağlığı

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## INTRODUCTION

In an occurence of a severe epidemic, a great number of suspected cases and close contacts of infected people need to be isolated for medical observation to cut off the spread of the virus carried by them.[1] The novel coronavirus (2019-nCoV) that emerged in Wuhan, China in December 2019 quickly spread and has exported to more than 180 countries. The World Health Organization (WHO) on March 11, 2020, has declared the 2019-nCoV outbreak a global pandemic. The world is yet again encountered with a situation of an outbreak with a closely related virus for which there is currently no specific therapeutics or vaccines. Once more, relying on classical public health measures is needed to interrupt the epidemic of this disease. The primary aim of such public health measures, including quarantine is to prevent the spread of disease by separating people to arrest transmission.

Laws can contribute to the prevention of infectious diseases by facilitating screening, counselling, and education of those at risk of infection, and supporting access to treatment, and empowering public health authorities to restrain contact with infected individuals and to exercise emergency powers in return for disease outbreaks.

However, where public health laws allow interferences with freedom of movement, the right to control person's health and body, privacy, and property rights, they must balance these private rights with the public health interest in an ethical and transparent way. By the same token, public health powers must rely on the principles of public health requirement, reasonable and effective means, proportionality, distributive justice, and transparency.[2]

Recent developments concerned have influenced Turkey as well and the importance of complying with measures imposed by the authorities related to infectious diseases has been understood more than ever. In our country, contravention the measures taken by the competent authorities is regulated as an offence in the Turkish Penal Code numbered 5237 (hereinafter referred to as the TPC)[3]. The General Hygiene Law (*Umumi Hıfzısıhha Kanunu*) numbered 1593[4] (hereinafter referred to as the GHL) also includes important provisions

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1 Zhang Min-Xia/Yan Hong-Fan/Wu Jia Yu/Zheng Yu-Jun, *"Quarantine Vehicle Scheduling for Transferring High-Risk Individuals in Epidemic Areas"*, International Journal of Environmental Research and Public Health, Volume: 17, Issue: 7, Year: 2020, p. 2275.

2 Advancing the Right to Health: The Vital Role of Law, World Health Organization, 2016, Chapter 10: Controlling the spread of infectious diseases, Summary Points, https://www.who.int/healthsystems/topics/health-law/chapter10.pdf (accessed 17.04.2020).

3 Turkish Penal Code, Law Number: 5237, Ratification: 26.09.2004, Issue: 12.10.2004-25611, https://www.mevzuat.gov.tr/MevzuatMetin/1.5.5237.pdf (accessed 14.04.2020).

4 General Hygiene Law, Law Number: 1593, Ratification: 24.04.1930, Issue: 06.05.1930-1489, https://www.mevzuat.gov.tr/MevzuatMetin/1.3.1593.pdf (accessed 14.04.2020).

regarding "quarantine", "infectious diseases", "necessary measures", and "competent authorities" which constitute the material subject of the offence in question.

In this article, this offence of acting contrary to measures regarding contagious diseases will be examined in detail by including comparative law.

## I. GENERAL EXPLANATIONS

The offence of acting contrary to measures regarding contagious diseases is among the "Offences against Public Health", which constitutes the Third Part of the Third Chapter titled "Offences against Society" of the Second Volume of the TPC. According to Article 195 of the TPC;

> Any person who contravenes the measures, taken by the competent authorities, with regard to putting someone who is infected with one of the contagious diseases or died because of these diseases in quarantine shall be sentenced to a penalty of imprisonment for a term of two months to one year.
>
> This offence also included in Article 261 of the Government Draft. Pursuant to the Draft;
>
> People who defy the orders imposed or prevent the works done by the authorities through force regarding cordoning off houses or other places where a person infected with a contagious disease or having died from such, shall be sentenced to a penalty of imprisonment for a term of two months to one year, depending on the degree of their actions. Adopted by amending in the Commission, the Draft was accepted ad verbum at the General Assembly of the Parliament.[5]

Not included in the Italian Penal Code of 1889[6], which was adopted as Turkish Penal Code numbered 765[7] (hereinafter referred to as the TPC numbered 765), this offence is in the eighth section, including offences regarding "Violence or Resistance against the Government and Opposition to the Laws" of the third book titled "Offences against the State Administration" of the Second Volume of the TPC numbered 765. Article 263 of the TPC numbered 765 states that

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5 12.05.2003, The Government Draft, 2092, https://www2.tbmm.gov.tr/d22/1/1-0593.pdf (accessed 14.04.2020).

6 Bayraktar Köksal/Kiziroğlu Serap Keskin/Yıldız Ali Kemal/Zafer Hamide/Aksoy Retornaz Eylem/Akyürek Güçlü/Evik Ali Hakan/Evik Vesile Sonay/Kangal Zeynel T./Kartal Pınar Memiş/Sınar Hasan/Altunç Sinan/İnceoğlu Asuman Aytekin/Bozbayındır Gülşah Bostancı/ Eroğlu Fulya, "Özel *Ceza Hukuku Cilt V Genel Tehlike Yaratan,* Çevreye *Karşı ve Kamunun Sağlığına Karşı Suçlar*", Kangal Zeynel T., "*Bulaşıcı Hastalıklara* İlişkin *Tedbirlere Aykırı Davranma*" On İki Levha, 1st Edition, İstanbul 2019, p. 434.

7 Turkish Penal Code, Law Number: 765, Ratification: 01.03.1926, Issue: 13.03.1926-320, http://www.ceza-bb.adalet.gov.tr/mevzuat/765.htm (accessed 14.04.2020).

> People who defy the orders imposed or prevent the works done by the authorities through force regarding cordoning off houses or other places where people infected with a contagious disease or having died from such, shall be sentenced to a penalty of imprisonment for a term of one month to one year, depending on the degree of their actions.

Concerning the offence being regulated in different sections within both TPC, the doctrine states that it is not possible to refer to the old practice and doctrine in the interpretation of the offence since the TPC differentiated its both verbal expression and the systematic structure. However, it is worth noting that the possibility for referring to the old practice and doctrine refarding this offence is already limited, as the offence was not subject to a great number of decisions made by the Court of Cassation and has not drawn enough academic attention.

With regard to this offence, the GHL also occupies an important position, as it includes both the concepts which constitute material subject of the offence and some provisions referring to Article 195 of the TPC, as will be mentioned in the following sections.

## II. COMPARATIVE LAW

As a serious and highly contagious respiratory disease, with symptoms that range in severity, the novel coronavirus (2019-nCoV) has caused an unprecedented public health emergency due to the rapid spread of it. This emergency, once again, has shown the significance of reducing transmission of communicable diseases and has urged States to criminalize acting contrary to measures taken by authorities in responding to the illness.

Using criminal law with the broad aim of prevention from infectious diseases, some States enact specific offences for disease exposure and transmission, while some enforce public health measures through criminal sanctions.[8]

In this section, the selected countries will be analyzed in terms of their legal regulations on the prevention of the spread of infectious diseases. In this context, after emphasizing what the concepts of infectious disease and quarantine (and/or isolation) mean, and analyzing what are the measures taken to prevent the spread of infectious diseases and which authorities are competent in this regard in the relevant country, the practice of each country will be compared to that of Turkey, where appropriate.

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[8] Sun Nina, "*COVID-19 Symposium: The Use of Criminal Sanctions in COVID-19 Responses – Exposure and Transmission, Part I*" Opiniojuris, http://opiniojuris.org/2020/04/03/covid-19-symposium-the-use-of-criminal-sanctions-in-covid-19-responses-exposure-and-transmission-part-i/ (accessed 10.04.2020).

**A. USA**

State and local governments are initially responsible for preserving public health and restraining the spread of diseases within the USA borders. In order to control the spread of disease within their borders, states enact laws to enforce the use of isolation and quarantine. These laws can vary from state to state and can be specific or broad.[9] In Massachusetts, for instance, when an illness which is hazardous to the public health emerges in a neighbourhood, or when a person is infected or lately has been infected therewith, the board of health must provide such hospital or reception place and such nurses and other assistance and necessaries as is assessed best for his/her accommodation and for the safety of the residents, and the same must be subject to the provisions of the board. The board can order any sick or infected person to be removed to such hospital or place, when it can be done without danger to his/her health; otherwise, the house or place where he/she remains will be regarded as a hospital, and all persons residing in or in any way connected therewith will be subject to the regulations of the board and, when necessary, persons in the town can be removed.[10] When a physician or other relevant persons violate a regulation of the board of health relative thereto, he/she will pay a penalty of not less than 10 US dollars nor more than 100 US dollars.[11] It seems that Massachusetts General Laws include penal provisions for those who are authorized for imposing quarantine measures, which remind of Article 266 of the TPC in case the officers concerned use a vehicle or material given as a result of their duty during the commission of the offence.

Deriving its authority for isolation and quarantine from the Commerce Clause of the U.S. Constitution, the federal government also has the authority to observe and respond to the spread of contagious diseases across borders, through the Centers for Disease Control and Prevention (hereinafter referred to as the CDC).[12] The power of the CDC to exercise quarantine and isolation for specific diseases derives from the federal Public Health Service Act[13] and most recently, a series of presidential executive orders.[14] According to Section

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9 NCSL National Conference of State Legislatures, State Quarantine and Isolation Statutes, https://www.ncsl.org/research/health/state-quarantine-and-isolation-statutes.aspx (accessed 11.04.2020).

10 Massachusetts General Laws, Part I, Title XVI, Chapter 111, Section 95.

11 Massachusetts General Laws, Part I, Title XVI, Chapter 111, Section 105.

12 NCSL National Conference of State Legislatures, State Quarantine and Isolation Statutes, https://www.ncsl.org/research/health/state-quarantine-and-isolation-statutes.aspx (accessed 11.04.2020).

13 Public Health Service Act [As Amended Through P.L. P.L. 116–94, Enacted December 20, 2019], https://legcounsel.house.gov/Comps/PHSA-merged.pdf (accessed 11.04.2020).

14 Revised List of Quarantinable Communicable Diseases, A Presidential Document by the Executive Office of the President on 08.06.2014, Executive Order 13674 of July 31,

361 of the Public Health Service Act (Section 264 of the 42 Code of Federal Regulations[15]), the U.S. Secretary of Health and Human Services, with the approval of the Secretary is empowered to make and enforce such provisions as in his/her judgment are required to prevent the occurrence, transmission, or spread of infectious diseases.

Tribes have police power as well, to take actions with the purpose of promoting the health, safety, and welfare of their own tribal members. Within this scope, tribal health authorities can enact their own isolation and quarantine laws within tribal lands.[16]

As seen, the authority to prevent the spread of contagious diseases in the USA has been shared between central and local governments, the Ministry of Health, and tribes. In this sense, it is possible to specify a partial difference between the USA and Turkey where the ministry concerned and local administrative authorities are competent.

The concepts of communicable disease, isolation, and quarantine are defined under the 42 Code of Federal Regulations. According to the Code;

> communicable diseases mean illnesses due to infectious agents or their toxic products, which may be transmitted from a reservoir to a susceptible host either directly as from an infected person or animal or indirectly through the agency of an intermediate plant or animal host, vector, or the inanimate environment,
>
> isolation means the separation of an individual or group reasonably believed to be infected with a quarantinable communicable disease from those who are healthy to prevent the spread of the quarantinable communicable disease, and
>
> quarantine means the separation of an individual or group reasonably believed to have been exposed to a quarantinable communicable disease, but who are not yet ill, from others who have not been so exposed, to prevent the possible spread of the quarantinable communicable disease.[17]

The definitions of contagious diseases and quarantine are not included in the TPC and the GHL as can be seen in the following sections, in comparison

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2014, https://www.federalregister.gov/documents/2014/08/06/2014-18682/revised-list-of-quarantinable-communicable-diseases (accessed 11.04.2020).

15 United States Code, 2006 Edition, Supplement 4, Title 42 - The Public Health and Welfare, Section 264, https://www.govinfo.gov/app/details/USCODE-2010-title42/USCODE-2010-title42-chap6A-subchapII-partG-sec264/summary (accessed 11.04.2020).

16 Centers for Disease Control and Prevention, Legal Authorities for Isolation and Quarantine, https://www.cdc.gov/quarantine/aboutlawsregulationsquarantineisolation.html (accessed 11.04.2020).

17 Section 70.1 of the 42 Code of Federal Regulations.

with the USA. Likewise, in terms of implementation of the offence, there is no difference between the concepts of isolation and quarantine in Turkey.

As for the penalties for violation of quarantine laws, pursuant to Section 271 of the 42 Code of Federal Regulations, any person who enters or departs from the limits of any quarantine station, ground, or anchorage in disobey of quarantine provisions or without permission of the quarantine officer in charge, will be punished by a fine of not more than 1,000 US dollars or by imprisonment for not more than one year, or both.

Considering the practice of the USA, failure to comply with quarantine measures, which is not sanctioned by a different penal code, requires both a fine and imprisonment in the 42 Code of Federal Regulations, unlike the TPC. Furthermore, quarantine does not need to be conducted on account of there being a person infected with a contagious disease or having died from such, in order to punish the violation of quarantine measures. As can be understood from the definitions of quarantine and isolation, it is sufficient to have reasonable doubt regarding the presence of infected people in terms of implementing these measures.

**B. CANADA**

Acting against the measures related to infectious diseases is not regulated as an offence in the Criminal Law of Canada[18] in comparison with Turkey. In order to prevent the emergence and transmission of infectious diseases,[19] the Government of Canada deploys the Quarantine Act.[20] When necessary, the Government can put in place emergency orders as well, as it is done within the scope of combating coronavirus.[21]

According to the Quarantine Act;

> communicable disease (*maladie transmissible*) means a human disease that is caused by an infectious agent or a biological toxin and poses a risk of significant harm to public health, or a disease listed in the schedule and includes an infectious agent that causes a communicable disease.[22]

Not including the definition of quarantine, the Act defines quarantine

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18 Criminal Code, CODIFICATION, R.S.C., 1985, c. C-46, https://www.legislationline.org/download/id/8563/file/Canada_Criminal_code_1985_am122019_en.pdf (accessed 10.04.2020).

19 Article 4 of the Quarantine Act.

20 Quarantine Act, S.C. 2005, c. 20, Assented to 2005-05-13, https://laws-lois.justice.gc.ca/eng/acts/q-1.1/FullText.html (accessed 10.04.2020).

21 Government of Canada, PC Number: 2020-0175, Date: 2020-03-24, https://orders-in council.canada.ca/attachment.php?attach=38989&lang=en (accessed 10.04.2020).

22 Article 2 of the Quarantine Act.

facility (*installation de quarantaine*);

as any place that is used for the detention of a traveler, and quarantine station (*poste de quarantaine*) as any place that is used for the administration and enforcement of this Act.[23]

The Minister of Health can appoint analysts, screening officers, environmental health officers, quarantine officers, and review officers.[24] The Minister can found a quarantine station at any place in the country[25], while can by order determine any place as a quarantine facility and amend, call off, or reinstate the designation.[26] When the relevant regulations are analyzed, it is seen that the Ministry of Health has the authority for quarantine measures and the relevant officials are appointed by the Minister in Canada. These regulations are reminiscent of the authorization of health officers made by the GHL, as will be mentioned in the following sections, except for the number of different types of groups that are authorized.

The Act includes detailed obligations on arriving and departing travelers. In this respect, every person who is subject to subsection 11(1) of the *Customs Act*[27] and enters Canada must present themselves to a screening officer at the nearest entry point.[28] Likewise, every person who leaves Canada through a departure point must present themselves to a screening officer or quarantine officer at the departure point.[29] Travelers must answer any relevant questions asked by a screening officer or quarantine officer and provide to the officer any information or record in their possession that the officer could reasonably necessitate in the exercise of a duty under this Act.[30] No person can enter or leave a quarantine facility without the permission of a quarantine officer.[31] People who violate these measures are guilty of an offence and liable on summary conviction to a fine of not more than 200,000 Canadian dollars or to imprisonment for a term of not more than six months, or to both.[32]

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23 Article 2 of the Quarantine Act.
24 Article 5 of the Quarantine Act.
25 Article 6 of the Quarantine Act.
26 Article 7 of the Quarantine Act.
27 According to subsection 11(1) of the *Customs Act;* "*Subject to this section, every person arriving in Canada shall, except in such circumstances and subject to such conditions as may be prescribed, enter Canada only at a customs office designated for that purpose that is open for business and without delay present himself or herself to an officer and answer truthfully any questions asked by the officer in the performance of his or her duties under this or any other Act of Parliament.*".
28 Article 12 of the Quarantine Act.
29 Article 13 of the Quarantine Act.
30 Article 15(1) of the Quarantine Act.
31 Article 65 of the Quarantine Act.
32 Article 70 of the Quarantine Act.

Any traveller who has reasonable grounds to suspect that they have or may have a contagious disease listed in the schedule or are infested with vectors, or that they have recently been in close proximity to a person who has, or is reasonably likely to have, such a disease will disclose that fact to a screening officer or quarantine officer.[33] Any person who contravenes this regulation is guilty of an offence and liable on conviction on indictment, to a fine of not more than 500,000 Canadian dollars or to imprisonment for a term of not more than three years, or to both; or on summary conviction, to a fine of not more than 200,000 Canadian dollars or to imprisonment for a term of not more than six months, or to both.[34]

When a quarantine officer, after the health evaluation or medical examination of a traveler, has reasonable grounds to suspect that the traveler has or might have an infectious disease, or has recently been in close proximity to a person who has or might have a communicable disease or is infested with vectors, the officer has the power to order the traveler to report to the public health authority specified in the order[35] or to comply with treatment or any other measure for preventing the introduction and spread of the communicable disease.[36] Every person who fails to comply with this obligation is guilty of an offence and liable on summary conviction to a fine of not more than 200,000 Canadian dollars or to imprisonment for a term of not more than six months, or to both.[37]

The operator must inform a quarantine officer or cause a quarantine officer to be informed of any reasonable grounds to suspect the existence of communicable diseases, before conveyance arrives at its destination in Canada or departs from Canada through a departure point[38], in addition to other obligations. Moreover, no person can export a cadaver, a body part, or other human remains that have or might have a contagious disease listed in the schedule unless the exportation is in accordance with the regulations or is authorized by the Minister.[39] The Governor in Council may make an order prohibiting or subjecting to any condition the entry into Canada of any class of persons who have been in a foreign country or a specified part of a foreign country if the Governor in Council is of the opinion that there is an outbreak of a communicable disease in the foreign country, the introduction or spread of the disease would pose an imminent and severe risk to public health, the entry of members of that class of persons into Canada may introduce or contribute

33 Article 15(2) of the Quarantine Act.
34 Article 72 of the Quarantine Act.
35 Article 25 of the Quarantine Act.
36 Article 26 of the Quarantine Act.
37 Article 68 of the Quarantine Act.
38 Article 34 of the Quarantine Act.
39 Article 45 of the Quarantine Act.

to the spread of the communicable disease, and no reasonable alternatives to prevent the introduction or spread of the disease are available.[40] By the same token, the Governor in Council may make an order prohibiting or subjecting to any condition the importing of anything into Canada or any part of Canada, either generally or from any place named in the order, for any period that the Governor in Council considers necessary for the purpose of preventing the introduction or spread of a communicable disease in Canada.[41] Every person who contravenes these regulations is guilty of an offence and liable on summary conviction to a fine of not more than 750,000 Canadian dollars or to imprisonment for a term of not more than six months, or to both.[42]

It is possible to state that these measures are similar to the measures set out in the First Chapter (Articles 29-56) titled "Boundaries and Coasts Sanitary Protection" in the First Book of the GHL titled "Combating Infectious and Epidemic Diseases". However, those who violate quarantine measures, which are explicitly regulated in the Quarantine Act, are subject to different sanctions depending on the nature of the actions, while such a distinction was not made in the GHL.

Every person is guilty of an offence if they cause a risk of imminent death or serious bodily harm to another person while wilfully or recklessly contravening this Act or the regulations. Every director and officer of a corporation must take all reasonable care to ensure that the corporation complies with this Act and the regulations.[43] People who violate this regulation is liable on conviction on indictment, to a fine of not more than 1,000,000 Canadian dollars or to imprisonment for a term of not more than three years, or to both; and on summary conviction, to a fine of not more than 300,000 Canadian dollars or to imprisonment for a term of not more than six months, or to both.[44]

As seen, unlike the TPC, the risk of transmission of infectious diseases is regulated as an offence in the Quarantine Act. Besides, the practice of punishing each action by its weight, which is detailed in the Act, has been adopted. Contrary to the TPC, this Act includes fines and/or prison terms.

### C. UNITED KINGDOM

The protection of public health from infectious diseases in the UK is based on broadly drafted modernized legislations. In addition to these legislations, which also include violating the measures against infectious diseases, the Penal Code also regulates the act of the spread of infectious diseases as an

40 Article 58 of the Quarantine Act.
41 Article 59 of the Quarantine Act.
42 Article 71 of the Quarantine Act.
43 Article 67(1) of the Quarantine Act.
44 Article 67(2) of the Quarantine Act.

offence and sanctions them. Besides all these, the impact coronavirus has had throughout the world has been felt in the UK as well, and the Coronavirus Act 2020 has been put into effect to combat this virus more effectively.

As the main legislation that addresses public health emergencies, the Public Health (Control of Disease) Act 1984[45] served to consolidate a number of pieces of legislation from the nineteenth century.[46] Not addressing the modern health risks due to reliance on the scientific knowledge and social circumstances of those times, the Act was reformed in 2009. Additional powers to detain individuals suffering from diseases caused concerns that the Law would not stand up to a challenge brought under the Human Rights Act 1998. As a result of these concerns, the government enacted the Health and Social Care Act 2008[47], which repealed many provisions in the Public Health (Control of Disease) Act 1984.

Due to both including regulations under the Penal Code and having a general public health law, it can be supposed that the United Kingdom shares some similarities with Turkey in terms of legal responses to infectious diseases. However, the United Kingdom has constantly updated its general public health legislation considering the needs of the community and developing conditions. Nonetheless, the GHL has been in force for a long time and is far from adapting to changing conditions.

According to the Health and Social Care Act 2008, the Secretary of State has the power to make regulations in order to prevent, protect against, control, and provide a public health response to the spread of infections.[48]The Law provides examples of powers that the Secretary of State may exercise by regulation, including imposing or enabling restrictions or requirements on individuals in response to a threat to public health, providing local authorities with functions to monitor public health risks[49], and removal to or detention in a hospital or other establishment, or isolation or quarantine.[50]

In order to prevent the spread of contagious diseases, the Public Health (Control of Disease) Act empowers Justices of the Peace to impose restrictions and requirements through orders, known as "Part 2A Orders",

45 Public Health (Control of Disease) Act 1984, Chapter 22, http://www.legislation.gov.uk/ukpga/1984/22 (accessed 13.04.2020).

46 Feikert-Ahalt Clare, "*England: Legal Responses to Health Emergencies*", Library of Congress, https://www.loc.gov/law/help/health-emergencies/england.php (accessed 13.04.2020).

47 Health and Social Care Act 2008, Chapter 14, http://www.legislation.gov.uk/ukpga/2008/14/pdfs/ukpga_20080014_en.pdf (accessed 13.04.2020).

48 Section 45C, as inserted by the Health and Social Care Act 2008, Chapter 14, Section 129.

49 Ibid.

50 Sections 45D–E of the Health and Social Care Act 2008.

including submission of medical examinations, being removed to a hospital or other suitable establishment, being detained in a hospital or other suitable establishment[51], being kept in isolation or quarantine[52], being disinfected or decontaminated, wearing protective clothing, providing information or answer questions about their health or other circumstances, having their health monitored and the results reported, attendance of training or advice sessions related to reducing the risk of infection, being subject to restrictions on where they go or with whom they have contact, and abstain from working or trading on individuals. The Justice of the Peace may issue the order only if he/she is satisfied that a person may be infected, could present significant harm to human health, and there is a risk the person may infect others.[53] Justices of the Peace have similar powers to make orders in relation to premises or things that may be infected or contaminated when they could present significant harm to human health and there is a risk that they may infect or contaminate humans.[54]

As seen, the United Kingdom differs from not only Turkey but also many other countries in terms of authorities competent for implementing quarantine measures. The main reason for this difference is the decision-making authority of the Justices of the Peace regarding quarantine measures. It is noteworthy that the Justices of the Peace, who have controversial experience in preventing the spread of infectious diseases, are equipped with these powers. On the other hand, it can be said that Turkey and the United Kingdom show similarities in terms of authorizing the Ministry to make regulations on infectious diseases.

The Secretary of State has the authority to make regulations to prevent the spread of infection or other contamination through vessels, aircraft, trains, or other conveyances leaving or arriving at any place, or to give effect to any international arrangement regarding the spread of infection or contamination as well.[55] As mentioned while examining the Canadian practice, there are detailed regulations regarding passengers and transportation vehicles in the GHL, which shows similarities with the Health and Social Care Act 2008 in this respect.

Failure to comply with the requirements of an order without a reasonable excuse can result in a fine of up to 20,000 pounds. Where the court is satisfied that the "failure or willful obstruction constituting the offence has caused premises or things to become infected them in a material way" by an individual convicted of an offense under the Act, the court may require the

51 Section 45L of the Health and Social Care Act 2008.
52 Ibid.
53 Section 45G of the Health and Social Care Act 2008.
54 Sections 45H–I of the Health and Social Care Act 2008
55 Section 45B of the Health and Social Care Act 2008.

individual to take or pay for remedial action.[56] The police may take individuals that contravene an order of detention, isolation, or quarantine into custody and return them to the place specified in the order.[57]

Failure to comply with the quarantine requirements related to infectious diseases without reasonable cause only requires fines, unlike the Turkey practice. On the other hand, the authority which enables the police to take individuls who contravene the orders into custody is quite remarkable. In such a case, there exists no balance between the freedoms of individuals and the aim of preventing the spread of infectious diseases.

The act of causing the spread of infectious diseases is regulated as an offence in the Penal Code as well. Pursuant to Article 298 of the Penal Code, titled "Negligent act likely to spread disease";

> Any person who unlawfully or negligently does any act which he knows or has reason to believe to be likely to cause the spread of any infectious or contagious disease shall be guilty of an offence and liable on summary conviction to a fine of $500 or to imprisonment for six months, or to both such fine and imprisonment.

Although this article does not directly include acting contrary to measures regarding contagious diseases, unlawfully or negligently act of the offender may be caused by failure to comply with the lawful measures taken by the competent authorities. It is not compulsory for the offender to know that his action caused infectious diseases. Having reasons to believe to be likely to cause the spread of any infectious disease for the offender is sufficient for the existence of this offence. Moreover, this offence can be committed not only deliberately but also by negligence, unlike the TPC.

As mentioned, the Parliament of the United Kingdom that grants the government emergency powers to handle the coronavirus pandemic introduced Coronavirus Act 2020.[58] The provisions of the Coronavirus Act, which are time-limited for two years, empower the government to restrict or prohibit public gatherings, control or suspend public transport, order businesses to close, temporarily detain people suspected of the 2019-nCoV infection, suspend the operation of ports and airports, enroll medical students and retired healthcare workers in the health services, relax regulations to ease the burden on healthcare services, and assume control of death management in particular local areas under the country-specific conditions.[59] Although it is possible to

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56 Section 45O of the Health and Social Care Act 2008.

57 Section 45N of the Health and Social Care Act 2008.

58 Coronavirus Act 2020, Chapter 7, http://www.legislation.gov.uk/ukpga/2020/7/pdfs/ukpga_20200007_en.pdf (accessed 13.04.2020).

59 Coronavirus Act 2020, Chapter 7, http://www.legislation.gov.uk/ukpga/2020/7/pdfs/

indicate that Turkey has taken stringent precautions because of the 2019-nCov, a 2019-nCov specific application of a law adopted by the United Kingdom does not exist in Turkey.

**D. FRANCE**

The main legislation on the protection of general health in France is the Public Health Law (*Code de la santé publique*)[60]. Under the first heading named "Fight against epidemics and some infectious diseases" included by the First Book titled "Fight against infectious diseases" covered by the Third Chapter titled "Combating Diseases and Addiction", this Law includes the measures to be taken for the prevention of the spread of infectious diseases and the provisions regarding passengers and means of transportation as well as other general public health issues such as vaccination and sexually transmitted diseases. According to Article 3115-10 of the Public Health Law, the relevant State officers must inform the public prosecutor about the isolation or quarantine of persons suffering from or suspected of being infected with contagious diseases, and the necessary measures are taken through a decree of *Conseil d'etat*. This law is similar to the GHL in terms of including the names of some infectious diseases and the competence of the Ministry of Health and affiliated units in the measures to be taken. However, France where judicial authorities are integrated into the fight against infectious diseases is significantly differentiated from Turkey in this regard.

As mentioned, measures to prevent the spread of infectious diseases are taken through decrees. These decrees are intent to prevent and eliminate the consequences of serious threats to public health and include sanctions for those who fail to comply with the measures taken within this context.

Within the scope of combating 2019-nCoV, the French government issued a decree[61] restricting travel, various activities, and many aspects of daily life with a few exceptions in preventing the spread of the disease. According to the Decree, the representative of the State is empowered to adopt more restrictive measures when required.

The Decree, which is enacted taking into consideration Article 1 of the Civil Code, Article 610(1) of the Criminal Code and Article 529 of the

ukpga_20200007_en.pdf (accessed 13.04.2020).

60 Code de la santé publique, http://codes.droit.org/CodV3/sante_publique.pdf (accessed 13.04.2020)

61 Décret n° 2020-260 du 16 mars 2020 portant réglementation des déplacements dans le cadre de la lutte contre la propagation du virus covid-19, https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000041728476&categorieLien=id (accessed 13.04.2020).

Criminal Procedure Code,[62] creates a 4th class contravention in case of failure to comply with the measures laid down by the decree 2020-260 of 16 March 2020. According to this Decree, the procedure of the fixed fine is applicable and the amount of the fixed fine and the increased fixed fine are 135 and 375 Euros respectively.

On 23 March 2020, however, the French Government published the Emergency Law (*L'état D'urgence Sanitaire*)[63] to deal more effectively with the 2019-nCoV epidemic. Including the provisions of the Public Health Law regarding "Threats and Serious Health Crises" (L. 3131) and introducing some additional provisions that aggravate penalties contained in Chapter 6, titled "Criminal Provisions" of the same, the Emergency Law imposes restrictions on many issues such as business life, the functioning of the justice mechanism, education, budget, taxation and elections and expands significantly the authorities of the Prime Minister and the Minister of Health.[64]

According to Article 2 of the Law, a state of health emergency is declared by decree of the Council of Ministers taken on the report of the Minister of Health. [65] In the areas where the state of health emergency is declared, the Prime Minister, by taking the opinion of the Minister of Health, has the authority to restrict or prohibit the movement of people and vehicles, prohibit people from leaving their homes, take quarantine and isolation measures, order the temporary closure of one or more categories of establishments open to the public, limit or prohibit gatherings on the public highway, order the requisition of all goods and services necessary for the fight against diseases.[66] Likewise, under the same conditions, the Minister of Health has the power to take any regulatory measure relating to the health system.[67] As seen, the powers of the prime minister in preventing the spread of infectious diseases expand during the emergency period, possibly in connection with the parliamentary system.

The Prime Minister and the Minister of Health may empower the representative of the State with territorial jurisdiction to take all general or individual measures for the application of provisions mentioned above.[68]

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62 Décret n° 2020-264 du 17 mars 2020 portant création d'une contravention réprimant la violation des mesures destinées à prévenir et limiter les conséquences des menaces sanitaires graves sur la santé de la population, https://perma.cc/FW6N-2LEW (accessed 13.04.2020).

63 LOI n° 2020-290 du 23 mars 2020 d'urgence pour faire face à l'épidémie de covid-19 (1), https://www.legifrance.gouv.fr/eli/loi/2020/3/23/PRMX2007883L/jo/texte (accessed 13.04.2020).

64 Art. L. 3136-1.

65 Art. L. 3131-13.

66 Art. L. 3131-15.

67 Art. L. 3131-16.

68 Art. L. 3131-17.

In the event of a declaration of a state of health emergency, a committee of scientists is immediately convened. The committee periodically issues its opinions on the disaster and the measures must be taken. The assignment of the administrative authorities and the designation of a committee of scientists are similarities observed between practices in Turkey and France. Yet, the designation of a committee of scientists is not subject to the declaration of a state of emergency.

Failure to comply with the obligations mentioned is punishable by six months imprisonment and a fine of 10,000 Euros. If the violation occurs within fifteen days, the fine is that provided for fines of the fifth class. When violations repeat more than three times within thirty days, the offences are punishable by six months imprisonment and a fine of 3.750 Euros, as well as the additional penalty of community service and suspension, for a period of no more than three years, from the driving license when the offence was committed driving a vehicle.[69]

Acting contrary to measures regarding contagious diseases is not included in the Penal Code in France, differently from Turkey. Likewise, the decrees require both a fine and imprisonment in France. In addition, a special recidivism arrangement is made by imposing accordingly more severe fines for recurring violations. This practice, which is different from other countries is highly effective in terms of preventing the spread of infectious diseases.

**E. GERMANY**

On the purpose of preventing communicable diseases in human beings, detecting infections at an early point in time and preventing their spread, the Infection Protection Act (*Infektionsschutzgesetz, IfSG*)[70] (hereinafter referred to as the IPA) entitles the competent authorities to take appropriate measures in Germany. These measures may be adopted in respect of ill persons, persons who are suspected of illness or infection, or persons who excrete pathogens without having symptoms, while some measures may also be addressed against the general public.

According to the Section 30 of the IPA, under the title of "Quarantine", the competent authority can order that persons suffering from or suspected of being infected with pneumonic plague or a haemorrhagic fever that can be transmitted from person to person are forthwith isolated in a hospital or an establishment equipped to treat these diseases. In respect of other persons

[69] L'article L. 3136-1.

[70] Act on the Reform of the Communicable Diseases Law (Communicable Diseases Law Reform Act) *Gesetz zur Neuordnung seuchenrechtlicher Vorschriften - (Seuchenrechtsneuordnungsgesetz - SeuchRNeuG)* of 20 July 2000.

who are ill or suspected of being ill, suspected of being contagious, and germ carriers, it may order that they are isolated in an appropriate hospital or by any other means deemed appropriate; however, this only applies to germ carriers if they do not, are unable or unlikely to comply with the other protective measures and thus pose a danger to their environment.

As seen, even if under different sections, the IPA includes penal provisions by specifying the names of some diseases, similar to the GHL and the TPC numbered 765, probably due to its effective date.

There are also measures taken by the competent authorities, including the prohibition of exercising certain professional activities[71], closing community facilities for minors[72], and restricting or prohibiting events or other gatherings of a large number of people as well as forcing persons not to leave the place they are in or not to enter places specified by it until the necessary protective measures have been taken.[73]

These measures are issued by way of a "general administrative act" (*Allgemeinverfügung*) instead of an executive regulation (*Rechtsverordnung*). Unlike an executive regulation, the advantage of issuing general administrative acts is that it cannot be challenged with the *erga omnes* effect in front of the courts. If individuals challenge a general administrative act, the administrative courts may only annul it with *inter partes* effects – leaving the validity of the "general administrative act" for the general public untouched.[74] Although this seems to be positive in terms of giving an effective and rapid legal response to infectious diseases at first glance, there is no doubt that these provisions, which allow direct intervention to the freedom of persons, should be subject to legal supervision, as noted in the introduction.

All measures described in the IPA can only be ordered by local or state authorities. The federal government has no authority to issue directives. Therefore, the closure of schools and the prohibition of mass events could not be ordered by the federal government. The federal government can only make recommendations and must then hope that the authorities of the *Länder* will comply.[75] Even though Germany and Turkey share some similarities in terms of authorization of state authorities, the practice in Germany is different from

71 Section 31 of the IPA.

72 Section 33 of the IPA.

73 Section 28 of the IPA.

74 Klafki Anika/Kießling Andrea, "*Fighting COVID 19 – Legal Powers and Risks: Germany*" Verfassungsblog on Matters Constitutional, https://verfassungsblog.de/fighting-covid-19-legal-powers-and-risks-germany/ (accessed 10.04.2020).

75 Klafki Anika/Kießling Andrea, "*Fighting COVID 19 – Legal Powers and Risks: Germany*" Verfassungsblog on Matters Constitutional, https://verfassungsblog.de/fighting-covid-19-legal-powers-and-risks-germany/ (accessed 10.04.2020).

Turkey where local authorities has the power to issue directives.

Acting against quarantine measures and the legal penalties involved can be found under Section 75 of the IPA. Pursuant to this provision, a person found violating quarantine measures can face a fine or a prison sentence. The prison sentence concerned can be up to 2 years whereas the fine is dependent on the monthly income of the person. Any person who is found to have intentionally broken the quarantine order and spread the virus can face up to a five-year prison sentence under Section 75 of the IPA. As seen, the IPA imposes much heavier penalties than both the TPC and the GHL.

**F. CHINA**

Despite great achievements in controlling infectious diseases and improving the public's health, China has encountered greater difficulties than ever in the last two decades due to the negative effects of aging of the population and the burdens of diseases, urbanization, industrialization, and globalization.[76] The novel coronavirus (2019-nCoV) has indicated once again how vital to prevent infectious diseases from spreading.

In China, The Law of the People's Republic of China on the Prevention and Treatment of Infectious Diseases (hereinafter referred to as the PTID)[77] is specifically formulated to prevent the occurrence, infection, and spread of infectious diseases. Pursuant to Article 3 of the PTID, infectious diseases are classified by the central competent authority according to degrees of risks and hazards such as case fatality rate, incidence rate, and transmission speed.[78]

Not including the definition of quarantine and enumerating contagious diseases, the PTID shows similar characteristics to the GHL. However, the PTID categorizes these diseases in terms of degrees of risks and hazards and takes this classification into account when determining the penalty, as will be shown.

The health administration departments of governments supervise the work of preventing and treating contagious diseases. Anti-epidemic agencies will undertake the obsercing and control of infectious diseases within their responsibilities.[79] Governments conduct health education on the prevention of

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[76] Lee Liming, "*The Current State of Public Health in China*" Annual Review of Public Health, Volume: 25, Year: 2004, p. 327.

[77] The Law of the People's Republic of China on the Prevention and Treatment of Infectious Diseases, 1989, http://english.mofcom.gov.cn/article/lawsdata/chineselaw/200211/20021100050619.shtml (accessed 17.04.2020)

[78] On 20 January 2020, China declared the novel coronavirus (2019-nCoV) a second-class infectious disease but has introduced management measures for a first-class infectious disease.

[79] Article 5 of the PTID.

contagious diseases and organize people for the elimination of the hazards of rodents and vector insects as well as other animals that transmit infectious diseases or suffer from them.[80] Local governments found or reconstruct public health facilities in a planned way.[81] Medical care and health institutions at various levels and of different types will set up preventive health organizations or assign personnel to undertake the prevention and control of infectious diseases and the management of the epidemic situation in their respective units or in the communities for which they are responsible. Municipalities, municipal districts, and counties will have hospitals for communicable diseases or clinics and wards for infectious diseases in designated hospitals.[82]

Competent authorities, whose duties and responsibilities are determined by the Law, in a general manner, conduct various investigations and implement effective preventive measures to control the occurrence of communicable diseases; when there are outbreaks or epidemics of communicable diseases, control them promptly to prevent further transmission.[83]

As seen, the distribution of powers has been made between local and central authorities in China in order to protect public health and prevent the spread of infectious disease, which is similar to the practice in Turkey. Likewise, the medical care and health personnel and anti-epidemic personnel who are competent for implementing quarantine measures are similar to health officers and health officials mentioned in the GHL.

The public must cooperate and accept the inspections, treatment, immunization, or other disease control and quarantine measures conducted by the competent authorities, when communicable diseases occur or are expected to occur.[84] Medical care and health personnel or anti-epidemic personel will immediately proceed with laboratory testing, diagnosis and investigating sources of communicable diseases or take other necessary measures, upon receipt of report or notification of communicable diseases or suspected communicable diseases, and report to the central competent authority. Patients or suspected patients with communicable diseases and relevant personnel cannot refuse, evade or obstruct the laboratory testing, diagnosis, investigation and management.[85]

When medical care and health institutions and anti-epidemic agencies find infectious diseases, they will immediately take the following measures:

80 Article 9 of the PTID.
81 Article 10 of the PTID.
82 Article 11 of the PTID.
83 Article 21 of the PTID.
84 Article 24 of the PTID.
85 Article 22 of the PTID.

1- Patients and pathogen carriers of A Class infectious diseases and patients of AIDS and of pulmonary anthrax as a type of anthrax among B Class infectious diseases shall be isolated for treatment. The period of isolation shall be determined according to the results of medical examination. For those who refuse treatment in isolation or break away from treatment in isolation before the expiration of the isolation period, the public security department may assist medical care institutions in taking measures to enforce the treatment in isolation;

2- For patients of B Class infectious diseases other than AIDS and pulmonary anthrax as a type of anthrax and patients of C Class infectious diseases, necessary treatment and control measures shall be taken according to the patients' conditions;

3- Suspected patients of A Class infectious diseases shall be kept under medical observation in designated places until a definite diagnosis is made; and

4- Necessary sanitary disposal and preventive measures shall be applied to places and objects contaminated by patients, pathogen carriers and suspected patients of infectious diseases and persons in close contact with them.[86]

The local government promptly organize people to control them and prevent transmission in the event of an emergence or a spread of infectious diseases; when necessary, it can take the following emergency measures, subject to reporting to and the decision by the local government at the next higher level:

1- restricting or suspending fairs, assemblies, cinema shows, theatrical performances and other types of mass congregation;

2- suspension of work, business and school classes;

3- provisional requisition of houses and means of transport; and

4- closing public drinking water sources contaminated with the pathogen of infectious diseases.[87]

In violation of the provisions of this Law, any unit or individual who commits any of the following acts will be ordered to rectify it or may be fined by the health administration department of a government at or above the county level; when there is a risk of causing an epidemic of infectious disease, the health administration department shall report to the government at the same level for the adoption of compulsory measures:

1- failure on the part of a water supply unit to conform to the hygienic standards for drinking water set by the state;

[86] Article 24 of the PTID.
[87] Article 25 of the PTID.

2- refusal to give disinfection treatment, according to the sanitary requirements proposed by a health and anti-epidemic agency, to sewage, wastes and faeces contaminated with the pathogen of infectious diseases;

3- approving or conniving at the taking of jobs by patients of infectious diseases, pathogen carriers or suspected patients of infectious diseases which they are prohibited from doing by the health administration department under the State Council because of the likelihood of causing a spread of infectious diseases; and

4- refusal to execute other preventive and control measures proposed by the health and anti-epidemic agencies according to this Law.[88]

According to Article 36 of the PTID, any party who refuses to accept a decision on fine may, within 15 days of receiving the notice on the punishment decision, apply to the health administration department at the next higher level for reconsideration; any party who refuses to accept the reconsideration decision may, within 15 days of receiving the notice on the reconsideration decision, bring a lawsuit before a court of law. Any party may also, within 15 days of receiving the notice on the punishment decision, directly bring a lawsuit before a court. If a party neither applies for reconsideration nor brings a lawsuit before a court of law nor carries out the punishment decision within the prescribed time, the health administration department that has made the decision on punishment may apply to a court for compulsory execution.

As mentioned, except for classifying the infectious diseases according to degrees of risks and hazards, and taking this classification into account when determining the penalties, the PTID and the GHL are similar in terms of the measures taken to prevent the spread of infectious diseases and the authorities who are competent in this regard.

If a person commits one of the acts specified in Article 35 of this Law and as a result causes the spread or a great risk of the spread of an A Class infectious disease, his criminal responsibility shall be investigated by applying mutatis mutandis the provisions of Article 178 of the Criminal Law of the People's Republic of China.[89]

Pursuant to Article 38, any person engaged in the experimentation, storage, carrying or transportation of bacterial strains and virus strains of infectious diseases who, in violation of the relevant provisions of the health administration department under the State Council, causes a spread of the bacterial strains or virus strains of an infectious disease, with severe consequences, shall be prosecuted in accordance with Article 115 of the Criminal Law; he shall be given an administrative sanction if the circumstances are not so serious.

88 Article 35 of the PTID.
89 Article 37 of the PTID.

Any person engaged in the medical care and health work, epidemic prevention, surveillance and control related to infectious diseases or any relevant responsible person of the government who causes the spread or epidemic of an infectious disease due to his dereliction of duty shall be given an administrative sanction; if the circumstances are serious enough to constitute a crime, he shall be prosecuted in accordance with Article 187 of the Criminal Law.[90]

As seen, referring to the criminal law regarding some actions in PTID is similar to Article 284 of the GHL. However, these references are made according to actions that are clearly stated and considered as serious, in comparison with the GHL. Only including the opposition to authorized officers, the GHL causes uncertainty, as will be explained in the conclusion. Another difference between the legislations of two countries is due to the definition of crime. In order to punish the offender in accordance with the PTID, only failure to comply with the quarantine measures is not sufficient, the offender must also cause the spread or great risk of the spread of certain infectious diseases as a result. Again, the seriousness of actions is pivotal as to whether the penalty must be determined by the PTID or the Criminal Law, and whether the penalty must be a fine or imprisonment.

## III. PROTECTED LEGAL VALUE

The legal value protected by the offence of acting contrary to measures regarding contagious diseases is the protection of public health.[91] In the article, contravention of the measures, taken by the competent authorities, with regard to putting someone who is infected with one of the contagious diseases or died because of these diseases in quarantine, is defined as an offence. Thereby, it is aimed to protect public health.

The reasoning of Article 195 of the TPC clearly emphasized this matter.

When examined the sections which the offence is regulated in, it is plausible to suppose that both the TPC and the TPC numbered 765 protect different legal values in terms of this offence. In this sense, since the offence is regulated among the offences against the public administration in the Third Book of the TPC numbered 765, it can be said that this offence is for the functioning of the public administration; therefore the legal value protected by this offence is the

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90 Article 39 of the PTID.

91 Hafızoğulları Zeki/Özen Muharrem, "*Türk Ceza Hukuku,* Özel *Hükümler, Topluma Karşı Suçlar*" US-A, 3rd Edition, Ankara 2017, p. 128; Çakmut Özlem Yenerer, "*Bulaşıcı Hastalıklara İlişkin Tedbirlere Aykırı Davranma Suçu*", Prof. Dr. Feridun Yenisey'e Armağan, Beta, Volume: 1, İstanbul 2014, p. 545; Yaşar Osman/Gökcan Hasan Tahsin/ Artuç Mustafa, *"Yorumlu – Uygulamalı Türk Ceza Kanunu",* Cilt IV, Adalet, Ankara 2010, p. 5472.

right to benefit from public service in the TPC numbered 765.[92]

On the other hand, it is accepted that the legal benefit protected by this offence is the health of individuals, as the offence is regulated among the offences against the public health in the Third Chapter of the TPC. Therefore, it is claimed that the offence aims to prevent both possible harm and dangers to the public health and the spread of infectious diseases because the offender endangers the health of all individuals who are both inside and outside the quarantine zone, by not complying with the quarantine measures regarding infectious diseases.[93]

## IV. ELEMENTS OF THE OFFENCE

### A. Material Elements

#### 1. Offender

It is because acting contrary to measures regarding contagious diseases is not a special offence that can only be committed by people with certain characteristics, anyone may commit this offence.[94] Article 195 of the TPC emphasizes this by including the phrase "*any person who contrevenes the measures*". In this regard, any person who fails to comply with quarantine measures, imposed by the authorities due to there being a person infected with a contagious disease or having died from such, would be the offender.

Acting contrary to measures regarding contagious diseases can also be committed by public officers, since it is possible for public officers to not comply with the quarantine measures imposed by the competent authorities during their duty. If a public officer uses a vehicle, or material, which he holds as a result of his duty, during the commission of this offence, however, the penalty to be imposed shall be increased by one-third pursuant to Article 266 of the TPC. According to this Article titled "Use of Public Vehicles or Materials in Public Service during the Commission of an Offence";

Provided that a constituent element of an offence does not include a reference to a public officer, then where a public officer uses a vehicle, or material, which he holds as a result of his duty, during the commission of an offence, the penalty to be imposed shall be increased by one third.

It is not required for the offender to be the person to whom the measures related to quarantine are directed or to be the subject of these measures, or to

92 Kangal, p. 434.
93 Ibid.
94 Kangal, p. 436; Hafızoğulları/Özen, p. 128; Çakmut, p. 546.

live or stay in the quarantine zone.[95]

Only natural persons can be the offender of acting contrary to measures regarding contagious diseases, since "*Penalties shall not be imposed on legal entities.*" pursuant to the first sentence of Article 20(2) of the TPC. Therefore, legal entities cannot be the offender of this offence.

It may be supposed that security measures can be applied to legal entities, where this offence is committed for the benefit of a legal entity through the participation of the organs or representatives of the legal entity, in accordance with the last sentence of Article 20(2) of the TPC which provides "*Security measures prescribed by law to be applied to such in respect of a criminal offence shall be reserved.*" However, this view is unstable due to Article 60(4) of the TPC, stating that "*The provisions of this article shall only apply where specifically stated in the law*", since there is no specific provision regarding the implementation of security measures in Article 195.

**2. Victim**

As the protected legal value by the offence of acting contrary to measures regarding the contagious diseases, the victim of this offence is all individuals who are part of the society.[96] There is no specific victim of this offence, so the public administration or officers who have imposed the quarantine measures cannot be considered as the victim. Despite the naysayers[97], this view is flawed when considering the legal value protected by the offence. The fact that the public administration in question or the competent authorities have the authority to impose measures does not mean that they are the victim. In this respect, the public administration concerned or the competent authorities do not have the right to intervene in the public claim and to appeal the court decision.

**3. Material Subject**

The material subject of the offence is the quarantine measures, imposed by the authorities due to there being a person infected with a contagious disease or having died from such.[98] Considering the material subject of the offence, the concepts of "infectious diseases", "measures", "quarantine" and "competent authorities" come into prominence. Therefore, it is useful to touch on these concepts related to the offence first for better understanding.

95 Kangal, p. 436-437.
96 Kangal, p. 437; Çakmut, p. 546.
97 Hafızoğulları/Özen, p. 128.
98 Kangal, p. 437.

**a. Contagious Diseases**

According to the World Health Organization, contagious/infectious/communicable diseases are caused by pathogenic microorganisms, such as bacteria, viruses, parasites or fungi; the diseases can be spread, directly or indirectly, from one person to another.[99]

Both of the TPCs do not include a definition of contagious disease. While Article 263 of TPC numbered 765 includes the expression "cholera and other infectious diseases", Article 195 of TPC preferred to use a general concept as "contagious diseases" including cholera.

Even though there is no definition of the concept of contagious disease in Article 57 of the GHL, diseases like cholera, plague (in form of bubon or pneumonia), prulente meningitis, camp fever (fever thyroid), paratyphoid fever or any kind of food poisoning, variola, diphtheria (croup), infectious brain fever, sleeping sickness (infectious encephalitis), dysentery (bacillus and amoebic), puerperal fever, ruam, scarlet fever, anthrax, paraphilia, measles, leprosy, relapsfever and brucellois were regarded as contagious diseases.

**b. Measures**

The measures to be imposed by the competent authorities, constituting the material subject of the offence must be related to quarantine. Although the measures to be imposed within this scope are not specified in the TPC, it can be found some explanations in the GHL.

According to Article 65 of the GHL, upon receipt of report or notification of the occurrence of contagious or suspected contagious diseases or death from contagious or suspected contagious diseases, government doctors, if not municipal doctors are reqired to investigate whether such diseases exist, if so what the reasons are and to notify relevant authorities, and all government forces are obliged to assist such doctors.

Furthermore, the following Article provides that such an investigation can be made when the government authorities suspect the occurrence of contagious diseases even they are not notified. Within this scope, health officers who investigate contagious diseases proceed with testing, diagnosis and investigating and management in the areas they deemed necessary.[100]

In order to facilitate this examination, health officers who investigate contagious diseases mentioned in Article 57, are entitled to visit the patient, examine both the patient and other residents, and ask questions about their medical conditions. Patients or suspected patients with contagious diseases,

[99] World Health Organization, Health Topics, https://www.who.int/topics/infectious_diseases/en/ (accessed 14.04.2020).

[100] Article 66 of the GHL.

who refuse, evade or obstruct the testing, diagnosis, investigation and management will be punished according to the GHL.[101]

The measures must be taken when one of the contagious diseases designated in Article 57 occurs or is suspected to occur are numbered in Article 72 of the GHL. According to Article, these measures are;

1- Detention and monitoring of those who are ill or suspected of being ill and who are notified to be contagious in their homes or other suitable establishments,

2- Vaccination or application of serum,

3- Disinfection or decontamination,

4- Destruction of animals spreading infectious diseases

5- Medical examination of travelers and disinfection their possessions,

6- Prohibition of the consumption of foods which causes to spread of diseases

7- Cordoning off or evacuation of places where one of the infectious diseases occurs until the danger passes.

Finally, it will be permissible to isolate the patients with contagious disease except for cholera, plague, and ruam in their homes, however, in this case, it must be accepted the existence of the conditions ensuring that the isolation is efficient by the relevant health officers. In this case, patients will be prohibited from leaving their homes and the house in which patients remain will be marked. It is also stated that cholera, plague and ruam patients, those who infected with contagious diseases and cannot be isolated in their residence, and those who are likely to cause the spread of cholera and plague can be subjected to compulsory isolation.[102]

**c. Quarantine**

Quarantine is one of the oldest and most effective tools for controlling infectious disease outbreaks. While the first quarantine practices date back to the seventh century, this public health practice was used widely in fourteenth century Italy to control the spread of bubonic and pneumonic plague, when ships arriving at the Venice port from plague-infected ports had to anchor and wait for 40 days before disembarking their surviving passengers.[103] In

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101 Article 67 of the GHL.

102 Article 73 of the GHL.

103 Kırılmış İlknur Tatar/Yakıncı Cengiz, "*Sağlıkla İlgili Bazı Kavramların Öyküleri*", Türk Dili, Language and Literature Review, Volume: CXVI, Issue: 807, March 2019, p. 73-74; Cetron Martin/Maloney Susan/Koppaka Ram/Simone Patricia, "*Isolation and Quarantine: Containment Strategies for Sars 2003*", https://www.ncbi.nlm.nih.gov/books/NBK92450/ (accessed 15.04.2020).

the Ottoman period, the term "*usul-ı tahaffuz*" was used for the concept of quarantine, while the terms "*karantinahane*" and "*tahaffuzhane*" were used for the quarantine sites.[104]

The word "quarantine" whose etymological origin comes from the Italian "*quarantina*" amounts to "forty days".[105] According to Turkish Language Association Dictionary, the term "quarantine" is defined as "*a health practice in form of closure of entries and exits by keeping a certain area or place under control in order to prevent the spread of an infectious disease*" and "*certain places in hospitals where hospitalized patients are registered and admitted*".[106]

Quarantine means the movement restriction of persons who are presumed to have been exposed to a contagious disease but are not ill, either because they did not become infected or because they are still in the incubation period. Quarantine usually takes place in the home and may be applied at the individual level or to a group or community of exposed persons. It may be voluntary or mandatory. During quarantine, all individuals must be monitored for the occurrence of any symptoms. If such symptoms occur, they must be immediately isolated in a designated center familiar with treating severe respiratory illness. Quarantining is most successful in settings where detection of cases is prompt; contacts can be listed and traced within a short time frame with prompt issuance of quarantine with voluntary compliance to this issuance.[107]

Article 195 of the TPC requires that the quarantine measures must be taken due to there being a person infected with a contagious disease or having died from such. In this regard, the detection of an animal or an object producing or carrying an infectious disease is not sufficient for the existence of the offence.[108]

**d. Competent Authorities**

There is no explicit provision regarding who is the competent authority to impose quarantine measures, both in the reasoning of Article 195 of the TPC and in the GHL. In this sense, the quarantine decision must be taken by the local authority within the scope of general administrative powers. Hence,

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104 Ayar Mesut/ Kılıç Yunus, "*Osmanlıda Vebanın Sona Erişine Dair Bir Değerlendirme*", Türk Dünyası *İncelemeleri* Dergisi/Journal of Turkish World Studies, Volume: 17, Issue: 2, Winter 2017, p. 170.

105 https://sozluk.gov.tr/ (accessed 15.04.2020). Forty days provided ample time for the incubation time to be completed so that yet asymptomatic cases became symptomatic and could therefore be identified.

106 Ibid.

107 Cetron/Maloney/Koppaka/Simone, https://www.ncbi.nlm.nih.gov/books/NBK92450/ (accessed 15.04.2020).

108 Kangal, p. 438.

quarantine decisions can be taken by governors in provinces and by district governors in districts.

It is stated by some authors that the competent authorities mentioned in Article 195 of the TPC are health officers or health officials mentioned in Article 69 of the GHL.[109] The concept of health officers is defined in Article 303 of the GHL as

> doctors who are entrusted with State affairs, civic actions and works of special provincial administrations, and lowly enlisted health officers who are in company with doctors regarding the issues allowed and deemed necessary by the Ministry of Health and Social Assistance.

While acknowledging that not complying with the measures implemented by these officers will constitute the offence of acting contrary to measures regarding contagious diseases, however, we have the opinion that the authorities who are competent to impose quarantine measures and officers who are responsible for implementing these decisions must be distinguished.

Returning to the material subject of the offence after these explanations, not complying with the measures imposed by authorities is sufficient for the existence of the offence. It is not required to endanger the health of others or infect the disease as a result of the action, in this regard.[110] In other words, there are no objective conditions of criminality in terms of this offence. Therefore, acting contrary to measures regarding contagious diseases is an abstract endangerment offence. Even though the lawmaker considers the typical act as dangerous in terms of the material subject of the offence, there is no clarity as to whether the action must reach a certain weight or intensity, or the offender must insist on not complying with quarantine measures.

Not complying with measures imposed by authorities does not constitute an offence per se, if the quarantine decision is not taken, despite the entity of a person infected with a contagious disease or having died from such. The Court of Cassation also emphasizes this in its decision made in the period when the TPC numbered 765 was in force.[111]

Likewise, if the quarantine decision is taken even though there is not a person infected with a contagious disease or having died from such, the measures imposed by authorities do not constitute an offence.[112] Therefore, quarantine decisions taken within the frame of Veterinary Services, Plant

[109] Çakmut, p. 547.
[110] Hafızoğulları/Özen, p. 128.
[111] The Second Criminal Chamber of the Court of Cassation, 05.04.1949 – 3469/2499.
[112] Hafızoğulları/Özen, p. 128; Yaşar/Gökcan/Artuç, p. 5474.

Health, Food and Fodder Law[113], for instance, do not fall under the material subject of the offence.[114]

Article 284 of the GHL expands the material subject of the offence. According to the aforementioned provision, "*Those who oppose officials who are competent to conduct investigations regarding contagious diseases, as mentioned in Articles 66 and 67, are punished by Article 195 of the TPC.*" Articles 66 and 67 of the GHL authorize health officials to enter a place where they are reported to have an infectious disease, to examine the patient and other persons at the same place. Thus, the material subject of the offence is the measures taken by the competent authorities to quarantine a place due to infectious diseases, as well as any measure taken and implemented within the scope of the quarantine.[115]

**4. Conduct**

The conduct that constitutes the material element of the offence is the contravention of quarantine measures, imposed by the authorities due to there being a person infected with a contagious disease or having died from such.[116] It is because Article 195 of the TPC does not require a result, including concrete endangerment and damage; this offence is a conduct offence.[117] Besides, since Article 195 of the TPC does not limit and specify conducts which amount to the failure to comply with measures, imposed by the authorities, this offence is an independent conduct offence.[118] Not complying with measures which are imposed by the authorities, by the offender in any way is sufficient for the existence of the offence. In this sense, it can be supposed that the legislator regards only the act of violation of quarantine measures as dangerous and hazardous for the society.[119]

The conduct that constitutes the material element of the offence is determined as "*defying the orders imposed or preventing the works done by the authorities through force*" in Article 263 of the TPC numbered 765. Therefore, defying the orders imposed or preventing the works done by the authorities is not sufficient for the existence of the offence per se, the offender must use force as well when defying the orders in the period of the TPC numbered 765.[120] The Court

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113 Veterinary Services, Plant Health, Food and Fodder Law, Law Number: 5996, Ratification: 11.06.2010, Issue: 13.06.2010-27610, https://www.mevzuat.gov.tr/MevzuatMetin/1.5.5996.pdf (accessed 17.04.2020).

114 Kangal, p. 438.

115 Kangal, p. 439; Çakmut, p. 548.

116 Kangal, p. 440; Hafızoğulları/Özen, p. 128; Çakmut, p. 546; Yaşar/Gökcan/Artuç, p. 5473.

117 Kangal, p. 440-441; Hafızoğulları/Özen, p. 128.

118 Kangal, p. 440; Hafızoğulları/Özen, p. 128.

119 Hafızoğulları/Özen, p. 128.

120 Öztürk Nejat, "*Türk Ceza Kanunu* Şerhi *ve Tatbikatı*" Volume: 1, Balkanoğlu, Ankara 1966,

of Cassation underlined this view, stating that declining the invitation made by the health officers for the purpose of vaccination does not constitute the offence regulated in Article 263 of the TPC numbered 765 per se.[121]

Article 195 of the TPC, however, indicates the material element of the offence as "*contravention of the measures imposed by the authorities*", which is more comprehensive. In this sense, failure to comply with measures, imposed by the authorities, by word of mouth is also found sufficient for the existence of the offence in Article 195 of the TPC.[122] On the other hand, using force or threats against public officers who impose the quarantine measures in order to prevent them from performing their duty constitutes the offence of prevention of public duty" which is regulated as

> Any person who uses force or threats against a public officer in order to prevent him from performing his duty shall be sentenced to a penalty of imprisonment for a term of six months to three years.

in Article 265 of the TPC.[123]

Failure to comply with the quarantine measures taken or implemented by the competent authorities may be committed by both an executive act and omission. In this sense, leaving a quarantine facility without the authorization of officers and defying the orders such as submission of medical examinations and treatment through force are regarded as executive acts while the refusal of providing information or answering questions about the health condition or other circumstances and not attendance of training or advice sessions related to reducing the risk of infection are considered as examples of omission. When committed by a negligent act, however, the offence will show the characteristic of a continuing offence.[124]

The conduct must be capable of violating quarantine measures taken or implemented by the competent authorities. On the other hand, violating quarantine measures is not necessary for the existence of the offence of acting contrary to measures regarding contagious diseases.

**B. Moral Element**

The offence of acting contrary to measures regarding contagious diseases can only be committed with intention. The object and motives of the offender

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p. 918; Gözübüyük Abdullah Pulat, "*Alman, Fransız, İsviçre ve İtaylan Ceza Kanunları ile Mukayeseli Türk Ceza Kanunu Açıklaması*", Volume: III, 4th Edition, Kazancı, İstanbul 1976, p.323

121 The Second Criminal Chamber of the Court of Cassation, 15.12.1948 – 12151/12408.

122 Kangal, p. 442; Çakmut, p. 548.

123 Çakmut, p. 548; Yaşar/Gökcan/Artuç, p. 5474.

124 Kangal, 441.

are not important for the existence of this offence. Commission of this offence with recklessness is not regulated by law.[125] Therefore, the offender must know the quarantine measures, imposed by the authorities due to there being a person infected with a contagious disease or having died from such, and act knowingly and willingly contrary to measures in question.[126] In order for the offender to know the quarantine measures taken or implemented by the competent authorities, they must be announced or declared.[127] However, there is no provision in the laws regarding how these announcements and declarations should be made. In practice, it is observed that these announcements and declarations are made through the general instructions of the Ministry of the Interior and governorates, and mass media. The offender is not considered to have acted intentionally in case of failure to comply with quarantine measures that are not submitted for people's information. In this sense, the offender who is not informed about quarantine measures and makes an inevitable mistake about whether his/her act was unjust or not, he/she will not be held criminally responsible.[128]

When forced to act contrary to measures regarding contagious diseases under duress or threat, the offender will not be held criminally responsible due to the lack of fault. Again, if the offender is used as a means of offence or benefits a reason for justification[129], he/she will be not acting in fault and thus he/she will not be held criminally responsible. In this sense, the reasons for setting aside or reducing criminal liability, such as carrying out provisions of a statute and orders from a superior, using a right and consent, and the unjust provocation will be applicable in terms of this offence.[130]

In order to talk about the unjust provocation in terms of acting contrary to measures regarding contagious diseases, the offender must commit the offence in a state of anger or severe distress caused by an unjust act.[131] In this respect, the quarantine measures imposed by the competent authorities in accordance with the law cannot be described as an unjust act. However, when the offender acts contrary to quarantine measures regarding contagious diseases in a state of anger or severe distress caused by the unjust and arbitrary acts of authorities while imposing the measures, the existence of the unjust act must be admitted.[132]

125 Kangal, 443; Çakmut, p. 548; Yaşar/Gökcan/Artuç, p. 5475.
126 Kangal, 443; Hafızoğulları/Özen, p. 129; Yaşar/Gökcan/Artuç, p. 5475.
127 Çakmut, p. 549.
128 Hafızoğulları/Özen, p. 129.
129 Çakmut, p. 548.
130 Kangal, p. 443.
131 Article 29 of the TPC.
132 Kangal, 444.

**C. Illegality**

The offence of acting contrary to measures regarding contagious diseases does not have any significance with respect to the illegality element. As mentioned, the reasons for setting aside criminal liability are applicable in terms of this offence. In this regard, the conduct may be in accordance with the law when the offender carries out the provisions of the law or an order given by an authorized body as part of his duty.[133] For instance, the conduct of health officers or other personnel who are authorized by law to enter the quarantine zone will be lawful. On the other hand, when officers act contrary to the aim of quarantine measures, this conduct will be unlawful even if they are authorized by law to enter the quarantine zone. Just to clarify, if debt enforcement officers enter the debtor's house which is designated as quarantine zone to impose a lien, their conduct will be unlawful, as the protection of public health outweighs the benefit arising from performing of the public service concerned.[134]

According to Article 25 of the TPC, titled "Legitimate Defence and the State of Necessity";

1.- No penalty shall be imposed upon an offender in respect of acts which were necessary to repel an unjust assault which is directed, carried out, certain to be carried out or to be repeated against a right to which he, or another, was entitled, provided such acts were proportionate to the assault, taking into account the situation and circumstances prevailing at the time.

2.- (No penalty shall be imposed upon an offender in respect of acts which were committed out of necessity, in order to protect against a serious and certain danger (which he has not knowingly caused) which was directed at a right to which he, or another, was entitled and where there were no other means of protection, provided that the means used were proportionate to the gravity and subject of the danger.

In principle, the legitimate defence is not applicable in terms of this offence, since the existence of an unjust assault is necessary in order for the legitimate defence to be in question.[135] Having been in accordance with the law, the quarantine measures imposed by the competent authorities within the scope of public office cannot be considered as an unjust assault. However, the quarantine measures imposed by the competent authorities who exceed the limits of their duties with the measures they have taken or implemented, or take an action that does not fall within the scope of their duties, or act arbitrarily will be regarded as an unjust assault and acting against such measures will be included in the scope of Article 25(1) of the TPC. For example, if a physician tries a medicine

133 Hafızoğulları/Özen, p. 128.
134 Kangal, 444.
135 Kangal, p. 445; Hafızoğulları/Özen, p. 129.

with dangerous side effects on the offender for the purpose of medical therapy, the opposition of these measures will be lawful in the framework of legitimate defence.[136]

The application of state of necessity is possible in respect of this offence which was committed out of necessity, in order to protect against a serious and certain danger.[137] However, the offence of acting contrary to measures regarding contagious diseases must be committed in order to protect a superior legal interest. For instance, leaving the quarantine zone to flee the fire will be lawful by virtue of the state of necessity.[138] On the other hand, the provisions of "use of right" and "consent" which are regulated in Article 26 of the TPC are not applicable in terms of this offence.

## V. SPECIAL APPEARANCE FORMS

### A. Attempt

Acting contrary to measures regarding contagious diseases is a conduct offence and no harm or consequence needs to be established for the existence of this offence. Since the danger of damage will simultaneously occur by conduct of the act, as soon as the offender acts contrary to quarantine measures the offence is completed. In this sense, some academics believe that it is not possible to attempt to commit this offence, as the acts of committing this offence are not capable of being separated into sections.[139] However, this statement is not acceptable under all circumstances. According to Article 35 of the TPC, when the offender begins to directly act, with the appropriate means and with the intention of acting contrary to quarantine measures but has been unable to complete the offence due to circumstances beyond his control, he shall be culpable for the attempt.[140] Considering this explanation of attempt, for example, when the offender is stopped by the officers just before entering the quarantine zone, the offence must be considered to remain in the attempt stage, as the act of committing this offence in this example can be separated into sections.[141]

### B. Jointly Committed Offences

The offence of acting contrary to measures regarding contagious diseases

136 Kangal, p. 445.
137 Hafızoğulları/Özen, p. 129.
138 Kangal, p. 445.
139 Hafızoğulları/Özen, p. 129.
140 Article 35 of the TPC.
141 Kangal, p. 442; Çakmut, p. 550; Yaşar/Gökcan/Artuç, p. 5475; Artuk, M. Emin/Gökcen Ahmet, "*Ceza Hukuku Genel Hükümler*", Adalet, 13rd Edition, Ankara 2019, p. 701.

can jointly be committed. In this case, general provisions on jointly committed offences will be applied.[142] According to Article 37(1) of the TPC, any person who jointly performs an act prescribed by law as an offence shall be culpable as the offender of that act. However, offenders must have the will of participation in the offence. Persons who do not participate in the act as offenders will be held accountable according to their contributions. A person who incites another to commit an offence shall be culpable for incitement,[143] while assists another with the commission of an offence shall remain culpable for assistance.[144] Pursuant to Article 39(2) of the TPC;

> A person remains culpable as an assistant if he:
>
> a) encourages the commission of an offence, or reinforces the decision to commit an offence, or promises that he will assist after the commission of an act.
>
> b) provides counsel as to how an offence is to be committed, or provides the means used for the commission of the offence.
>
> c) facilitates the execution of an offence by providing assistance before or after the commission of the offence.

For instance, a person who incites another to leave the quarantine zone will be culpable for incitement. Moreover, a person who gives scissors to the offender to cut the barrier tape surrounding the quarantine zone will be punished as an assistant.

**C. Joinder**

It is possible to commit the offence of acting contrary to measures regarding contagious diseases as a successive offence[145]. In case the offender commits this offence, more than once, in the same quarantine area, at different times in the course of carrying out a decision to commit this offence, a single penalty will be given. However, the penalty to be imposed in respect of this offence will be increased according to Article 43 of the TPC.

In order to implement the provision of successive offence, more than one act, each constituting the same offence, is required. If legally there is a single action, there will be no successive offence. Therefore, if the offender counteracts the quarantine measures taken or applied by the authorities with successive acts, the penalty to be given will not be increased Article 43 of the TPC, since there is legally only a single action. For example, if the offender removes the quarantine signs immediately after entering the quarantine zone,

142 Çakmut, p. 551; Yaşar/Gökcan/Artuç, p. 5475.
143 Article 38 of the TPC.
144 Article 39 of the TPC.
145 Çakmut, p. 550; Yaşar/Gökcan/Artuç, p. 5475.

the provision of the successive offence will not be applied.[146]

The offender who infects a contagious disease to someone else by acting contrary to measures imposed by authorities will be culpable for the offence of intentional injury,[147] if he acts intentionally. If the offender acts recklessly, he will be culpable for the offence of reckless injury.[148] In this case, the offender will not be punished according to Article 195 of the TPC.

If the offender insults public officers who want to implement quarantine measures regarding contagious diseases and prevents the works done by the authorities in this way, his acts will also constitute the offence of insult.[149] However, pursuant to Article 44 of the TPC which provides that "*A person who commits more than one offence through a single act shall only be sentenced for the offence with the heaviest penalty*", the offender will only be sentenced for the offence of insult, including the heaviest penalty according to Article 125(3) of the TPC. Likewise, if the offender counteracts the measures taken or applied by the authorities, by damaging to property, by breaking guideboards for example, he commits both the offence of damaging to property and the offence of acting contrary to measures regarding contagious diseases. In this case, the offender will only be sentenced for the offence of damaging to property, including the heaviest penalty according to Article 151/152 of the TPC.

As mentioned, this offence can also be committed by public officers who do not comply with quarantine measures, during their duty. In this case, the offender will be sentenced for the offence of acting contrary to measures regarding contagious diseases, even though the offence of misuse of public duty, which is regulated in Article 257 of the TPC, includes the heaviest penalty. Pursuant to the provision concerned, for the existence of misuse of public duty, the conduct of the offender should not be defined elsewhere as a separate offence in law.

The act of failure to comply with the quarantine measures taken or applied by the competent authorities may also be included in the scope of Article 32 of the Law of Misdemeanors[150]. This article, titled "Acting contrary to orders";

1- A person who acts contrary to orders, given by competent authorities in accordance with the law due to procedural acts or, in order to protect public security, public order or public health will be fined one hundred Turkish Liras. This penalty is decided by the authority who has given the order.

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146 Kangal, p. 447.

147 Articles 86-87-88 of the TPC.

148 Article 89 of the TPC.

149 Kangal, p. 447.

150 Law of Misdemeanors, Law Number: 5326, Ratification: 30.03.2005, Issue: 31.03.2005-25772 (Mükerrer), https://www.mevzuat.gov.tr/MevzuatMetin/1.5.5326.pdf (accessed 17.04.2020).

2- This article can be implemented only where explicitly prescribed by the law concerned.

3- References made by other laws to article 526 of the Turkish Penal Code dated 1.3.1926 and numbered 765, are considered to be made to this law.

According to the article, acting contrary to general orders issued by the State in order to protect public health through unnamed regulatory acts requires administrative fine, where prescribed by the law. As seen, acting contrary to quarantine measures regarding contagious diseases constitutes both a misdemeanor and the offence regulated in Article 195 of the TPC.

For instance, in relation to trachoma patients Article 287 of the GHL and with regard to patients with syphilis Article 291 of the Law in question refer to Article 32 of the Law of Misdemeanors when the patients concerned refuse or evade medical examination or treatment deemed necessary by the authorized committees.

In such a case, the offender will only be sentenced for the offence of acting contrary to measures regarding contagious diseases due to Article 15(3) of the Law of Misdemeanors which provides that "*If conduct is defined as both an offence and a misdemeanour, it can only be sanctioned in respect of the offence.*"

According to Article 282 of the GHL, those who act contrary to measures, mentioned in Articles 72 and 73 of the Law in question, including detention, isolation and monitoring of those who are ill or suspected of being ill and who are notified to be contagious in their homes or other suitable establishments, vaccination or application of serum, disinfection or decontamination, destruction of animals spreading infectious diseases, medical examination of travelers and disinfection their possessions, prohibition of the consumption of foods which causes to spread of diseases, cordoning off or evacuation of places where infectious diseases occur if their conduct does not constitute a separate offence, will be fined 250 Turkish Liras up to 1000 Turkish Liras.

As seen, acting contrary to quarantine measures imposed by the competent authorities regarding contagious diseases may constitute both the offence which is regulated in Article 195 of the TPC and a misdemeanour which is penalised pursuant to Article 282 of the GHL. In this case, without application of Article 15 of the Law of Misdemeanors, the offender will only be sentenced according to Article 195 of the TPC due to the provision "*if their conduct does not constitute a separate offence*" regulated in Article 282 of the GHL.

## VI. SANCTION AND PROCEDURAL PROVISIONS

The sanction of the offence of acting contrary to measures regarding contagious diseases is imprisonment for a term of two months to one year. The

judge will determine the basic penalty, between the minimum and maximum limits of the offence as defined by law, by considering the factors, including the manner in which the offence was committed, the means used to commit it, the time and place where the offence was committed, the importance and value of the subject of the offence, the gravity of the danger, the degree of fault relating to the intent, and the object and motives of the offender pursuant to Article 61 of the TPC.

Since the penalty of imprisonment determined for this offence is the short-term penalty, the Court, after taking into account the characteristics of the offence and personality, social and economic situation of the offender and any remorse he expresses during the trial process, may substitute short-term imprisonment for alternative sanctions, such as judicial fine, compensation to the victim or public which returns or restores matters to their previous condition or which indemnifies such in respect of all damage caused, and publicly beneficial work for a minimum term of between half and two times the term of imprisonment, though only with the consent of the offender according to Article 50 of the TPC.

No matters of aggravation and mitigation are included in Article 195 of the TPC. However, if a public officer uses a vehicle, or material, which he holds as a result of his duty, during the commission of this offence, however, the penalty to be imposed shall be increased by one-third pursuant to Article 266 of the TPC.

The investigation and prosecution of this offence are not subject to the filing of a complaint by the victim. Criminal courts of first instance have competency in terms of this offence.

## CONCLUSION

Minimizing the transmission of contagious diseases is a core function of public health laws that may authorize the isolation of individuals and groups who may have been exposed to an infectious disease, as well as the closure of businesses and premises and the confiscation of property. The exercise of these powers must rely on public health considerations.

The GHL which aims to protect the society from infectious diseases cannot keep up with constantly changing conditions although it contains very detailed provisions regarding the protection of public health. In this sense, the provisions regarding "infectious diseases", "the measures to be taken" and "the competent authorities who are responsible for taking measures" should be updated. Without amendments to these concepts, the offence regulated in Article 195 of the TPC will remain ambiguous and this causes the violation of the principles "legality of crimes and punishment" and "legal certainty".

In this sense, contagious diseases listed in the GHL could be categorized in

terms of degrees of risks and hazards, and this classification could be taken into account when determining the penalty, as the PTID does.

Furthermore, a special recidivism arrangement can be made by imposing accordingly more severe fines for recurring violations of quarantine measures, as such in France, in order to provide deterrence.

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# FRENCH LAW AND WHISTLEBLOWERS

*Fransız Hukuku ve İhbarcı*

**Loïc LEVOYER***

*Research Article.*

**Summary**

The "Sapin II" law of 9 December 2016 on transparency, the fight against corruption and the modernisation of economic life has introduced a whistleblower status into French law. It provides for a comprehensive mechanism to bring reprehensible facts to the attention of the judiciary and, secondarily, public opinion. It provides a definition of a whistleblower and a framework for the procedure for reporting the alert. The Sapin II Law extends the protection mechanism to any natural person recognised as a whistleblower and broadens the scope of the protection granted. However, the law on whistleblowers gives too much discretion to employers and too little protection to whistleblowers. There are great limits to the protection granted and the use of the procedure. While the contributions of the Whistleblower Act are therefore important, the Act needs to be supplemented. This is the purpose of the bill tabled on 15 January 2020 to create a general inspectorate for whistleblower protection. It is also the purpose of the new competence granted to the Defender of Rights to better protect whistleblowers.

**Keywords** whistleblower - protection - status - good faith - anonymity - public opinion

**Özet**

Şeffaflık, yolsuzlukla mücadele ve ekonomik yaşamın modernizasyonu hakkındaki 9 Aralık 2016 tarihli "Sapin II" yasası, Fransız hukukuna ihbarcı (Muhbir-casus- bilgi uçuran) statüsünü getirmektedir. Yargının ve ikincil olarak kamuoyunun dikkatine cezalandırılabilir durumları (fiilleri) getirmek için kapsamlı bir mekanizma sağlamaktadır. Bu yasa, ihbarcının tanımı ve ihbar prosedürü için bir çerçeve getirmektedir. Sapin II Yasası, koruma mekanizmasını ihbarcı olarak tanınan herhangi bir gerçek kişiye genişletip, sağlanan korumanın kapsamını genişletmektedir. Bununla birlikte, bu kanun, işverenlere çok fazla takdir yetkisi verip, ihbarcılara çok az koruma sağlamaktadır. Ancak bu korumanın ve prosedürün kullanımının sınırlı olduğu söylenebilir. Bu nedenle, ihbarcılara ilişkin kanunun katkıları önemli olmakla birlikte, bu kanunun tamamlanması gerekir. Bu amaçla, 15 Ocak 2020 tarihli tasarı, ihbarcıların korunması için genel bir müfettişlik oluşturmaktır. Ayrıca, ihbarcıların haklarını daha iyi korumak için Hak Savunucularına yeni yetkiler verilmiştir.

**Anahtar Kelimeler** İhbarcı (muhbir) - Koruma - Durum - İyi niyet - Anonimlik - Kamuoyu

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## INTRODUCTION

The "Sapin II" law of 9 December 2016 on transparency, the fight against corruption and the modernisation of economic life[1] was adopted by the National Assembly on Tuesday 8 November 2016[2]. It provides for numerous innovations, including the introduction of a definition of whistleblower in French law. First of all, it provides a definition of the term "whistleblower".

First, it provides a definition of a whistleblower. This new statute applies to legal persons under public or private law with at least 50 employees[3]. In order to guarantee the anonymity and security of whistleblowers, the law imposes appropriate procedures for the collection of alerts, which must guarantee strict confidentiality of the identity of the authors of the alert, the persons targeted by it and the information collected.

The "Sapin II" law of 9 December 2016 provides a second framework for the alert notification procedure[4]. The alert must be brought to the attention of the direct or indirect hierarchical superior, the employer or a referent designated by the latter. If the person to whom the alert is addressed fails to take action within a reasonable period of time, it may be sent to the judicial authority, the administrative authority or the professional bodies. As a last resort, in the absence of processing by one of these bodies within three months, the alert may be made public.

The law of 9 December 2016 on whistleblowers has therefore provided for a comprehensive mechanism to bring reprehensible acts to the attention of the courts and, secondarily, to the public[5]. This is an important step forward for the rule of law, the guarantee of individual freedoms and respect for the human person. The contributions of the "Sapin II" law of 9 December 2016 are real. However, this law does not provide all the solutions to this new way of exercising democracy. Several limits can be exposed.

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1 M.-C. de Montecler, *Loi Sapin 2 : un contrôle exigeant du Conseil constitutionnel*, Dalloz actualité, 13 déc. 2016.

2 L. n° 2016-1691, 9 déc. 2016 : JO, 10 déc. 2016 ; A circular outlines the provisions of thie law, as well as the law's penal policy guidelines : Circ. CRIM/2018-01/G3, 31 janv. 2018, NOR : JUSD1802971C.

3 M.-C. de Montecler, *Le volet droit public du projet de loi Sapin II*, Dalloz actualité, 10 nov. 2016 ; A. Laurent, L'agent public lanceur d'alerte : de la déontologie à la transparence ?, Revue de Droit Public, 1er juill. 2016.

4 O. Hielle, *Les principales mesures du projet de loi Sapin II*, Dalloz actualité, 16 juin 2016.

5 F. Chaltiel, *A la recherche d'un statut pour les lanceurs d'alerte*, Petites affiches n° 49, 9 mars 2017.

*Development*

## I. / THE CONTRIBUTIONS OF THE LAW ON WHISTLEBLOWERS

The Sapin II law of 9 December 2016 on "whistleblowers" extended the protection mechanism to any natural person recognised as a whistleblower and broadened the scope of the protection granted.

### A. / An extension of the protective device for any natural person recognized as a whistleblower

Recognition of the protective status of a whistleblower is granted to any natural person who meets several conditions.

*1) Conditionally granted protection for all natural persons*

The whistleblower system provides protection to any natural person who meets the criteria and follows the procedure laid down by law. Private sector employees, permanent or contractual public officials, but also users, relatives, friends, third parties of public or private structures may be concerned. The protection of military whistleblowers is also provided for by law, "no member of the armed forces may be punished or subjected to any direct or indirect discriminatory measure for having reported an alert"[6].

The European directive on the protection of persons who report violations of European Union law[7] also provides for the protection of a third party who helped or is linked to the whistleblower (colleagues, relatives, etc.)[8].

Prior to the 2016 law, protection was more limited.

Only employees or agents of social institutions and health professionals were protected. This protection measure was later extended to "employees of the family carer" because care for the elderly can be provided in different structures. However, this protection measure was only available to employees or agents who had testified. Trainees or persons undergoing training - and therefore not bound by an employment contract - were not protected. Candidates for recruitment, access to a traineeship or a period of training in a company were not also protected.

Prior to the 2016 law, health professionals were also protected. Article 226-14, paragraph 2, of the Criminal Code released health professionals from the obligation to maintain medical confidentiality in two cases: (a) when "the

6 C. défense, art. L. 4122-4.

7 C. Collin, *Lanceurs d'alerte : un niveau de protection supplémentaire au sein de l'Union européenne*, Dalloz actualité, 16 déc. 2019.

8 P. Januel, *Lanceurs d'alerte : les apports de la directive pour une meilleure protection*, Dalloz actualité, 20 mars 2019.

victim is a minor or a person who is unable to protect himself or herself because of age or physical or mental incapacity" or (b) when the health professional finds, in the exercise of his or her profession, physical or mental abuse or deprivation.

The Sapin II law of 2016 therefore retained the pre-existing protections. However, it extended the protection mechanism to any natural person as soon as he or she is recognised as a whistleblower[9].

*2) Protection subject to recognition of whistleblower status*

To be recognized as a whistleblower, three conditions must be met. The first condition is to "reveal or report", "disinterestedly and in good faith" facts. Personal knowledge of the facts is the second condition. The third condition is compliance with a tiered or graduated procedure[10].

The necessity of good faith is the first condition. It is an important condition. The whistle-blower is different from the informer. His approach must be one of good faith and good intentions. It must not be defamatory. It must not be vengeful towards an individual or group of individuals or against institutions. His approach must be in good faith[11], sincere and motivated by the general interest[12]. One may question the appropriateness of taking an interest in the motivations of the person who issued the alert, provided that the content of the alert is true. However, the condition of good faith remains a classic one. This condition applies regardless of the status of the person being granted protection[13]. Article L. 1661-1 of the Labour Code on witnesses of corruption, for example, takes up this notion as a condition for the benefit of the protection it grants. The same applies to Act No. 2008-496 of 27 May 2008 on various provisions for adapting to Community law in the area of combating discrimination[14]. This lack of bad faith in order to benefit from protection has also been applied in disputes arising from the dismissal of employees who had reported or testified about sexual[15] or moral harassment[16]. Generally speaking, case law requires

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9 M. Disant et D. Pollet-Panoussis, *Les lanceurs d'alerte, Quelle protection juridique ? Quelles limites ?*, LGDJ, juill. 2017.

10 Transparency International France, Guide pratique à l'usage du lanceur d'alerte, déc. 2017.

11 The European Union directive imposes the same condition of good faith on the whistleblower.

12 Ph. Graveleau, Variations sur le thème du lanceurs d'alerte, Gazette du Palais, 14 juin 2016.

13 S. Niquège, *La qualité de lanceur d'alerte peut être reconnue même en cas de divulgation publique directe*, AJFP, 11 sept. 2019.

14 L. n° 2008-496, 27 mai 2008 portant diverses dispositions d'adaptation au droit communautaire dans le domaine de la lutte contre les discriminations, JORF n°0123 du 28 mai 2008 p. 8801.

15 Soc. 22 févr. 2006, n° 03-43.369.

16 Soc. 10 mars 2009, n° 07-44.092, Bull. civ. V, n°66 ; D. 2009. 952, obs. L. Perrin ; RDT 2009. 376, obs. B. Lardy-Pélissier.

proof of bad faith in order to rule out the protective mechanism. In principle, good faith is presumed, and it is up to the person alleging bad faith to prove it.

On the civil side, bad faith causes the whistleblower to lose his legal protection. If the whistleblower has an intention to harm, he may be ordered to compensate the third parties concerned for the damage suffered.

In criminal law, bad faith in testimony is punishable by five years' imprisonment and a fine of 45,000 euros (art. 226-10 of the Criminal Code). Good faith must be accompanied by a "disinterested" act. This condition is specific to French law. It is not provided for in the European directive on the protection of persons reporting violations of European Union law.

The second condition for recognition of whistleblower status is personal knowledge of the facts. For health, health safety, the environment and more generally for corruption, conflicts of interest, misdemeanours and crimes, the employee must have had knowledge of the facts "in the performance of his duties". For discrimination and harassment, these specifications do not exist.

On the contrary, the Sapin II law sets as a condition that the whistleblower must have personal knowledge of the facts. The origin of the knowledge of the facts thus appears to be an indispensable condition for the recognition of whistleblower status.

The third and final condition for alert status is compliance with a tiered or graduated procedure. This procedure is defined in Article 8 of the Law of 9 December 2016. The professional who reports an alert must tell his direct or indirect hierarchical superior, his employer or the referent designated by the latter. The person to whom the alert has been reported must then check, "within a reasonable period of time", the admissibility of the alert. Legal persons governed by public and private law with at least 50 employees, State administrations, local and regional authorities must set up procedures for collecting alerts issued by members of their staff or external and occasional collaborators.

The time limit is not defined by law. When the person to whom the alert is not reactive, the whistle-blower must address his alert to the judicial authority, the administrative authority or the professional orders. If the judicial authority or the professional orders have not dealt with the alert within 3 months, the alert may be made public[17].

In the event of serious and imminent danger or where there is a risk of irreversible damage, the alert may be brought directly to the attention of the administrative or judicial authority or to the professional body and made public. If, from the second alert, the employee does not obtain any return within three

[17] J. Vayr, P. Lagesse, *Le lanceur d'alerte dans tous ses états*, 9 janv. 2019, Petites Affiches.

months, he may then himself make the alert public. Obstruction by a third party of a whistleblower is punishable by one year's imprisonment and a fine of 15,000 euros.

**B. / A broadening of the object of protection granted**

The "Sapin" law of December 2016 broadens the object of the protection granted to whistleblowers: firstly for the denunciations covered by the protection and secondly for the protection itself associated with the status of whistleblower.

*1) A broader consideration of the denunciations covered by the protection*

Before the Sapin II law, only crimes and misdemeanours could be subject to whistleblower protection. The texts punished the non-reporting of crimes or misdemeanours[18]. They imposed an obligation to speak without exemption for those who are bound by professional secrecy. These texts were intended to protect children, the elderly or more generally people unable to defend themselves alone against certain forms of abuse[19].

The Sapin II law of December 2016 extends this protection to the denunciation of a "serious and manifest violation" of a legal norm (law, regulation, international commitment...) and to "a serious threat or prejudice to the general interest". This extension of the denunciations covered by the Sapin law increases the preventive role played by whistleblowers. Only facts, information or documents, whatever their form or medium, covered by national defence secrecy, medical secrecy or the secrecy of relations between a lawyer and his client remain excluded from the alert system defined by the law.

*2) Broader protection associated with whistleblower status*

By his action, his posture and the nature of his revelations, the whistleblower potentially takes significant risks. This is why it is important to protect them. The Sapin II law has provided for a legal regime in this respect.

In criminal law, a person who violates a secret protected by law cannot be prosecuted when the disclosure is "necessary and proportionate to safeguard the interests involved", when it is made in compliance with the reporting procedures and when the person meets the definition of whistleblower[20]. Whistleblowers therefore benefit from real protection in criminal law. This mechanism is part of a framework where assistance for persons in danger[21] can already oblige to put an end to a situation affecting a person's physical integrity.

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18 Art. 434-1 et 434-3 C. pén.

19 M. Disant, *Les lanceurs d'alerte saisis par le droit*, Petites Affiches, 7 juin. 2018.

20 Art. 122-9 C. pén.

21 Art. 223-6 C. pén.

In addition to the criminal protection afforded to whistleblowers, there is also protection under labour law. Whistleblowers may not be sanctioned, dismissed or subjected to any direct or indirect discriminatory measure (in particular as regards remuneration, training, professional promotion, etc.)[22] in response to the alert they have made. In the event of dismissal, the judge may order the reinstatement of the employee concerned. Dismissal is not only unlawful, but compensation is due to the person concerned for the damage suffered. These provisions apply to all social and medico-social structures and to public officials. The nullity of these measures is supposed to protect whistleblowers against any attempt at intimidation by their employer. Article 226-14 of the Criminal Code also encourages those who report to the competent authorities. No disciplinary action may be taken against them. A professional in the field of social work who denounces unethical behaviour cannot be concerned by a slanderous denunciation[23], since this offence requires a will to harm in order to be characterized.

Respect for anonymity is obviously a prerequisite for the protection of whistleblowers. The procedures for collecting alerts must therefore guarantee the anonymity of the person issuing the alert and of the persons targeted by the alert. The confidentiality of the information collected must be ensured. Anonymity may be lifted only if several conditions are met.

## II. / THE LIMITS OF THE LAW ON WHISTLEBLOWERS FOR THE SOCIAL AND MEDICO-SOCIAL SECTOR

The whistleblower law gives too much discretion to employers and too little protection to whistleblowers.

### A. / Too much discretion left to employers

The tiering procedure provided for in the Sapin II law of 9 December 2016 is a major obstacle to the protection granted and the use of the procedure.

Prior referral to the establishment's management bodies is understandable. It can allow the employer to react quickly and in a proportionate manner.

However, in cases of institutional ill-treatment, the need to inform the management of the establishment in advance constitutes a risk of inaction and inaction[24].

The absence of a time limit within which the admissibility of the alert must

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22 Art. L. 1132-3-3 C. trav. ; art. L. 911-1-1 C. just. adm.

23 Art. 226-10 C. pén.

24 Rédaction Lextenso, *Les lanceurs d'alerte : quelle protection juridique ? Quelles limites ?*, Petites Affiches, 13 déc. 2017 ; Rédaction Lextenso, *Les lanceurs d'alerte : quelle protection juridique ? Quelles limites ?*, Petites Affiches, 10 avr. 2018.

be established ("within a reasonable period of time" says the law) is another limit to the recognition of the status of whistleblower. The obligation to alert employers in the first instance is a real difficulty. The procedure thus relies solely on the goodwill of management. In order to remedy this, the referral to the management should be coupled with that of the joint bodies of the company which could be empowered to report. This double referral would ensure that management can play its role, while giving greater assurance that the investigation is carried out within a reasonable time. It would provide the reporter with an additional safeguard against the risk of inappropriate treatment. Systematic appointment of "alert referents" in companies and institutions would also be a step forward that could encourage the generalisation of a formalised procedure for collecting alerts[25].

**B. / Insufficient protection of the launchers**

Respect for anonymity is an indispensable condition for the protection of whistleblowers. While the obligation to inform the hierarchy before any alert is launched is understandable, it nevertheless constitutes, by the very admission of the players themselves, a significant risk of renunciation. The fear of reprisals is real. In addition to pressure and intimidation, the risk of destruction of evidence is not nil. An improvement in the warning system could therefore lead to the choice of warning channel being left to the discretion of the hierarchy without necessarily having to ask the hierarchy beforehand[26].

So far, the lack of management response is necessary for the whistleblower to be able to warn the courts and then make the alert public. However, due to the congestion in the courts, the procedures often take time. In practice, whistleblowers sometimes find themselves dismissed or face intimidation or harassment even before the proceedings have been completed[27]. When the judge finally rules in favour of the employee and restores his rights, it is usually after several years of proceedings and sometimes of being sidelined professionally.

For this reason, the whistleblower must be compensated for the damage suffered. Being a whistleblower should not be a sacrifice for employees, nor should it cause any harm to their families. Families do not benefit from a specific protection mechanism. Most of the time people are not aware of their rights and are not able to express their difficulties. There is a need to raise awareness of the laws so that employees can use the alert procedure.

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25 Art. 9, L. n° 2006-1691 du 9 déc. 2016.

26 Rédaction Lextenso, *Les lanceurs d'alerte : quelle protection juridique ? Quelles limites ?*, Petites Affiches, 21 août 2017 ; Rédaction Lextenso, *Les lanceurs d'alerte : quelle protection juridique ? Quelles limites ?*, Petites Affiches, 2 févr. 2018.

27 Rédaction Lextenso, *Les lanceurs d'alerte : quelle protection juridique ? Quelles limites ?*, Petites Affiches, 17 oct. 2017.

Companies and public institutions must mobilise resources and set up a real information policy for employees.

## CONCLUSION

Organic Law No. 2011-333 of 29 March 2011 on the Human Rights Defender[28] has been supplemented to give the Human Rights Defender a new competence. The Human Rights Defender can now refer any person reporting an alert to the competent authorities under the conditions set by law. He must also monitor the rights and freedoms of the whistleblower.

The Constitutional Council confirmed these new competences of the Human Rights Defender. In its decision of 8 December 2016, it specified that the organic legislator may entrust the Defender of Rights with the task of directing whistleblowers to the competent authorities in order to collect their reports[29].

However, the Council of State has specified that the Human Rights Defender cannot provide financial assistance to whistleblowers. The constitutional mission of the Human Rights Defender is to ensure respect for rights and freedoms. This task does not include the task of providing financial assistance to persons who may refer a matter to the Defender of Rights[30].

A bill was tabled on 15 January 2020 to create a general inspectorate for the protection of whistleblowers. This bill aims to create a new control body by introducing a new article 37-1 in the organic law n° 2011-333 of 29 March 2011[31]. This inspection, would be in charge of receiving the alerts[32]. It would accompany the whistle-blowers. It would evaluate the effects of the alert through thematic commissions. It would check the conformity of internal alert procedures in public and private structures. The protection of rights and freedoms by whistleblowers would thus be better ensured but also better supervised.

28 L. n° 2011-333 du 29 mars 2011, JO du 30 mars 2011.

29 Décision n° 2016-740 DC, 8 Déc. 2016, JO du 10 Déc.

30 Conseil d'Etat, *Le droit d'alerte : signaler, traiter, protéger*, Les études du Conseil d'État, 25 févr. 2016.

31 Proposal for an organic law National Assembly, n° 2591, 15 janv. 2020.

32 U. Bernalicis, *Assemblée nationale, Rapport* N ° 2739 et 2740 visant à la protection effective des lanceuses et des lanceurs d'alerte (n° 2600) et à la création de l'inspection générale de la protection des lanceuses et lanceurs d'alerte (n° 2591), 4 mars 2020.

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# MARGIN OF APPRECIATION AS A HINDRANCE TO TRANSFORMATIVE IMPACT OF INTERNATIONAL LAW: CHANGE IN INTERPRETATION OF LAICISM BY TURKISH CONSTITUTIONAL COURT

*Uluslararası Hukukun Dönüştürücü Etkisine Bir Engel Olarak Takdir Marjı: Türk Anayasa Mahkemesi'nin Laiklik Yorumunun Değişimi*

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*Research Article*

**Abstract**

International law, particularly human rights treaties and protection mechanisms, assume both complementary and transformative functions in their relation with domestic law. Transformative impact of international law is observable in the judgments of Turkish Constitutional Court (TCC) although change of interpretation pertaining to laicism seems uninfluenced. In 2012, TCC specified its understanding of the laicism cited in its former judgments as "strict interpretation of laicism", and declared that a "libertarian interpretation of laicism" was embraced upon renunciation of former interpretation. From that time on, TCC interprets its judgments on freedom of religion from the viewpoint of libertarian laicism. Nevertheless, the interpretation defined as "strict laicism" by TCC was regarded to fall within the scope of margin of appreciation according to the European Court of Human Rights (ECtHR) in such judgments as Refah v. Turkey and Leyla Şahin v. Turkey. The margin of appreciation doctrine of ECtHR exerted an adverse impact in this sense and thus led to delay in change of TCC's interpretation of laicism. Even though individual application to the Constitutional Court was introduced through a Constitutional amendment in 2010, and subsequently, in 2012 individuals were entitled to make application with respect to the rights and freedoms regulated in the Constitution and ECHR, these developments have likewise not been considered as a factor stimulating TCC to change its interpretation of laicism. In this context, it can be construed that the given change did not take place because of the transformative impact of international human rights law, but instead stemmed from the adaptation of TCC to changing socio-cultural atmosphere and appointment of new judges to TCC. This situation requires reconsidering the preventive function of the margin of appreciation doctrine as well as its obstructive function in transformation of domestic law. This study will first briefly address the discussions on the concept of laicism and thereafter will explicate the change in interpretation of laicism by TCC in a comparative analysis with the relevant ECtHR judgments.

**Keywords** International Law, Human Rights, Margin of Appreciation, Laicism, Freedom of Religion, Individual Application, TCC, ECHR, ECtHR

**Özet**

Uluslararası hukuk, özellikle insan hakları andlaşmaları ve koruma mekanizmaları, iç hukuku tamamlayıcı bir işlev görürken aynı zamanda dönüştürücü bir fonksiyona sahiptir. Uluslararası hukukun dönüştürücü etkisi Türk Anayasa Mahkemesi (AYM) kararlarında gözlemlenebilmekle beraber laiklik bağlamında görülen yorum değişikliği bu durumdan etkilenmemiş görünmektedir. AYM 2012 tarihinde, eski kararlarında geçen laiklik anlayışını "katı laiklik anlayışı" olarak nitelendirmiş ve bu anlayıştan vazgeçerek "özgürlükçü laiklik anlayışı"na geçtiğini beyan etmiştir. AYM din özgürlüğü kapsamında verdiği kararları artık özgürlükçü laiklik anlayışı ile birlikte yorumlamaktadır. Ancak AYM'nin katı laiklik şeklinde adlandırdığı yorum Avrupa İnsan Hakları Mahkemesi (AİHM) tarafından, Refah v. Türkiye ve Leyla Şahin v. Türkiye kararlarında görüleceği üzere, takdir marjı kapsamında sayılmıştır. AİHM'in takdir marjı doktrini bu anlamda negatif bir etkiye sahip olmuş ve AYM'nin laiklik yorumunun değişmesini geciktirmiştir. Her ne kadar 2010 yılında yapılan bir Anayasa değişikliği ile Anayasa Mahkemesi'ne bireysel başvuru yolu kabul edilmiş ve 2012 yılında bireylere Anayasa'da ve AİHS'te düzenlenen temel hak ve özgürlüklere ilişkin başvuru hakkı tanınmış ise de bu durum da AYM'nin laiklik yorumunu değiştirmesine etki eden bir neden olarak görünmemektedir. Bu anlamda değişimin sebebi uluslararası insan hakları hukukunun dönüştürücü etkisi değil AYM'nin değişen sosyo-kültürel atmosfere ayak uydurması ve AYM yargıçlarının değişimidir. Bu durum da takdir marjı doktrininin önleyici ve fakat iç hukukun dönüşümü açısından engelleyici fonksiyonunu yeniden düşünmeyi gerektirmektedir. Çalışmamızda öncelikle laiklik kavramı üzerindeki tartışmalar kısaca ele alınacak, daha sonrasında ise AYM'nin laiklik yorumundaki dönüşüm AİHM kararları ile karşılaştırmalı bir şekilde izah edilecektir.

**Anahtar Kelimeler** Uluslararası Hukuk, İnsan Hakları, Takdir Marjı, Laiklik, Din Özgürlüğü, Bireysel Başvuru, AYM, AİHS, AİHM

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## INTRODUCTION[1]

One of the most significant principles holding sway in the system of the European Court of Human Rights (ECtHR), to which Turkey allowed individual application as an international legal remedy, is the 'principle of subsidiarity'. This principle denotes that protection of human rights fundamentally is a duty undertaken by the domestic law. Nevertheless, international law plays a complementary role.[2] In line with this principle, ECtHR established the margin of appreciation and thus showed respect to the power of states to govern regulations regarding human rights.[3] On the other hand, it was declared and acknowledged that international treaties would prevail in matters of conflict and that, as per the Article 27 of Vienna Convention on the Law of Treaties[4], states could not evade their international liabilities on the grounds of domestic law.[5] Accordingly, the 1982 Constitution adopted this main principle through the following sentence added to Article 90 in 2004 that 'in case the duly enacted domestic laws and duly executed international treaties about the fundamental rights and freedoms confront any disputes or disagreement that might arise out of the divergent provisions they prescribe on the same subject, provisions of international treaties will prevail'.[6]

In this sense, it can be asserted that international human rights law, ECtHR judgments in particular, have transformative impact on the Turkish domestic law in principle. However, in the realms that this transformative impact weakened or lessened, Turkish domestic law experienced an internal transformation. In this sense, TCC changed its interpretation of laicism in 2012. In the remaining of our study, it should be analysed that whether this change of interpretation

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1 I feel indebted to Recep Kaymakcan, Murat Tümay, Batuhan Ustabulut and Ömer Temel for their invaluable opinions on the draft study. Undoubtedly, I am fully responsible for all the ideas and views presented in this study.

2 IGLESIAS VILA, Marisa, 'Subsidiarity, Margin of Appreciation and International Adjudication within a Cooperative Conception of Human Rights' International Journal of Constitutional Law, Volume 15, Issue 2, April 2017, p.401.

3 ECtHR, Handyside v. United Kingdom. Application No. 5493/72, Judgement of 7 December 1976, parag.48.

4 Vienna Convention on the Law of Treaties. Concluded in Vienna on May 23, 1969, art.27. https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf (access date 22.11.2019).

5 PALOMBINO, Fulvio Maria, 'Compliance with International Judgments: Between Supremacy of International Law and National Fundamental Principles', ZaöRV, vol.75, 2015, p.504.

6 The Constitution of Republic of Turkey, No: 2709, Official Gazette Date: 09.11.1982 – Issue:17863, Art. 90/5. KABOĞLU, İbrahim Ö. & KOUTNATZIS, Stylianos-Ioannis G., 'The Reception Process in Greece and Turkey', in Keller, Helen & Sweet, Alec Stone (ed), 'A Europe of Rights: The Impact of the ECHR on National Legal Systems', Oxford University Press, 2008, p.468.

by TCC on laicism resulted from the given impact of the international human rights law.

Laicism has been discussed by various spheres of society since founding of Republic up until now. [7] These discussions on laicism demonstrated a substantial increase after 1970s when the Constitutional Court (TCC) mainly began to interpret the concept of laicism constitutionally while rendering its judgments. Because the cases about the principle of laicism were brought to TCC during the given period of time, and thereupon TCC tried to create the content of the principle of laicism. In its Judgment on Class of Religious Officials dated 1970, TCC drew up a brief report of analysis with respect to the fact that it is quite natural for both Christian and Islamic societies to have different understanding of laicism and thereafter established its basic doctrine of laicism. TCC reiterated and applied its self-designed doctrine of laicism in its various judgments. Despite the fact that the majority of assessments on laicism have been mostly included in the judgments pertaining to party closure and headscarf cases, TCC have rendered further explanations on laicism in its many other judgments too.

It can be maintained and postulated that TCC predicated its judgments related to National Order Party (Milli Nizam Partisi), Peace Party (Huzur Partisi), Welfare Party (Refah Partisi) and Virtue Party (Fazilet Partisi) on the basis of the primary feature of the doctrine of laicism which is 'religion must not be dominant or influential over state affairs'. In its Judgments directly affecting the social life like those on headscarf, divine religions, class of religious officials, section of religion on civil register of births, Committee for Protection of Minors from Obscene Publications, TCC applied the following feature of the doctrine of laicism 'religious affairs shall be conducted under state control and supervision'. In consideration of the matters above, Yüksel emphasizes that Turkey actually does not have its specific practice and exercise of laicism, instead has adopted the classical understanding, which prescribes that religion is kept under control of state, as in France.[8]

TCC has sustained this fundamental approach until 2012 while it renounced this doctrine and instead adopted a new interpretation in the judgments dated 2012 and onwards. Above all, TCC itself identifies the former doctrine, which was applicable until 2012, as 'strict interpretation of laicism' whereas it classifies the latter doctrine applicable as from 2012 and onwards as 'libertarian interpretation of laicism.' Having abandoned the former understanding of

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7 BİLGİN, Beyza, 'Turkey'de Din ve Laiklik' Venice, Presentation paper dated 2000 p.42-43. See: http://dergiler.ankara.edu.tr/dergiler/37/756/9630.pdf (access date 30.06.2019).

8 YÜKSEL, Saadet, 'The Clash Between Free Exercise of Religion and Secularism within The Turkish Legal System' Public and Private International Law Bulletin, 2013, Vol. 33, Issue 2, p.121.

laicism which had been applicable to judgments for years, TCC upheld a libertarian understanding of laicism which puts a remarkable emphasis on human rights. Accordingly, offering such optional subjects, in secondary and high schools, as recitation of Holy Quran and Life of Prophet was not found contrary to the principle of laicism in the judgments of TCC related to Religious Education. Likewise, serving as a lawyer with headscarf was considered to be in compliance with laicism and freedom of religion in its judgement for the individual application dated 2014. TCC also began to function as the court of human rights upon allowing for individual application and made judgments finding violation of fundamental rights and freedoms. Enabling an individual application to TCC about an alleged violation against any fundamental rights and freedoms guaranteed both in the Constitution and international treaties to which Turkey is a party has required TCC to interpret the domestic law under the sway of international law as time passes. Because of the likelihood that judgments by TCC finding the alleged violation inadmissible might be referred to ECtHR, TCC frequently cites the judgments of ECtHR within its own judgments and thus tries to correlate his own interpretation with the relevant judgments of ECtHR. Moreover, TCC has often included citations from and references to the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights and decisions of United Nations Human Rights Committee in recent years.

Nonetheless, the primary reason for change in interpretation of laicism by TCC is not actually the international human rights law. To be able to better conceptualise and provide insight into both TCC judgments and transformation in understanding of laicism, firstly an overview of the discussions on the concept of laicism will be addressed. Thereafter, the judgments that TCC rendered in the light of strict understanding of laicism and new libertarian understanding of Islam will be explained respectively. Taking into account the findings obtained through meticulous research, this study will conclude with analysis of the reasons behind the transformed perception of laicism in Turkey.

### 1. Laicism as a Controversial Concept

Jean Bauberot & Micheline Milot defined the laicism as 'a principle assuring that state remains neutral (impartial) against religion and that all religions and beliefs can be enjoyed.' According to these authors, the principle of laicism also stands for the separation between church and state.[9] Bauberot asserts that the first theorist in developing the concept of laicism is Ferdinand Buisson who conducted studies on designing education policies according to principle of laicism and was also appointed as the chairman to a commission which was set

[9] BAUBEROT, Jean & MILOT, Micheline, 'Parlons Laïcité en 30 Questions' La Documentation Française, p.24.

up in French parliament to separate state affairs from those of church between 1903 and 1905.[10]

Leon Duguit defined the laic state as the one which remains absolutely impartial, does not belong to any religion, does not bear any religious identity, does not attend or does not let organise any religious ceremony on its behalf.[11] Sharing the similar thoughts, Başgil argues that laicism will tend to be abused by the oppressive governments as long as its scope and framework stays vague and ambiguous in the constitution. Therefore, in his opinion, laicism necessitates being described and its framework being explicitly drawn up in our constitution.[12] According to Kılıçbay, while laicism was translated, solely its aspect of "separation between religious and state affairs' has been in focus. Especially translations from the foreign encyclopaedia reflect this situation very clearly. In fact, original texts make an emphasis on "religious considerations are not taken into account in political and social life".[13] In this context, some authors believe that the concept of laicism in Turkey was quoted or cited from the original one without cultural and intellectual preparation, thus bringing along many challenges.[14]

Some authors are in the opinion that laicism is the institutional dimension of secularisation which can be construed as a social phenomenon. To put it more explicitly, laicism denotes withdrawal and exclusion of religion from political and legal areas while secularism[15] in broader terms, cleansing the common life from religious rules.[16] In other words, laicism represents the institutional dimension whereas secularism reflects the social dimension. Even some authors describe secularism as "lessening the importance of religion in social life and weakening of piety whereas some claim that the concept of secularism should not be used in legal literature because of its sociological meaning. [17] On

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10 BAUBEROT, Jean, 'Laiklik - Tutku ve Akıl Arasında: 1905-2005' İstanbul Bilgi Üniversitesi Yayınları, İstanbul 2018, p.6-8.

11 DUGUİT, Leon, 'Traite de droit Constitutionnel', V.5, p.376. Stated by DİNÇKOL, Bihterin Vural, '1982 Anayasası Çerçevesinde ve Anayasa Mahkemesi Kararlarında Laiklik', Kazancı Hukuk Yayınları, İstanbul, 1992 p.7.

12 BAŞGİL, Ali Fuat, 'Din ve Laiklik', Kubbealtı Yayınları, 2016, p.173, 189-191.

13 KILIÇBAY, Mehmet Ali, 'Laiklik ya da Bu Dünyayı Yaşayabilmek' Cogito, Laiklik, Issue 1, 1994, Yapı Kredi Yayınları, p.15-16.

14 ABEL, Oliver & ARKOUN, Mohammed & MARDİN, Şerif, 'Avrupa'da Etik, Din ve Laiklik' Metis Kitap, 1995, p.20-21.

15 According to Asad, the terms 'Secularism' and 'Secularist' were first coined in English in mid-nineteen century by the philosophers who tried to repudiate the accusations 'atheist' and 'infidel'. See ASAD, Talal, 'Formations of the Secular: Christianity, Islam, Modernity', Stanford University Press, California 2003, p.23.

16 MERT, Nuray, 'Laiklik Tartışmasına Kavramsal Bir Bakış: Cumhuriyet Kurulurken Laik Düşünce', 1994, İstanbul, Bağlam Yayıncılık, p.95-115.

17 ERDOĞAN, Mustafa, 'Anayasal Demokrasi' Ankara, Siyasal Kitabevi, 3rd Edition, 1999,

the other hand, Ertit asserts that laicism and secularism actually two different concepts used to express the same logical argument, i.e. that religion no longer plays a decisive role. However, laicism stands for the name of the project applied to state to create the above-mentioned environment in the society. So lack of either of them does not affect existence of the other, which means that it is indeed possible to witness a laicist state with non-secular society or non-laicist state with secular society. While Turkey and France are governed according to laicism, England, Denmark, Sweden (till 2000), Norway, inter alia, where the head of state is the head of church and the state embraces an official religion, are not laicist but governed secularly.[18]

Altındal thinks that the concepts of laicism and secularism are mostly confused and mistaken and not comprehended enough. Laicism means to empower individual against church, not against the God. Actually laicism denotes being profane and non-clerical.[19] According to Kuru, laicism is not a uniform concept and has at least two types. In case of passive laicism, state acts passively and therefore do not impose any religion or ideology. On the other hand, when assertive laicism is concerned, state assumes the role of secularising the society and defining religion in its own way, thus attempting to do social engineering. In this sense, the USA can be an example of passive laicism while France and Turkey set an example of assertive laicism.[20] To better point this out, the reason why Kuru indicates Turkey as the example of assertive laicism stems from the understanding of laicism renounced by TCC as former and strict, which will be elaborated further below. New understanding of laicism brought TCC much closer to passive laicism. As for Freeman, Western states have adopted, in course of time, such an understanding of laicism according to which religion is associated with private life and public space is not determined or regulated by religious rules, but religious freedoms are assured and guaranteed.[21]

On the other hand, freedom of religion has been construed within the context of laicism by TCC. The concept of 'Freedom of Religion' was first established and designated as a legal right in the Virginia Declaration of Rights of 1776 and thereafter it maintained its existence as a right in France's Declaration

p.241.

18 ERTİT, Volkan, 'Birbirinin Yerine Kullanılan İki Farklı Kavram: Sekülerleşme ve Laiklik' Akademik İncelemeler Dergisi, 2014, V.9, Issue 1, p.103. For a more comprehensive analysis of the concept of laicism in European countries, see BAUBEROT, Jean (ed), 'Avrupa Birliği Ülkelerinde Dinler ve Laiklik' Ufuk Kitapları, 2003.

19 ALTINDAL, Aytunç, 'Laiklik: Enigma'ya Dönüşen Paradigma' Anahtar Kitaplar Yayınevi, 1994, p.29-35.

20 KURU, Ahmet T., 'Secularism and State Policies: The United States, France and Turkey' Cambridge University Press, 2009, p.1.

21 FREEMAN, Michael, 'Human Rights', Cambridge, Polity Press, 2002, p.5.

of Rights of Man and Citizen of 1789. It was most comprehensively laid down in the United Nations Universal Declaration of Human Rights in 1948.[22] The most vital characteristic of the article on freedom of religion the in UN Declaration is to grant this right to all humanity not just to certain minorities. This universality was particularly reinforced by such international documents as International Covenant on Civil and Political Rights in 1966 and the UN Declaration on Elimination of all forms of Intolerance and Discrimination based on Religion or Belief.[23]

For Turkey, the most significant international document prescribing the freedom of religion is the European Convention on Human Rights (ECHR). Because this Convention introduced the right to individual application to the ECtHR on the claim of violation of freedom of religion, and additionally conferred on individuals the opportunity for claiming remedy against the violating state.[24] In accordance, the ECHR, which is binding on Turkey, laid down this under Article 9. Moreover, Article 24 of Turkish Constitution 1982 included similar but also peculiar provisions in terms of the content. [25] Kaboğlu is in the opinion that freedom of religion, in the broadest sense, refers to believing in whatever religion one likes, performing the necessary religious actions at their will and not getting exposed to any insult or persecution.[26] This definition seems similar to that of laicism. At this point, it should be kept in mind that freedom of thought and expression presents somehow a kind of guarantee of freedom of religion. Accordingly, freedom of religion involves expressing one's thoughts nourished by their religion. In addition, it must be pointed out that freedom of religion not only encompasses the believers of a religion or followers of a belief system but also protects all sorts of non-believers who do not embrace any religion or have any faith. In other words, freedom of religion assures free choices of both believing and not believing. In negative sense, in *Alexandridis v. Greece,* ECtHR rules that Article 9 involves the freedom

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22 Article 18: Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance. Universal Declaration of Human Rights, Article 18 See: https://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf (access date 30.06.2019).

23 ÖKTEM, A. Emre, 'Uluslararası Hukukta İnanç Özgürlüğü', Ankara, Liberte Yayınları, 2003, p.187 et. seq

24 European Convention on Human Rights, Official Gazette, Issue 8662, Date: 19.03.1954. For English version, please see https://www.echr.coe.int/Documents/Convention_ENG.pdf (access date 30.06.2019).

25 The Constitution of 1982, Republic of Turkey a.24. See https://www.tbmm.gov.tr/anayasa/anayasa_2011.pdf (access date 30.06.2019).

26 KABOĞLU, İbrahim Ö., 'Özgürlükler Hukuku' 6. Baskı, Ankara, İmge Yayınları, 2002, p.364.

not to belong to a religion and not to practice it.[27] When indication of religion on identity cards concerned, in *Sinan Işık v. Turkey*, the Court has ruled that the indication – whether obligatory or optional – of religion on such cards is contrary to Article 9 of the Convention.[28] In positive sense, in *Metropolitan Church of Bessarabia and Others v. Moldova*, ECtHR states that freedom of religion also implies freedom to manifest one's religion. This manifestation might be alone and in private or in community with others, in public and within the circle of those whose faith one shares. Bearing witness in words and deeds is bound up with the existence of religious convictions. That freedom entails, inter alia, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion.[29]

When freedom of religion is concerned, some directly associated rights accompany it. The most important among them is to let everybody regulate their individual life and affairs according to their religion. This covers a wide spectrum of rights from freedom of individual and social worship to demanding education as one's religion necessitates.[30] In this sense, as stated above, TCC interpreted the freedom of religion within the scope of laicism in the judgments to be examined below and laid down various parameters. Although laicism is not a concept whose meanings or implications have been widely agreed upon, it bears many similarities to freedom of religion.

**2. Classic Understanding of Laicism by TCC**

The Constitutional Court was first introduced to the Turkish legal system in the Constitution of 1961. It formed its opinion on laicism in 1970s. On May 20, 1971, TCC ruled in favour of closure of the National Order Party (MNP) on the grounds of running operations against principles of laicist state. The section of laicism in the judgment includes these statements: 'Religion is a matter of conscience, faith and conviction. It is taken out of being a spiritual relation between God and human, thereby exceeding the limits stipulated by the Constitution. Religion is aimed to be shown as the sole resource, foundation and order to resort to for all earthly affairs including but not restricted to politics, governance, economics, education, science, technology, social and private relations'.[31] Having not incorporated a detailed explanation of laicism in its judgment on MNP, TCC formulated its doctrine of laicism in its judgment on Class of Religious Officials five months later. Pursuant to this judgment,

27 ECtHR, Alexandridis v. Greece, Application No. 19516/06, 21 February 2008, parag.32.
28 ECtHR, Sinan Işık v. Turkey, Application No. 21924/05, 2 February 2010, parag.51-52.
29 ECtHR, Metropolitan Church of Bessarabia and Others v. Moldova, Application No. 45701/99, 13 December 2001, parag.114.
30 ERDOĞAN, Mustafa, 'İnsan Hakları Teorisi ve Hukuku', Ankara, Orion Yayınevi, 2007, p.163.
31 TCC, The Judgment No. E.1971/1 and K.1971/1, dated 20.05.1971, p.17.

the Law no 1327 dated July 31, 1970 and Article 36 of the Law on Civil servants, No. 657 were amended and thus 'class of religious officials' was added to other classes of civil servants. TCC ruled that such an amendment was not in breach of laicism. The most critical aspect of this judgment is that TCC created a doctrine of laicism peculiar to Turkey. In this context, TCC tries to elucidate laicism in the following statements: '*Laicism legally refers to separation of religious affairs from those of state in the classic meaning. This separation requires that religion does not interfere in State affairs and, in return, State does not intervene in religious affairs. Accordingly, church enjoys absolute independence. This outcome not only stems from many historical events, necessities and obligations in the nations believing in Christianity, but also considerably results from the facts that church is a religious institution, Christianity has clergy presenting religious services and Pope is recognised as the holy religious leader. On the other hand, Islam does not have clergy, and the officers working in the places of worship are not regarded as holy. Now that the conditions of both religions do not seem to be same, independence or autonomy of religious officers do not bear the same results in both our country and western countries.'*.[32]

Having asserted that laws received since The Imperial Edict of Reorganisation (Tanzimat Fermanı) were not based upon religion because of then-current social necessities and that the dominance of religion over state affairs have been gradually reduced thenceforth, TCC established the parameters of laicism as follows: *The principle of laicism adopted in the Constitution of Republic of Turkey is particularly comprised of the below-cited qualities: a) accepting that religion does not play a dominant or decisive role in State affairs; b) granting unlimited freedom to individuals in embracing whatever religious belief they like in their spiritual life, and not imposing any sort of segregation against them based on their choice, and providing assurance for religion under the Constitution; c) imposing restrictions to protect public order and interests, preventing or prohibiting abuse or exploitation of religion when religion surpasses one's spiritual life and ends up in affecting the social life through individual actions or behaviours; d) vesting the state with the power to control or supervise religious rights and freedoms as the protector of public order and given rights.* [33]

It is also controversial for the Court to regard the state as a supervisory mechanism over freedom of religion and not to find the existence of Presidency of Religious Affairs contrary to laicism. [34] Afterwards, the Court

[32] TCC, The Judgment No. E.1970/53 and K.1971/76, dated 21.10.1971, p.6-7.
[33] TCC, The Judgment No. E.1970/53 and K.1971/76, dated 21.10.1971, , p.9.
[34] For further info, see KAYA, Emir, 'Secularism and State Religion in Modern Turkey: Law, Policy-Making and the Diyanet' London, 2017, I.B. Tauris & Co. Ltd.

quoted its own formulation of laicism verbatim in numerous cases ahead. In this regard, TCC justified its judgments based on this understanding of laicism while ruling that the section of religion in the civil register of births was not against the constitution[35], while closing the Peace Party on the grounds that the statements in the party bylaw were in breach of the principle of laicism[36], while annulling the phrase 'holy religions' in the former Turkish Criminal Code[37], while finding no violation of the principle of laicism when one member of the Higher Committee of Religious Affairs was assigned to an additional seat in the Committee for Protection of Minors for Obscene[38]. Some judgments of the Court were considered to be examples of judicial activism by some authors.[39] In his essay published in 2007, Özbudun argued that the judicial activism of the Constitutional Court was not in favour of enhancing or strengthening the fundamental rights, but instead was inclined to protect main values and interests of the state. According to the author, TCC, in the judgments particularly on Headscarf, interpreted laicism from an absolute positivist point of view by dismissing the generally accepted scientific explanation of laicism.[40] However, as examined below, as of 2012, TCC began to interpret the principle of laicism by taking into consideration the fundamental rights and freedoms. This situation requires reconsidering the findings and arguments presented by Özbudun. To enable comparison between two types of interpretation, it would be necessary to draw examples from former and new judgments of the Constitutional Court.

### 2.1.Headscarf and Laicism

One of two issues upon which TCC made the most major analyses of laicism is the ban on headscarf.[41] In this sense, in its Judgment dated 1989, TCC did not find suitable and acceptable the wearing of headscarf in the public sphere on the grounds of being a potential threat to democratic order. With respect to the subject of this Judgment, Grand National Assembly of Turkey (TBMM) adopted an amendment to the Law on Higher Education No. 2547 and liberated covering of neck and hair with headscarf as a part of freedom of clothing.

The then-president Kenan Evren referred this amendment to TCC for

35 TCC, The Judgment No. E.1979/9 and K.1979/44 dated 27.11.1979.
36 TCC, The Judgment No. E.1983/2 and K.1983/2 dated 25.10.1983.
37 TCC, The Judgment No. E.1986/11 and K.1986/26 dated 04.11.1986.
38 TCC, The Judgment No. E. 1986/12 and K. 1987/4 dated 21.11.1987.
39 HÖJELİD, Stefan, 'Headscarves, Judicial Activism and Democracy: The 2007–8 Constitutional Crisis in Turkey' The European Legacy, Vol. 15, No. 4, 2010, p.467.
40 ÖZBUDUN, Ergun, 'Türk Anayasa Mahkemesinin Yargısal Aktivizmi ve Siyasal Elitlerin Tepkisi' Ankara Üniversitesi Siyasal Bilgiler Fakültesi Dergisi, Vol: 62, Issue: 3, 2007, p.264-265.
41 The other refers to the case of political party closures exemplified in detail below.

annulment on the grounds of violation of principle of laicism. First of all, the Constitutional Court maintained that the principle of laicism stood for a philosophy of life for Turkey, a tool of transition to democracy and guarantor of Constitutional order; however, headscarf caused the given religion to appear out-of-date. Thereupon, TCC specified the below-cited views:

*'Democratic order is the opposite of Sharia system which aims at domination of religious requirements. Any regulation in which government puts its focus on religious requirements cannot be deemed democratic. Democratic state can only be a laicist state. Any regulations prioritising religious requirements lead to augmentation of religious activities, pressure and enforcement, thus ending up in religious divergences. Eventually democracy will lose its characteristics such as being libertarian, pluralist and tolerant.'*[42]

According to Mustafa Erdogan, the main problem here does not arise from perception of headscarf as outdated clothing by TCC, but actually results from usage of the concept 'contemporary' in the amended law. The author is in the opinion that first sentence of the provisions in the amendment has restricted clothing of students of higher education with 'contemporariness'. Thus, all types of clothing and appearance not counted as 'contemporary' have been turned out to be a sufficient reason for restriction of freedom of education by state. Since contemporariness is not a legal (technical) term, arbitrariness in practice is unavoidable as is experienced. Therefore, this amendment can be construed as jurisprudentially inappropriate'.[43]

According to the ECtHR, the ban on headscarf falls into scope of margin of appreciation particularly in Turkey. The most crucial judgment of ECtHR in regards to headscarf is the one called *Leyla Şahin v. Turkey*. The case brought to ECtHR by Leyla Şahin, an undergraduate student studying at the Çapa Faculty of Medicine, Istanbul University, was found inadmissible by the Chamber 4 of ECtHR on June 29, 2004[44]. Nevertheless, the case was referred to the Grand Chamber of ECtHR upon lodging of an appeal. In its Judgment dates November 10, 2005[45], the Grand Chamber upheld that the ban on headscarf did not lead to breach of the convention. Having underlined that freedom of religion is one of the foundations of a democratic society and that this freedom entails to hold or not to hold religious beliefs and to practise or not to practise a religion, the Court explicitly states that Article 9, enshrining this freedom, of the European Convention on Human Rights does not protect every act motivated or inspired by a religion or belief. According to Court,

42 TCC, The Judgment E.1989/1 and K.1989/12 dated 7.3.1989, p.11.

43 ERDOĞAN, Mustafa, 'Anayasa Mahkemesi Nasıl Karar Veriyor: Başörtüsü Kararı', Liberal Düşünce, Ankara,1998, p.9.

44 ECtHR, Leyla Şahin v. Turkey, Application No.44774/98, 29.06.2004.

45 ECtHR, Leyla Şahin v. Turkey, 44774/98, The Judgement [GC], dated 10.11.2005.

*'In democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on freedom to manifest one's religion or belief in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected.'*[46] *In addition, like the Constitutional Court, the Court considers that, when examining the question of the Islamic headscarf in the Turkish context, it must be borne in mind the impact which wearing such a symbol, which is presented or perceived as a compulsory religious duty, may have on those who choose not to wear it. Imposing limitations on freedom in this sphere may, therefore, be regarded as meeting a pressing social need by seeking to achieve those two legitimate aims, especially since, as the Turkish courts stated ..., this religious symbol has taken on political significance in Turkey in recent years. The Court does not lose sight of the fact that there are extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts.'*[47] Decker and Lloydd, *inter alia*, who criticise this judgment argue that the conviction *'laicism will be jeopardised if headscarf is not prohibited'* is problematic. If democracy really confronts a danger like headscarf, it needs to be questioned why headscarf is not forbidden in all the universities.[48] Indeed, such a research was neither undertaken by TCC nor questioned by ECtHR.

The ECtHR, with a reference to the Judgment dated 1989 of the Constitutional Court, stated that the principle of laicism was regarded in the Judgment as the guarantor of democratic values and a meeting point of freedom and equality. Therefore, right to manifest one's religion could be limited to defend these rights and principles. ECtHR, furthermore, concluded that such an understanding of laicism complied with the fundamental values of the Convention.[49] Tulkens, the judge filing his dissenting opinion on the Judgment, argued that the margin of appreciation was inaccurately applied to this case. In Judge's opinion, students with headscarf are allowed to study at almost all the universities in Europe. So it cannot be claimed that a very crucial social necessity has emerged or is in place to prohibit the headscarf. Existence of fears does not mean that the necessary conditions have taken place.[50] Likewise, Ergun Özbudun asserts that it is not appropriate and rightful in terms of human rights standards to impose a headscarf ban on university students.[51] In this regard, Okdemir maintains that

46 ECtHR, Leyla Şahin v. Turkey, parag.104-106.

47 ECtHR, Leyla Şahin v. Turkey, parag.115.

48 DECKER, Christopher & LLOYDD, Marnie, 'Case Comment, Leyla Sahin v. Turkey' European Human Rights Law Review, Vol.6, 2004, p.677.

49 ECtHR, Leyla Şahin v. Turkey, parag.113-114.

50 Seperate opinion of Judge Tulkens, parag.3-4-5.

51 ÖZBUDUN, Ergun, 'Laiklik ve Din Hürriyeti'. GÖZTEPE, Ece & ÇELEBİ, Aykut (ed), 'Demokratik Anayasa: Görüşler ve Öneriler' İstanbul, Metis Yayınları, 2012, p.197.

fundamental rights and freedoms can solely be restricted by law and ECtHR did not take this into account.[52] As for Arslan, the issues whether the students wearing a headscarf indeed constitute the majority of student population in universities or whether they put pressure on others must have been subjected to a detailed examination.[53] In the Judgment on *Dahlab v. Switzerland* cited in the Judgment on Şahin, ECtHR specified that the measure by which the primary teacher was prohibited from wearing a headscarf to protect rights of others (minors) could be found reasonable.[54] However, in the case of Leyla Şahin, such a necessity of protecting the defenceless (vulnerable) individuals was not a matter of concern. On the other hand, in the Judgment on *Kokkinakis v. Greece*, the Court held that peaceful dissemination of religious opinions was taken under protection of the Convention.[55] Evans believes that the Court sharing the opinion of TCC considered headscarf as an intolerance signifier. However, ECtHR, in its own Judgment on *Gündüz v. Turkey*, asserted that the opinions of a religious group leader as to establishing Islamic order by persuasion without any resort to violence could be protected under freedom of expression.[56] Nevertheless, in the Judgment on Şahin case, the Court ruled in the opposite direction even though no act of intolerance was in question.[57] In this sense, the approach of ECtHR towards freedom of headscarf in Turkey reveals the impression of approving the perception of militant democracy, which will be explained in detail below, as usually manifested in the dissolutions of political parties.[58]

### 2.2.Closure of Political Parties and Laicism

The doctrine of laicism was indicated as the main justification for closure of political parties in some cases. The Constitutional Court ruled to dissolve the Welfare Party in January 16, 1998 and ban the party executives from politics for a five-year term on the grounds that political goals of the given party did not conform to the principles of democratic society and laicism. In fact, when party closures are concerned, the opinions of TCC on the principle

52 OKDEMİR, İlkay, 'Din ve Vicdan Özgürlüğü ve Laiklik Bağlamında Üniversitelerde Türban Sorunu' Yayımlanmamış Yüksek Lisans Tezi, Akdeniz Üniversitesi Sosyal Bilimler Enstitüsü, Antalya, 2005, p.142.

53 ARSLAN, Zühtü, 'Avrupa İnsan Hakları Sözleşmesi'nde Din Özgürlüğü' Ankara, Liberal Düşünce Topluluğu Yayınları, 2005, p.86.

54 ECtHR, Dahlab v. Switzerland, Application No. 42393/98, 15 February 2001, p.13.

55 ECtHR, Kokkinakis v. Greece, Application no. 14307/88, 25 May 1993, parag.48.

56 ECtHR, Gündüz v. Turkey, Application no. 35071/97, 4 December 2003, parag.51.

57 EVANS, Carolyn, 'The 'Islamic Scarf' in the European Court of Human Rights'(2006) Melbourne Journal of International Law, Vol.7(1), p.70-71.

58 ODER, Bertil Emrah, 'Turkey', in Thiel, Markus (ed), 'The Militant Democracy Principle in Modern Democracies' Routledge Publishing, 2009, p.289.

of laicism are almost manifested in the similar direction. The below-cited analysis on laicism by TCC was later resorted to by ECtHR: *'Democracy is the opposite of Sharia order. As an indicator of contemporariness, this principle became a driving force for transition of the Republic of Turkey from being an 'ummah' to a 'nation'. Laicism cannot be constrained to the sole meaning of separation of religious affairs from those of state. On the contrary, laicism provides an environment of contemporariness, freedom and civilisation with wider coverage of areas in larger sizes. Modernisation philosophy of Turkey is embodied by a humane life style and ideal of humanity. In a laicist order, religion as a characteristic social institution cannot establish dominance over state institutions and governance'.* [59]

The judgment on closure of the Welfare Party was also referred to the European Court of Human Rights. ECtHR delivered its final Judgment on the case of *Welfare v. Turkey* in 2003 and accordingly did not find the closure of Welfare against the Convention. The following statements excerpted from the Judgment of ECtHR on Welfare basically support the Judgment of TCC on Closure: '*The Court cannot criticise the national courts for not acting earlier, at the risk of intervening prematurely and before the danger concerned had taken shape and become real. Nor can it criticise them for not waiting, at the risk of putting the political regime and civil peace in jeopardy, for Refah to seize power and swing into action, for example by tabling bills in Parliament, in order to implement its plans. In short, the Court considers that in electing to intervene at the time when they did in the present case the national authorities did not go beyond the margin of appreciation left to them under the Convention. Like the Constitutional Court, the Court considers that sharia, which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it. The Court notes that, when read together, the offending statements, which contain explicit references to the introduction of sharia, are difficult to reconcile with the fundamental principles of democracy, as conceived in the Convention taken as a whole. It is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on sharia, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts. Mindful of the importance for survival of the democratic regime of ensuring respect for the principle of secularism in Turkey, the Court considers that the Constitutional Court was justified in holding that Refah's policy of establishing*

[59] TCC, Judgment No. E.1997/1 ve K.1998/1, 16.01.1998, p.99-100.

*sharia was incompatible with democracy'*. [60] The arguments presented by ECtHR in the given Judgment were criticised by many authors for allowing 'preventive intervention'. Macklem considers that closure of any party solely based on a probability even though no concrete action has indeed taken place to change the system constitutes infringement of one's right to political participation.[61] Kirshner asserts that two elements of any comprehensive threat against democracy, i.e. 'intention and scope' require explicit identification and examination. According to the author, it would be easily noticed that the government comprised of Welfare, inter alia, was not capable of converting the system when such criteria as number of seats in the Assembly, military power, effectiveness of the Welfare bureaucrats are taken into consideration. However, ECtHR disregarded these criteria in its Judgment on the Welfare although it took them into account in the earlier judgments.[62]

As emphasized by Kirshner, ECtHR actually evaluates each case in its own merits given that it has taken into account the capacity of political parties to convert democratic regime in many of its Judgments. In this sense, with regards to the criticisms directed at the Judgment on the *Welfare Party v. Turkey*, it would be beneficial to touch base on the opinions or views of the Court on democratic society and different thoughts. In the Judgment on the *United Communist Party of Turkey v. Turkey*, ECtHR emphasized, in the following words, what should be understood from democracy and human rights*: 'Democracy is without doubt a fundamental feature of the European public order. The Preamble to the Convention affirms that European countries have a common heritage of political tradition, ideals and freedom. It has pointed out several times that the Convention was designed to maintain and promote the ideals and values of a democratic society*. *Democracy thrives on freedom of expression. From that point of view, there can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State's population and to take part in the nation's political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned. At the hearing before the Court the Delegate of the Commission, in a preliminary observation, stressed the difference between implementing an illegal programme and implementing one in which all that was sought was a change in the law. While that distinction could sometimes be difficult to draw in*

60 ECtHR, Refah Partisi ve Diğerleri v. Turkey, App. No. 41340/98, 41342/98, 41343/98 ve 41344/98 13.02.2003, parag.123.

61 MACKLEM, Patrick, 'Militant Democracy, Legal Pluralism, and the Paradox of Self-Determination' International Journal of Constitutional Law, Volume 4, Issue 3, 2006, p.512-515.

62 KIRSHNER, Alexander S., 'A Theory of Militant Democracy: The Ethics of Combatting Political Extremism' Yale University Press, 2014, p.130-131.

*practice, associations, including political parties, should be able to campaign for a change in the law or the legal and constitutional structures of the State, provided of course that the means used for the purpose were in all respects lawful and democratic and that the proposed change was itself compatible with fundamental democratic principles*.[63] As cited above, to demonstrate tolerance for ideas of the parties incapable of converting the system is actually regarded by ECtHR as a necessity of democratic society.

According to Atilla Yayla, the Judgment on the case of Welfare Party by ECtHR does actually conflict with the classic view of the Court. The Judgment was delivered by majority vote like four votes to three and one of the four members is Turkish Judge Rıza Türmen. In fact, although it is actually not possible to claim, in this combination, that ECtHR has modified its case-law, this Judgment provides, at least, strong data as to the fact that Turkey is regarded in a different category compared to other European countries. On the other hand, the considerations and evaluations on laicism and violence in the Judgment are almost identical to those of TCC. Therefore, this leaves the Judgment wide open to criticism.[64] Erdogan states that the first cases referred to and heard by the ECtHR with respect to dissolutions of Turkish political parties were concerned with the parties of relatively less political weight like the United Communist Party of Turkey (TBKP), Socialist Party and Freedom and Democracy Party. However, in the Judgment of Welfare Party, the Court heard a case pertaining to a party established quite long time ago and serving as the senior partner of a coalition government in office. It can be inferred that this Judgment of the Court noticeably deviated from its previous settled case-law on other political party dissolutions. It seems obvious that this Judgment on Welfare Party does not only constitute a deviation from the settled case-law of the court but also sort of divergence from the criteria laid down in the reports of Venice Commission.[65] In the case of the Welfare Party, ECtHR adopted an opinion quite opposite to the Judgment on the case of TBKP and held that the dissolution of the Welfare Party by the Constitutional Court was a rightful judgment.[66]

This situation rekindled the discussion called Militant Democracy in the

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63 ECtHR, United Communist Party of Turkey and Others v. Turkey, European Court of Human Rights Grand Chamber, Application No. 113/1996/752/951, 30 January 1998, parag. 45-57.

64 YAYLA, Atilla, 'AİHM'in RP Kararı Üzerine' Liberal Düşünce Dergisi, Yaz 2001, p.76-79.

65 ERDOĞAN, Mustafa, 'AİHM'in RP Kararının Düşündürdükleri', Liberal Düşünce, sayı 23, Summer 2001, p.46.

66 ECtHR, Refah Partisi (The Welfare Party) and Others v. Turkey, Grand Chamber, Application No. 41340/98, 41342/98 and 41344/98, 13 February 2003, parag.135. Full case published by American Society of International Law (2003) 'International Legal Materials', Vol. 42, No. 3, p. 560-595.

academic field. Pursuant to the theory of Militant Democracy developed by Karl Loewenstein in 1937, democracy can suspend the most fundamental democratic rights in order to prevent the regimes like fascism suspending democracy. To put it more clearly, democracy can protect and defend itself against any looming danger through party closure or any other precaution.[67] In Article 17, ECHR forbids abuse of rights with the aim of protecting the values enshrined in the convention.[68] One of the reporters of the Convention, Pierre-Henri Teitgen set forth under the term of 'preparatory works' *(travaux preparatoires)* the necessity that democracies must be ready to defend themselves not to end up in Nazi government again in the future.[69] Likewise, ECHR notes that anybody who intends to eliminate the rights enshrined in the convention shall be deprived of the protection coverage of the convention.[70] In this context, the Constitutional Court considered the Islamic discourse as antithesis of Democracy and furthermore stated that the principle of laicism laid the foundation of Turkish society and constituted the founding ideology of the republic when it ruled the closure of Welfare Party.[71] Likewise, ECtHR specified that the Welfare Party desired to establish a plural legal system based on religion and to predicate on the Sharia both its domestic affairs and relationships with the Islamic World.[72] When the principles set forth in the Judgment on TBKP and the arguments presented by ECtHR in the Judgment on the Welfare Party are compared, it can be deduced that the Welfare Party was identified as a danger while TBKP was considered a harmless party by the Court thereby applying the theory of Militant Democracy. ECtHR referred to Article 17 as an instrument of interpreting its Judgment on the Welfare Party.

On the other hand, it seems that the State applied a restriction for any reason or purpose whatsoever other than those underlying behind the restrictions

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67 LOEWENSTEIN, K. 'Militant Democracy and Fundamental Rights I' The American Political Science Review, 1937, Vol.XXXI, No.3, p.417.

68 ARTICLE 17, Prohibition of abuse of rights: 'Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention'.

69 TEITGEN, Pierre-Henri, delivering a speech before the consultative Assembly of Council of Europe in September 1949, cited in Bates, E., The Evolution of the European Convention on Human Rights, from Inception to the Creation of a Permanent Court of Human Rights, Oxford U.P., 2010, p.44.

70 ECtHR, Hizb-ut-Tahrir v. Germany, Application no. 31098/08, Decision, 12 June 2012, parag.74. ECtHR, Kasymakhunov and Saybatalov v. Russia, Applications nos. 26261/05 and 26377/06, Judgement, 14 March 2013, parag.107-114.

71 TCC, Refah Partisi, Judgment No. E.1997/1, K.1998/1, 16 January 1998, AYMKD Vol.34/2, p.1027-1054.

72 ECtHR, Refah Partisi (The Welfare Party) and Others v. Turkey, Grand Chamber, Application No. 41340/98, 41342/98 and 41344/98, 13 Feb. 2003, paragraphs 72 and 123.

prescribed to protect the rights enshrined in the convention. It should be born in mind that the reasons behind restrictions might be exploited to serve a secret agenda. In this regard, Article 18 of the convention states that the restrictions permitted under the Convention shall not be applied for any purpose other than the prescribed ones.[73] To be more precise, it prevents abuse of power. Lacking of any curb thereon might let restrictions be applied to serve political or any other purpose. Although Article 18 can actually be referred to along with many rights, ECtHR has only admitted it for the cases pertaining to Article 5 so far. Because providing evidences of or proving the Article 18 is not easy. Moreover, ECtHR did not render its Judgment by taking into consideration Article 18 unless it is invoked by the applicant. For instance, Article 18 was not invoked by the applicant in the case of Leyla Şahin, whereas it was invoked but could not be substantiated in the case of the Welfare Party and therefore was not found worthy of examination by the Court.

The Welfare Party was exposed to many criticisms directed by various authors. McGoldrick expresses that the justifications provided by the ECtHR in Judgment on the Welfare Party fell very short of the standards.[74] Following the delivery of Judgment by ECtHR, many authors criticised the Court by maintaining that the Court made its decision under the sway of Islamophobia, focused on the threat to democracy rather than freedom of association and unnecessarily made ideological or political comments on Islam. What is more, several authors affirm that the executives of Welfare party do not actually impose or enforce any Islamic rule and their party programmes conform to democratic values, and therefore allege that ECtHR advocated the doctrine of secular (laicist) state. According to Schilling, even if the views of the Welfare Party contradicted with laicism, ECtHR could not have heard the case based on laicism. He further adds that examination by the Court should have been restricted to Article 11 and the practices of the Welfare Party during its one-year-term in power should have been taken into account.[75] The Judge Kovler with a dissenting opinion on the Judgment propounds that the Court is required to avoid such political and ideological notions as 'Islamic fundamentalism', 'totalitarian movements' or 'danger to democratic regime'. In Judge's view,

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73 ARTICLE 18, Limitation on Use of Restrictions on Rights: 'The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed'.

74 MCGOLDRICK, Dominic, 'Accommodating Muslims in Europe: From Adopting Sharia Law to Religiously Based Opt Outs from Generally Applicable Laws' 2009, Human Rights Law Review, Vol.9/4, p.612-613.

75 SCHILLING, David, 'European Islamophobia and Turkey - Refah Partisi (The Welfare Party) v. Turkey', Loyola of Los Angeles International and Comparative Law Review, Vol.26, (2004), p.512.

the Court should additionally refrain from caricaturing certain concepts.[76] The executives of Welfare Party claimed that the Judgment of TCC was not given in conformity with the criterion of 'clear and present danger' laid down by the Supreme Court of the United States of America.[77] In this scope, clear danger stands for indubitable danger arising from the words used by the concerned person while present danger denotes an almost-certain danger resulting from the words used by the concerned person.[78] Nevertheless, neither TCC nor ECtHR applied the criterion of clear and present danger.[79] In other respects, it can be claimed that having made direct references to the justifications of TCC without an attempt to determine guiding principles in implementation of margin of appreciation, ECtHR put an obstacle to TCC revising its own opinion. At this stage, it can be concluded that international human rights law could not show its transformative impact on this case.

On the other hand, The Virtue Party founded by the deputies remaining from the Welfare Party formerly in power was also dissolved on the same grounds by TCC. The speeches of the party leader, deputies and party members, on one hand, and their support for wearing of headscarf in public buildings and schools, on the other hand, were set forth as justified reasons for dissolution of the Welfare Party.[80] According to Özbudun who criticises the Judgment, prohibiting the students wearing headscarf from entering the universities is 'doubtable and disputable in terms of conformity with fundamental human rights and universal democratic standards'. It seems hard to comprehend that although the executives and members of Welfare Party raise their demand in their speeches for lifting of the ban on a basic human right with a view to enhancing the realm of freedom, the Constitutional Court considered this demand, for enhancement of realm of freedom, as a sufficient ground for closure of the relevant party.[81] On the other hand, in the case of *Kavakçı v. Turkey*, ECtHR held that the right to free election, who was elected as a deputy with headscarf for the Virtue Party, had been violated.[82] In my opinion, the

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76 Seperate opinion of Judge Kovler, parag.94-99-107-128.

77 USTABULUT, Batuhan, 'İfade Özgürlüğünde Açık ve Mevcut Tehlike', Kocaeli Üniversitesi Hukuk Fakültesi Dergisi, Sayı 16, 2017, p.52.

78 USTABULUT, Batuhan, 'İfade Özgürlüğünde Açık ve Mevcut Tehlike' p.43.

79 Clear and present danger principle had not been regulated in Turkish law when TCC announced its judgment on dissolution of Welfare Party. The principle was first appeared in Turkish law by amendment of the article 17 of 'law on meetings and demonstrations' in 2002 as 'clear and close danger'.

80 TCC, Judgment No. E.1999/2 ve K.2001/2, 22.06.2001.

81 ÖZBUDUN, Ergun, 'Laiklik ve Din Hürriyeti'. GÖZTEPE, Ece & ÇELEBİ, Aykut (ed), 'Demokratik Anayasa: Görüşler ve Öneriler', İstanbul 2012, Metis Yayınları, p.169 et seq.

82 ECtHR, Kavakçı v. Turkey, Application No. 71907/01, 05.04.2007, parag.47.

Judgment on the Virtue Party embodies a typical example of the 'preventive intervention as emphasized above by Kirshner. Such a newly founded party was dissolved because of being a just continuation or follow-up of the Welfare Party with the immediate presumption of having the same 'intention' as the latter, but without assessment of its capacity for changing the system. If this Judgment had been referred to the ECtHR, it might have been probable to get a different result. As for Turhan, he asserts that the Constitutional Courts are established as the guarantors of fundamental rights and freedoms. In this sense, the Judgment was delivered as result of an inappropriate assessment by stating that deputies enjoy parliamentary immunity while this immunity does not cover the legal entity of a party. This situation is likely to cause deputies, who are aware that their party can be held accountable, a sense of being restricted, which is not acceptable in a democratic rule of law.[83] Erdoğan thinks that the Constitutional Court functions problematically. TCC seems to be driven almost by the motive of being protector of *status quo*.[84]

While delivering the Judgment on 'Dress Code' dated 2008, TCC made references to its former judgments in regards to its views on secularism and concluded its analysis predominantly based on the Judgments of ECtHR, esp. Judgment on Leyla Şahin. TCC reiterated its classic views, i.e. its specific conviction that wearing headscarf would put pressure on other individuals. On the other side, TCC paid particular attention to expressing its classic views by taking into account the case-law of ECtHR.[85] Esen emphasizes that when political party closures were concerned, TCC made references mainly to the international human rights law although it did not fully integrate with standards of ECtHR.[86] Upon closer inspection, it reveals that international human rights law did not create any transformative impact on the decision-making process of TCC and, above all, that TCC justified its Judgment of 2008 on grounds of that the ban conformed to human rights law. This study claims that 'changing socio-cultural climate' and respective viewpoints of TCC members have influenced opinions of TCC. As seen below, TCC changed its interpretation of laicism under the sway of these factors as time passed.

### 3. New interpretation of Laicism by TCC

TCC adopted a certain doctrine of laicism since its establishment and

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83 TURHAN, Mehmet, 'Anayasa Mahkemesi'nin Fazilet Partisi Kararı' Liberal Düşünce, Yaz 2002, p.42.

84 ERDOĞAN, Mustafa, 'Fazilet Partisi'ni Kapatma Kararı Işığında Türkiye'nin Anayasa Mahkemesi Sorunu' Liberal Düşünce, Yaz 2001, p.38-40.

85 TCC, Judgment No. E. 2008/16 K.2008/116, 5.6.2008.

86 ESEN, Selin, How Influential are the Standards of the European Court of Human Rights on the Turkish Constitutional System in Banning Political Parties? Ankara Law Review, Vol.9, No.2, 2012, p.153-154.

afterwards identified this doctrine as 'the strict interpretation of laicism' in 2012.[87] The Court has emphasized new 'libertarian interpretation of laicism' in its Judgments as from 2012 onwards after renouncing and forgoing its former strict understanding of laicism. In the case recognised in the society as 'Judgment on 4+4+4', some amendments were introduced to certain laws, thus prescribing to add such elective courses as Holy Quran and Life of the Prophet to the subjects taught in secondary and high schools. In this very Judgment, the Court developed a different understanding of laicism unlike the ordinary perception and declared that TCC instead adopted libertarian understanding of laicism: *"When the historical progress of laicism is examined, two different types of interpretation and implementation seem to have existed depending on diverse approaches to religion. According to the strict understanding of laicism, religion denotes a phenomenon that only enlivens in the conscience of individuals and must not definitely go beyond and be reflected to social and public area. The other flexible or libertarian interpretation of laicism is driven by the conviction that religion not only has an individual dimension but also is a social phenomenon. The latter understanding does not confine religion solely to the inner world of the individual and regards religion as an important part of individual and collective identity, thereby letting this identity appear in social life. In the laicist political life, individual choices about religious matters and the life styles shaped by these choices are beyond intervention, but under protection of the state"*.[88] Hakyemez drew attention in his doctorate thesis of 1999 to the capacity of the Constitutional Court for making libertarian comments. Because the Court declares that it has accepted to follow the democratic social order of the western style as the model. In this sense, in the event that TCC attaches the requisite attention to the necessities of the democratic social order and the principle of proportionality, this would facilitate delivery of more libertarian comments.[89] The author's foresight came true in 2012. However, as elaborated below, it is doubted whether this transformation has stemmed from attaching importance to both principles mentioned by the author.

This Judgment was not actually given in respect to compulsory religious education. In this regard, Özbudun believes that supervision and control of the state over religious education and teachings of ethics are obligatory to prevent the freedom of teaching religion from being exploited for the purposes enlisted in Article 14 of the Constitution. But compulsory religious education is contrary to the principles of laicist state no matter how and why religious

87 See: TCC, Judgment No. E.2012/65 K.2012/128, 20.09.2012.

88 TCC, Judgment No. E.2012/65 K.2012/128, 20.09.2012, p.60.

89 HAKYEMEZ, Yusuf Şevki, 'Militan Demokrasi Anlayışı ve 1982 Anayasası' Seçkin Yayıncılık, 2000, p.231-235.

education is introduced.[90] In the case of *Hasan and Eylem Zengin v. Turkey*, ECtHR ruled that including in the curricula a compulsory course in religious culture constituted a violation[91] of Article 2 of Additional Protocol No. 1[92]. At a closer look at the Judgment on Religious Education within the context of elective courses reveals that TCC has used the concept of freedom of religion more often and made more references to international human rights law. The texts most shown as references by TCC are the European Convention on Human Rights and ECtHR Judgments.[93] Nevertheless, TCC has not identified new parameters with respect to laicism. Even though it is stated in broad terms that religious freedoms are assured under the protection of state, it remains vague which principles will govern the relationship between state and religion. In this regard, TCC declares that the former interpretation was renounced and that some of the freedoms forbidden on grounds of the principle of laicism would be protected under the same principle of 'laicism'.

The transformation in understanding of laicism by TCC has also been reflected to judgments on the cases of individual applications. As is known, individual application to the Constitutional Court was introduced through the constitutional amendments of 2010, thus letting TCC acquire the status of a human rights court to which individuals apply for their personal claims on rights. In an individual case, Tuğba Arslan who worked as a lawyer lodged an application with TCC by claiming that being debarred from practising her profession due to wearing headscarf was against the freedom of religion. In this case, instead of upholding the classic view of laicism, TCC built and demonstrated a human rights-oriented understanding of laicism through references to the Judgments of ECtHR. Through resorting again to the dual classification in its former Judgment, TCC sustained its efforts to set a precedent on this matter.[94] The statements used by TCC during the material examination of Tuğba Arslan's case in terms of freedom of religion and conscience were quoted verbatim in the Judgment on Esra Nur Özbey who lodged an application with the claim that being forced to take off her overcoat at the entrance of courthouse constitutes a breach of freedom of religion and conscience. TCC directly demonstrated and upheld its libertarian understanding of laicism in

90 ÖZBUDUN, Ergun, 'Türk Anayasa Hukuku' Ankara, 2004, Yetkin Yayınları, p.77-78.

91 ECtHR, Hasan ve Eylem Zengin v. Turkey, Başvuru No.1448/04, 09.10.2007, parag.77.

92 Additional Protocol 1, ARTICLE 2, Right to Education: 'No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions'.

93 YILDIRIM, Engin & GÜLENER, Serdar, 'Anayasa Mahkemesi Kararlarında Uluslararası ve Karşılaştırmalı Hukuka Yapılan Atıflar: Ampirik Bir Analiz' Ankara Üniversitesi Hukuk Fakültesi Dergisi, Sayı: 67/1, 2018, p.123.

94 TCC, Individual Application No. 2014/256, 25.6.2014.

the Judgment on Esra Nur Özbey without making a dual classification as in the Judgment on Tuğba Arslan. [95] In the Judgments hearing the individual applications of B.S.[96] and Sara Akgül lodged with TCC with the respective claims that removal from public office due to headscarf[97], on one hand, and the obligation to repay all the received scholarships because of being expelled from school for wearing headscarf[98], on the other hand, constitute violation of freedom of religion and conscience, TCC reiterated its precedent with reference to the former Judgments on both Tuğba Arslan and Esra Nur Özbey.

As a matter of fact, TCC did not explain the reason why it renounced the interpretation it had adopted for years. If the developments taking place in the international human rights law had created an impact, TCC could probably have changed its interpretation much earlier. In this sense, notwithstanding the impact of individual application introduced through a Constitutional amendment in 2010, the Judgment on Religious Education, which reflected the actual transformation of laicism, was delivered before the practice of individual application took effect on September 23, 2012. This transformation in the precedents of TCC is therefore not based on the impact of international law or a radical legal reform. This outcome leads us to conclusion that TCC accommodated itself to the changing socio-cultural atmosphere. TCC declares that it exhibits a libertarian approach any more to the matters considered as 'threat to democracy' under the scope of laicism. What is more, in spite of all the criticisms, ECtHR leaves the interpretation of laicism to the discretion and appreciation of TCC. Appointment of new judges to TCC might be another reason for this transformation without clear evidence though. According to Bali, the procedures pertaining to appointment of TCC judges has been amended in order to change composition of the Court and carry out the reform agenda by appointing new judges with different points of view.[99] When only the political and social factors of transformation are taken into account, it might have been more probable for TCC to adopt this new interpretation of laicism well before 2012. In our opinion, change of judges has also played a role in change of interpretation along with the changing socio-cultural climate. This situation necessitates reconsidering the immemorial debate about the role of lawyers, which was brought about and briefly summarised by Dworkin as 'law is interpretation'.[100]

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95 TCC, Individual Application No. 2013/7443, 20.05.2015.

96 Applicant requested the court not to disclose his/her name and TCC accepted this request.

97 TCC, Individual Application No. 2015/8491, 18.7.2018.

98 TCC, Individual Application No. 2015/269, 22.11.2018.

99 BALİ, Aslı, 'Courts and Constitutional Transition: Lessons from the Turkish Case' International Journal of Constitutional Law, Vol.11, Issue 3, July 2013, pp.691-693.

100 ÖKTEM, Niyazi, 'Ronald Dworkin ve Hukuk Felsefesi' Anayasa Yargısı, Sayı: 28, 2011, p.88.

## CONCLUSION

Perception of laicism by the Constitutional Court, which assumed the function of a human rights court following the introduction of the right to individual application thereto, underwent a kind of transformation in 2012. TCC incorporated more analysis on human rights in its Judgments and commenced to approach such issues as headscarf from the perspective of fundamental human rights. In this context, TCC designated its former approach as strict laicism and the new approach as libertarian laicism. Libertarian interpretation of laicism indeed does not go beyond putting more of TCC's focus and attention on international human rights standards and freedom of religion. Societies gradually develop and change at their own pace as time passes. Assessment of the change in Judgments of the Constitutional Court merely from the aspect of legal necessity will preclude us from understanding the matter comprehensively. TCC has accepted by itself in its miscellaneous judgments that both moral precepts and legal rules will be naturally subject to change as long as perceptions of a society change.[101] A similar point of view was also adopted in the Ottoman Code of Civil Law (Mecelle) under a general rule that potential changes in laws and their interpretations shall be undeniable as time changes.[102] In other words, it is absolutely inevitable to hold such a reasonable and logical expectation that dynamic rules of law and then-current interpretations of legal rules, which must respond to social needs, will change in proportion to the extent of change that the societies experience. On the other hand, social changes bring about political and legal transformation. Therefore, it is requisite to read and analyse the transformation in Judgments of TCC not from a single point of view but taking into account more factors.

Constitutions are the legal texts of the highest rank which regulate and enshrine essential qualities of a state, on one hand, and fundamental rights and freedoms, on the other hand. Through addressing a wide variety of subjects, it embodies main dynamics of not only state affairs and political life but also those of social life. Therefore, the issues referred to TCC are of closest concern and interest for both state itself and political life and social life. Therefore, it is quite natural to find political and social analyses in any Judgment of TCC. For instance, TCC found the existence of an institution like Presidency of Religious Affairs appropriate in terms of social order and historical necessity. In another Judgment, TCC did not rule in favour of dissolution of AK Party although it found this party as opponent of laicism. It sounds highly improbable to explain these cases simply based on appointments

[101] See: TCC, Judgment No. E. 1963/128 K. 1964/8, 28.01.1964.

[102] Majalla article 39: '*It is an accepted fact that the terms of law vary with the change in the times'*. For further information: YILDIRIM, Mustafa, 'Mecelle'nin Külli Kaideleri' Tibyan Yayıncılık, 2015, İzmir, p.112.

or changing opinions of TCC members. Today even political opponents of the parties, whose potential closures are highly controversial on the agenda, can put forward that any sort of party closures does not constitute a democratic practice. The matters regarding laicism can be analysed through a similar reasoning. Students wearing headscarf can easily enter universities and make their requests in public institutions without unveiling their heads any more. In this sense, no social tension has taken place and, as time goes on, public officers have been allowed to work by wearing headscarf and, what is more, even working with headscarf in Turkish Armed Forces has become admissible. Thus, headscarf was no longer part of discussions on deliberate attempts to eliminate democracy. Under these social circumstances, it is also impossible for TCC to sustain its strict understanding of laicism. It must be stated that what mostly held sway over the transformation of human rights perception of TCC were the developments in the field of international human rights law and particularly Judgments of ECtHR. When these factors are ignored, it can be mistaken by considering TCC as a court in charge of making mere political and social analyses.

As a result of assuming the function of a kind of human rights court following the admission of individual applications as from 2010, TCC seemed to include more analyses and international case-laws on human rights than ever before. Nevertheless, it is essential to exclude the transformation in the interpretation of laicism by TCC from the field of international human rights law. ECtHR held that TCC's interpretation of laicism fell into scope of margin of appreciation and, in this respect, did not play a transformative role. This study argues that the underlying reasons for the said change comprise socio-cultural environment, on one hand, and changing TCC judges, on the other hand. It is highly normal for the changing socio-cultural environment to exert impact on TCC Judgments. Analyses on laicism are basically predicated upon defending of democracy. The analyses about strict interpretation of laicism currently put aside by TCC might be brought to top agenda again in the future.

This situation is directly proportionate to TCC's perception of threat to democracy. It is quite likely for TCC to regard a factor as a threat today which was once counted as non-threatening at all or deem a factor non-threatening today which was counted as a threat in the past. Because neither the Constitution nor TCC Judgments have so far made or included a fixed definition of laicism. It is highly challenging to define laicism though. No change has taken place in terms of legal rules, only change has occurred in the way of interpretation. At this stage, it became also influential for new TCC judges to read the changing socio-cultural climate correctly. On the other hand, it cannot be expected from ECtHR to make an interpretation of laicism since there is no established or standard interpretation of laicism. The complaints referred to ECtHR were

especially filed with respect to exercise of rights enshrined under convention such as freedom of association or freedom of religion. If ECtHR had ruled that then-current interpretation of laicism led to infringement of any fundamental rights or if the Court had determined some basic guiding principles in light of its earlier Judgments, this transformation might have taken place earlier. In this sense, it can be drawn such conclusions that a fair balance needs to be established between the doctrine of margin of appreciation and the limitation of rights enshrined in the convention and, to that end, certain parameters are required to be identified. In this regard, ECtHR would have generated an independent interpretation by itself, and would have taken heed of the fact that Article 18 constitutes an assurance under the convention against abuse of power under the even if no request is submitted by parties, and would have specified that limitations of rights beyond moderate limits of democratic societies could not be excused and rationalised under the margin of appreciation, and would have identified certain parameters.

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# EVALUATION OF TURKISH COMMERCIAL CODE TEMPORARY ART. 13 FROM THE PERSPECTIVE OF COVID-19 OUTBREAK AND JOINT STOCK COMPANIES[1]

*Türk Ticaret Kanunu Geçici Madde 13'ün Covid-19 Salgını ve Anonim Şirketler Açısından Değerlendirilmesi*

**By Dr. Setenay YAĞMUR***

*Review and Literature Scan Article*

**Abstract**

With the temporary article (Art.) 13 added to the Turkish Commercial Code (TCC) No. 6102, pursuant to Art. 12 of the "*Law on Reducing the Effects of the New Corona Virus (Covid-19) Outbreak on Economic and Social Life and Law on Amendment to Certain Laws"*, numbered 7244 and which entered into force on 17.04.2020 in order to control the negative effects caused by the Covid 19 outbreak, some restrictions were imposed on the distribution of dividend and dividend advances of capital companies. As part of this, pursuant to TCC temporary Art.13/1, in capital companies with some exceptions, it can be decided to distribute only up to twenty-five percent of the net profit for 2019 until 30.09.2020; previous year profits and free reserves cannot be distributed; general assembly cannot authorize the board of directors to distribute advance dividends. Moreover, in accordance with TCC temporary Art. 13/2, if the general assembly has decided to distribute dividends for the fiscal year 2019, but the shareholders have not yet been paid or have been partially paid, payments exceeding twenty-five percent of the net profit for 2019 will be postponed until 30.09.2020. It is possible to extend or shorten the term by three months with the decision of the president of the republic. As it is seen, by this provision, serious restrictions are imposed on the financial rights of the shareholders regarding the dividend. However, acquiring a dividend is the main investment aim of the shareholder. However, taking into account the pandemic process, the lawmaker directly intervened in the interests of different interest groups associated with the capital companies through the companies. Within the scope of this study, temporary Art. 13 of TCC will be handled in terms of joint stock companies in Turkish law system and the evaluations regarding the provision in question will be included**.**

**Keywords** Covid 19, join stock company, dividend.

**Özet**

Covid 19 salgınından kaynaklı olumsuz etkileri kontrol altında alabilmek amacıyla 17.04.2020 tarihinde yürürlüğe giren 7244 sayılı *"Yeni Koronavirüs (Covıd-19) Salgınının Ekonomik ve Sosyal Hayata Etkilerinin Azaltılması Hakkında Kanun ile Bazı Kanunlarda Değişiklik Yapılmasına Dair Kanun"* madde (m.) 12 uyarınca, 6102 sayılı Türk Ticaret Kanunu'na (TTK) eklenen geçici madde (gm.) 13 ile sermaye şirketlerinin kâr payı ve kâr payı avansı dağıtımlarına ilişkin olarak bazı sınırlamalar getirilmiştir. Bu kapsamda TTK gm. 13/1'e göre, istisnaları olmakla birlikte sermaye şirketlerinde, 30.09.2020 tarihine kadar 2019 yılı net dönem kârının yalnızca yüzde yirmi beşine kadarının dağıtımına karar verilebilir; geçmiş yıl kârları ve serbest yedek akçeler dağıtıma konu edilemez; genel kurul, yönetim kuruluna kâr payı avansı dağıtımı yetkisi verilemez. Ayrıca TTK gm. 13/2 uyarınca genel kurul tarafından 2019 yılı hesap dönemine ilişkin kâr payı dağıtımı kararı alınmış ancak henüz pay sahiplerine ödeme yapılmamışsa veya kısmi ödeme yapılmışsa, 2019 yılı net dönem kârının yüzde yirmi beşini aşan kısma ilişkin ödemeler 30.09.2020 tarihine kadar ertelenir. Söz konusu sürenin cumhurbaşkanı kararı ile üç ay uzatılması veya kısaltılması mümkündür. Görüldüğü üzere, işbu bu hükümle pay sahiplerinin kâr payına ilişkin mali hakları açısından ciddi sınırlandırmalar getirilmiştir. Oysa kâr payı elde etmek, pay sahibinin temel yatırım gayesidir. Buna karşın kanun koyucu pandemi sürecini dikkate alarak, sermaye şirketleri ile bağlantılı farklı çıkar gruplarının şirketler üzerinden elde edecekleri menfaatlere doğrudan müdahale etmiştir. Bu çalışma kapsamında TTK gm. 13, Türk hukuk sisteminde anonim şirketler açısından ele alınacak olup, söz konusu hükme ilişkin değerlendirmelere yer verilecektir.

**Anahtar Kelimeler** Covid 19, anonim şirket, kâr payı.

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## INTRODUCTION

The disease, which first appeared in Wuhan, China in December 2019 and named as the new coronavirus (Covid-19), was declared as a global epidemic by the World Health Organization on 11.03.2020, and an emergency call was made to all countries to take the necessary measures. Also, in Turkey, a series of measures were taken to reduce the effects of the epidemic on social and economic life[1].

In this context, "*Law on Reducing the Effects of the New Corona Virus (Covid-19) Outbreak on Economic and Social Life and Law on Amendment to Certain Laws*", numbered 7244, were accepted on the date of 16.04.2020 and entered into force on 17.04.2020[2]. In the justification of Art. 11 of Law No. 7244, the law-maker stated that Covid-19 poses a great danger for the economic life as well as for the health of the society and stated that various measures are applied in order to eliminate the epidemic's negative effects on the economic activities. The economic effects of the epidemic are not yet clearly revealed due to the slowdown in economic activities, closure of borders, and uncertainties in terms of supply and demand balance. However, as required by the precautionary policy, a special regulation regarding the profit distribution to be made until 30.09.2020 has been introduced in order to prevent the reduction of company resources due to dividend distribution, to protect the existing equity of companies and to avoid the need for additional financing.

In accordance with Art. 12 of Law No. 7244, the temporary Art. added to the TCC, 13/1, it can be decided to distribute only twenty-five percent of the net profit of 2019 until 30.09.2020; previous year profits and independent capital reserves cannot be subject to distribution; general assembly cannot authorize the Board of Directors to distribute advance dividends. These provisions of this paragraph do not apply to governments, special provincial administrations, municipalities, villages and other public legal entities, and to companies whose more than fifty percent of the capital directly or indirectly held by the public funds. The President of republic is authorized to extend and shorten the periods specified in this paragraph for three months. In addition, if the general assembly decided to distribute dividends for the 2019 fiscal year according to the TCC temporary Art. 13/2, but the payments have not been made yet to the shareholders or the partial payment has been made, the payments for the part exceeding twenty-five percent[3] of the net profit for the year 2019 will be

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1 General Rationale of Law No. 7244, Access Address: https://www2.tbmm.gov.tr/d27/2/2-2812.pdf, Access Date: 22.04.2020.

2 Published in the Official Gazette numbered 31102 and dated 17.04.2020.

3 Before the Law No. 7244, the letter of Turkey Union of Chambers and Commodity Exchanges dated 01.04.2020 and Numbered 34221550-045.02-3392 also addresses a parallel arrangement, based on the announcement of the Ministry of Commerce dated

postponed until the end of the period specified in the first paragraph.

As part of this study, firstly, the content and purpose of making the temporary Art. 13 of the TCC will be examined, and then the deadlines regarding the application of the substance will be evaluated, and finally, the legal consequences of the violation of the regulation in question will be determined.

## I. EVALUATION OF THE PROVISION IN TERMS OF THE CONTENT AND THE PURPOSE OF MAKING

### A. Evaluation of the Content of the Provision

Financial rights are the rights of joint stock company shareholders, which arise from company assets and have a value that can be measured with money. The basis of financial rights establishes an economic right of the shareholder's ownership on the company's assets. Within the framework of these rights, although the shareholder does not have control and saving possibilities on the company's assets; they have the right to participate, benefit and acquire[4]. The right to dividend also has an important place within the financial rights of the shareholder.

Dividend is a certain part of the company's profit that is decided to be distributed by the general assembly and paid to the shareholders from the net profit of the year or independent capital reserves in return for the paid capital share to the joint stock company[5].

As with all corporations, the ultimate aim of joint stock companies is to make profit and to distribute it[6]. Abandoning or distorting this purpose will

31.03.2020. For evaluations regarding the determination of twenty-five percent limit determined within the scope of the letter of the Ministry of Commerce regarding the distribution of dividends dated 31.03.2020, see: **Akın,** Murat Yusuf: *"Ticaret Bakanlığının 31.03.2020 Tarihli Kar payı Dağıtımına İlişkin Yazısı Üzerine Düşünceler",* Access Address: http://www.ticaretkanunu.net/murat-yusuf-akin-ticaret-bakanliginin-31-03-2020-tarihli-kar-payi-dagitimina-iliskin-yazisi-uzerine-dusunceler/, Access Date: 12.04.2020.

4 **Poroy,** Reha/ **Tekinalp,** Ünal/ **Çamoğlu,** Ersin: Ortaklıklar Hukuku I, İstanbul 2019, p. 686; **Turanlı,** Hüsnü/ **Seyman Korkmaz,** Seda: *"Anonim Ortaklıklarda Kar Payı Alma Hakkı",* İstanbul Kültür Üniversitesi Hukuk Fakültesi Dergisi, Y. 2015, Vol. 14, Issue 1, p.12. Shareholders' financial rights are dividends, interest for the preparation stage, pre-emption rights and liquidation dividends, (**İpekel Kayalı,** Ferna: Turkish Private Law, Edit. **Korkusuz,** Refik, Ankara 2018, p. 250).

5 **Canözü,** Salih: Anonim Şirketlerde Kar Payının Tespiti ve Dağıtılması, Ankara 2015, p. 24.

6 **Birsel,** Mahmut: Anonim Şirketlerde Kar Kavramı, İzmir 1973, p. 13 ff; **İmregün,** Oğuz*: "Anonim Ortaklıkta Pay Sahibinin Kâr Payı (Temettü) Hakkı",* Prof. Dr. Ömer Teoman'a 55. Yaş Günü Armağanı, İstanbul 2002, p. 414; **Poroy/ Tekinalp/ Çamoğlu,** p. 696; **Turanlı/ Seyman Korkmaz,** p. 8; **Üçışık,** Güzin/ **Çelik**, Aydın: Anonim Ortaklıkta Finansal Tablolar, Yedek Akçeler ve Kar Dağıtımı, İstanbul 2018, p. 309.

eliminate the company and turn it into another kind of union persons. In accordance with Art.331 of the TCC, joint stock companies can be established for any economic purposes and issues that are not prohibited by law. It is stated in the doctrine that the subject to be explained with the expression "*economic purpose*" in the mentioned provision is "*activities for profit making and distribution*" [7]. However, the fact that the ultimate aim of the joint stock company is to make profit and to share it does not mean unlimited-ness in terms of profit and sharing. Joint stock companies must act like a responsible citizen and businessman, aware of their social and moral obligations. As a requirement of this imperative, there are regulations (for example, TCC art. 519/3) that provide protection of the enterprise during the crisis, elimination of unemployment or alleviating the consequences[8]. Therefore, although making profit in joint stock companies is the ultimate aim, it is not in a nature that can be applied unlimitedly under all circumstances.

According to TCC Art. 507/1, each shareholder has right to participate in the net period profit, which is decided to be distributed to the shareholders according to the provisions of the law and articles of association, in the rate of owned shares. As it can be seen, within the scope of the general provision regulating the dividend, it is sought to find a distribution decision in accordance with the provisions of the law and the articles of association, in terms of the distribution of the net profit to the shareholders. In this context, since TCC temporary Art. 13 is a special legal arrangement as an exception regarding the profit distribution, it constitutes the necessary legal basis.

General assembly determines the time, conditions and rate of dividend payment[9]. In this case, the entire dividend can be paid at once or in instalments and as a rule, the general assembly decides how[10]. In addition, in joint stock companies, in accordance with TCC Art. 523/2, b, if the interests of all shareholders are considered, with the decision of the general assembly, it is possible to transfer all of the profit to reserve funds and not to distribute any dividends if the company is justified in terms of continuous development and distribution of stable profit as much as possible. In the doctrine, *Pekdinçer* and *Yılmaz* make the following statement, which we also agree with, specifically for Covid-19 process: *"We believe that it is an economically correct way*

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7 **Poroy/ Tekinalp/ Çamoğlu,** p. 696.

8 **Poroy/ Tekinalp/ Çamoğlu,** p. 696.

9 **Pulaşlı,** Hasan: Şirketler Hukuku Genel Esaslar, Ankara 2017, p. 617;**Turanlı/ Seyman Korkmaz,** p. 27; **Yanlı,** Veliye: *"Yeni Ticaret Kanunu ve Anonim Şirketlerde Kâr Dağıtımı",* BATIDER, Y. 2014, Vol. 30, Issue 1, p. 23; **Yasaman,** Hamdi: Menkul Kıymetler Borsası Hukuku, İstanbul 1992, p. 192.

10 **Pulaşlı,** Hasan: Şirketler Hukuku Genel Esaslar, Ankara 2017, p. 617;**Turanlı/ Seyman Korkmaz,** p. 27; **Yasaman,** Hamdi: Menkul Kıymetler Borsası Hukuku, İstanbul 1992, p. 192.

*for companies not to distribute dividends in this process, and in the current situation, there is no discussion about the condition, as also stated in TCC Art. 523/2 b, of (i)- the interest of all shareholders and (ii)- the continuous development of the company and the distribution of stable dividends as much as possible. Therefore, there will be no unlawful direction found in deciding not to distribute dividends by the companies, within the scope of the TCC 523/2, b.*[11] *"*

With the regulation of TCC temporary Art. 13, the legislator has removed/restricted the general assembly's authority regarding the profit distribution decision until 30.09.2020 (it is possible to extend or shorten it for three months by the President's decision).

The restrictions and prohibitions in TCC temporary Art. 13 do not apply to governments, special provincial administrations, municipalities, villages and other public legal entities, and to companies whose more than fifty percent of the capital directly or indirectly held by the public funds. We are of the opinion that the aim of the legislator within the scope of this exception is to ensure the continuity of the cash flow to the public.

According to TCC temporary Art. 13/1, until the date of 30.09.2020, only twenty-five percent of the net profit of the year 2019 can be decided to be distributed, the previous year profits and free reserves cannot be distributed, and the general board cannot be authorized to distribute dividend advances. In accordance with TCC temporary Art. 13/2, if the general assembly has decided to distribute dividends for the 2019 fiscal year, but the shareholders have not yet been paid or partial payments been made, the payments related to the portion exceeding twenty-five percent of the net profit for 2019 will be postponed until the end of the period specified in the first paragraph. At this point, our opinion is that if the profit distribution decision has been taken and implemented, it will no longer be possible to repay the amount in question to the company. This is because there is no regulation regarding this issue. In addition, in accordance with Law No. 7244 Art. 17, TCC temporary Art. 13 provisions come into force on 17.04.2020, the date of publication. Therefore, payments made based on the decisions of the general assembly taken before this date should be accepted

[11] **Pekdinçer,** Tamer/ **Yılmaz,** Abdussamed: *"Anonim Ortaklıkların 2019 Yılı Olağan Genel Kurul Toplantılarında Dağıtabilecekleri Kar Payı Oranına İlişkin Ticaret Bakanlığı Duyurusunun Değerlendirilmesi",* Access Address: https://blog.lexpera.com.tr/anonim-ortakliklarin-dagitabilecekleri-kar-payi-oranina-iliskin-ticaret-bakanligi-duyurusunun-degerlendirilmesi/?fbclid=IwAR1Ey6VY7K9XDQOgJR4gGayyDYuN4IN6h33b37mahtwMS4fTUuWZCMpBgU, Access Date: 10.04.2020. For the 11th Civil Chamber of the Turkish Court of Appeal's decisions in the same direction, see: **Yanlı,** p. 30, fn. 69-70. For a general evaluation on this subject, see: **Yanlı,** p. 23 ff. For an opposite view and subject of net profit, see: **Tekinalp,** Ünal: Sermaye Ortaklıklarının Yeni Hukuku, İstanbul 2015, p. 354.

outside the scope of the provision.

Additionally, based on the temporary Art. 13/3 of the TCC, "*The Communiqué on the Procedures and Principles Regarding the Implementation of the Temporary 13th Article of the Turkish Commercial Code No. 6102*" was published by the Ministry of Commerce[12]. According to the Art. 5 of the mentioned Communiqué, companies that decide to distribute dividends of TRY120,000 and below shall be able to distribute dividends, except: employers who benefit from short-term employee grant due to force major from Covid-19 and/or cash wage support due to unpaid leave; and those who use Treasury-backed loan surety and have an unpaid credit debt balance. Besides, companies deciding to distribute dividends provided that more than half of the dividend decided to be distributed is used in order to fully pay in cash of the capital commitment payable to another capital company under the provisions of the law, are also excluded from the temporary Art. 13 of the TCC. Moreover, the company taking dividend distribution decisions, if it is used in cash for the performance of liabilities that have expired until 30.09.2020 constitutes an exception to the TCC the temporary Art. 13. However, the provision of these conditions alone is not sufficient. At this point, under Art. 6 of the Communiqué, it is mandatory to obtain confirmation from the Ministry of Commerce to discuss the dividend distribution at the general assembly.

The dividend payments to be made within the limits determined in accordance with TCC temporary Art. 13 should be made in accordance with the principle of equal treatment rule, as it is outside the pandemic process[13].

**B. Evaluation of the Purpose of Making the Award**

Joint stock companies have separate legal entities from shareholders and company managers. In accordance with the principle of separation of the assets that arise because of this situation, the assets of the joint stock company are separate from the assets of the shareholders. According to TCC Art. 329/1, the joint stock company is the company that is solely responsible for its assets due to its debts.

The shareholders of the company are not responsible for the creditors of

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12 Published in the Official Gazette numbered 31130 and dated 17.05.2020.

13 For detailed information, see: **Akdağ Güney,** Necla: *"Anonim Şirketlerde Eşitlik İlkesi",* Gazi Üniversitesi Hukuk Fakültesi Dergisi, Y. 2014, Vol. 18, Issue 3-4, p. 123; **Üçışık/ Çelik,** Kar Dağıtımı, p. 311; **Gürbüz, Usluel,** Aslı Elif: Anonim Şirkette Pay Sahibinin Kar Payı Alma Hakkı, Ankara 2016, p. 55 ff; **Nomer,** Füsun: *"Anonim Ortaklıkta Eşit Davranma (Eşit İşlem) İlkesi",* Prof. Dr. Oğuz İmregün'e Armağan, İstanbul 1998, p. 478 ff; **Turanlı/ Seyman Korkmaz,** p. 27; **Yağmur,** Setenay: Anonim Şirketlerde Eşit İşlem İlkesi, İstanbul 2020, p. 128 ff; **Yıldız,** Şükrü: Anonim Ortaklıkta Pay Sahipleri Açısından Eşit İşlem İlkesi, Ankara 2004, p. 140.

joint stock companies. Therefore, creditors of the company can only turn to the assets of the company. In other words, creditors can get their receivables only from company assets. Apart from this, creditors do not have the opportunity to turn to the assets of the shareholders[14]. So much so that according to TCC Art. 329/2, shareholders are only responsible for the capital shares they have committed and against the company.

This responsibility system, which is accepted within the scope of joint stock companies, brings along the principle of protection of joint stock company capital[15]. The capital maintenance rule is defined as rules and provisions protecting capital and ensuring that the capital can be put in accordance with the law, the subject of the commitment is securely transferred to the joint stock company, the shares below the nominal value are not issued, the shares of their participation are not returned to the shareholders, and in case the promised capital share is not exercised, it can be started legal proceeding by the company[16].

In the joint stock company, the assets that are prevented from being distributed to the shareholders constitute a minimum guarantee in favour of the creditors of the company. However, when the interest groups within the company are evaluated as a whole, all assets that are indicators of the financial situation of the company should be protected[17]. In this context, we believe that the main value that needs to be preserved should not be limited to capital, and an assessment should be made on company assets with a broader perspective.

Protection of company assets is in line with company interests. Company interest is an umbrella concept that protects everyone, directly or indirectly related to the company[18]. Although this concept has not been defined by the legislator; it is described in the doctrine as the insurance that the joint stock company maintains its legal and economic presence in the best possible way[19].

The scope and quality of the shareholders' rights that meet the financing needs of the joint stock company and the creditors of the company are different from each other. This situation is explained in the doctrine as follows: The

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14 **Şener,** Oruç Hami: Teorik ve Uygulamalı Ortaklıklar Hukuku, Ankara 2019, p. 314; **Canözü,** p. 25; **Üçışık,** Güzin/ **Çelik,** Aydın: Anonim Ortaklıklar Hukuku I, Ankara 2013, p. 53.

15 **Kırca,** İsmail/ **Şehirali Çelik,** Feyzan Hayal/ **Manavgat,** Çağlar: Anonim Şirketler Hukuku, C. I, Ankara 2013, p. 121; **Poroy/ Tekinalp/ Çamoğlu,** p. 316; **Üçışık/ Çelik,** Anonim Ortaklıklar, p. 53.

16 **Tekinalp,** p. 80. See: **Üçışık/ Çelik,** Kar Dağıtımı, p. 313.

17 **Kırca/ Şehirali Çelik/ Manavgat,** C.I, p. 129.

18 **Sulu,** Mumammed: Anonim Ortaklıkta Şirket Menfaati Kavramı*,* İstanbul 2019, p. 72.

19 **Helvacı,** Mehmet/ **Çamurcu,** E., **Türkyılmaz,** İ.: *"Özellikle Anonim Şirketler Açısından Şirket Menfaati Kavramı",* Prof. Dr. Hamdi Yasaman'a Armağan, İstanbul 2017, p. 311.

claim rights of the company creditors on the company assets are fixed and limited to the amount of the receivable and this situation is called as *"fixed claims"*. On the other hand, the shareholders' right to demand on company assets is variable. The increase in the company's assets will return to the shareholder as a dividend if the company continues, and as a liquidation share in case the company ends. In this framework, shareholders are advantageous compared to creditors. Considering the influence of shareholders in making company decisions, their strong position towards company creditors becomes clearer. The fact that the creditors have no effectiveness for the company, while the shareholders are part of this structure, albeit partially, brings about the information asymmetry. For all these reasons, the general systematic of the law is to protect the interests of creditors primarily. For example, it is possible to pay dividends to shareholders while the company is continuing or liquidation share at the end of the company only after the company's debts have been paid, that is, after the creditors have been satisfied. Therefore, shareholders have a variable demand right over the remaining amount after the receivables of the creditors are paid. And it is called as *"residual claims"*[20].

Considering the negative effects of Covid-19 outbreak on economic activities, it is understood that TCC temporary Art. 13 acknowledges that many companies are in economic instability and that this situation have brought limit to dividend distributions before they appear soon. So, with TCC temporary Art. 13, company capital is tried to be protected with a wider perspective, and this way, the principle of protecting assets, which is one of the basic principles that dominate joint stock companies, is supported. In this context, the choice of the legislator, considering the TCC temporary Art. 13, among the interest groups within the company was to keep the creditors in the foreground. In other words, it is understood that the legislator, with TCC temporary Art. 13, in accordance with the general systematic of the code, keep the interests of the creditors before the interests of the shareholders.

Joint-stock companies, even though, independently of their shareholders, are surrounded by a legal entity wall, they essentially still can continue their existence with the decisions taken by the shareholders. In this context, it is essential for the shareholders to invest together taking the risk factor into consideration. Prioritizing the interests of the shareholders in the pandemic process compared to creditors may cause slowing economic activities to come to a halt, as this may weaken the relationship of trust among the actors of the economy.

The main purpose of joint stock companies should be to move the company assets, which existed before the pandemic, safely to the end of the process.

[20] **Kırca/ Şehirali Çelik/ Manavgat,** C.I, p. 127 ff.

Taking a path in this direction will serve the interests of creditors and shareholders in the long term, as it will be in the corporate interest.

At this point, *Dural* rightly reveals the following reservation: *"With the exception of the two exceptions specified in TCC Art. 358, the freedom of the shareholders/partners to borrow to the company continues and the restrictions are not imposed, it is doubtful that the provision of TCC temporary Art. 13 may be effective in protecting the assets of the company and the purpose of the article can achieve its intended purpose"*[21].

In case the conditions in question are met, it may be possible for the shareholders to act by circumventing the provision of TCC temporary Art. 13. Our recommendation; in addition to the conditions set in TCC Art. 358, is to limit the borrowing amounts over a certain percentage within the periods specified in the TCC temporary Art. 13, and to regulate the conditions of borrowing. At this point, it may be considered to suspend the prohibition of borrowing to the company within the periods determined in the TCC temporary Art. 13. However, our view is that adopting such a way can have unfair consequences.

According to Art. 358 of TCC, it is possible for the shareholders who fulfill the due debts resulting from capital commitments to contract a debt with these companies in case the profit along with the independent capital reserve of the companies that they have a share in are sufficient to cover the losses of the previous years[22].

The lawmaker stated that the purpose of the introducing the provision is to prevent the shareholders from becoming indebted to the company, that is, using the treasury of the company in many operations and transactions including capital subscription, spending money for their personal expenditures by this means, or even from withdrawing money from the company. However, it is specified that it is considered that the implementation of this provision in an unexceptional and strict manner may lead to injustice, therefore exceptions are accepted[23]. The regulation on the prohibition of borrowing to the company was amended by law no. 6335 before the TCC Law no. 6102 entered into force. The regulation in the first version of the law is as follows: "*Except for the debt resulting from the subscription, shareholders cannot borrow to the*

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21 **Dural,** H. Ali: *"COVID-19 Salgını Nedeniyle Türk Ticaret Kanunu'na 7244 Sayılı Kanunla Eklenen Geçici 13. Madde ile Sermaye Şirketlerinde Kâr Dağıtımına Getirilen Sınırlamalar"* Access Address: https://blog.lexpera.com.tr/covid-19-salgini-nedeniyle-turk-ticaret-kanununa-eklenen-gecici-13-madde-ile-sermaye-sirketlerinde-kar-dagitimina-getirilen-sinirlamalar/, Access Date: 22.04.2020.

22 For the criticism on the amendment, see: **Kendigelen,** Abuzer: Türk Ticaret Kanunu Değişiklikler, Yenilikler ve İlk Tespitler, İstanbul 2016, p. 243. For detailed information, see: **Toraman Çolgar,** Emek: Şirkete Borçlanma Yasağı, İstanbul 2019, p. 126 ff.

23 Justification TCC Art. 358.

*company. Excepting the debt results from a transaction that has been made with the company as the business subject of the company and the business of the shareholder and is subject to the same or similar terms as its equals."*[24] According to the lawmaker, through the amendment, it is rendered possible that the urgent fund needs of the partners and the managers can be fulfilled by corporate assets. On the contrary, it should not be concluded that the amendments made on the aforesaid article allow the shareholders and managers to borrow from corporate assets limitlessly. Yet, this matter contradicts the principle of capital maintenance which is one of the basic principles of the law. The purpose of making the aforesaid amendment is to meet the urgent needs of the shareholders and managers in a reasonable time and in a way that will not harm the company. Long-term and high rates of loaning from company assets will not be appropriate for the purpose of the provision. Because this situation can lead to the evacuation of the company[25].

Although it is regulated by the lawmaker that within the scope of Art. 358 of TCC, the shareholders can meet their urgent needs by borrowing from the company within reasonable bounds, within the scope of relevant regulation, issues such as the amount, maturity and repayment method of the shareholder's debt has not been regulated. However, it is clear that action should be taken within the context of the prohibition of abuse of rights.

While it is considered that these people may have urgent needs even in normal times when dividend are paid in full to the shareholders in case of providing necessary conditions, it will not be fair to ignore this situation during the pandemic. As a result of the extraordinary process experienced due to the pandemic, the purpose of protecting the assets of the joint stock company serves the public interest with a broad perspective. However, when it is considered that there may be shareholders whose only source of income is dividend and these people should also be protected, we have the opinion that, borrowing to the company should not be completely prohibited during the period specified in the temporary Art. 13 of TCC, nevertheless, in order to prevent the aforementioned provision from being functionless, by making temporary addition to Art. 358 of TCC, the amount and conditions of borrowing can be limited.

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[24] For the evaluation of the first version of Art. 358, see: **Özkorkut,** Korkut: *"6102 Sayılı Türk Ticaret Kanunu'nda Şirkete Borçlanma Yasağı, Finansal Raporlama ve Bağımsız Denetime İlişkin Değişiklikler",* BATIDER, Y. 2012, Vol. 28, Issue 3, p. 50 ff.

[25] The juristification of Law No. 6335

## II. EVALUATION IN TERMS OF PERIODS RELATING PROVISION

With the regulation of Art.409/1 of TCC, the time, conditions and rate of payment of the dividend is determined by the general assembly. Therefore, the entire dividend can be paid at once or in instalments and as a rule, the general assembly decides on it[26]. The 11th Civil Chamber of the Turkish Court of Appeal, in accordance with TCC Art. 408/2, considering that the decision-making authority regarding profit distribution is exclusively at the general assembly, the decision of the trial court has been unanimously approved[27]. The fact that the receivable dividend of the shareholder becomes an unconditional and claimable due, depends on the general assembly's decision regarding the distribution of the profit[28].

In accordance with Art. 147/1,5 of Turkish Code of Obligations, if the shareholders do not request his receivable dividend, the dividend of relevant year will be prescribe. According to the temporary Art. 13/2 of TCC, if the general assembly has decided to distribute dividends for the accounting period of 2019, but the shareholders have not yet been paid or have been partially paid, payments related to the part exceeding twenty five percent of the net profit of the year 2019 are postponed until the date of 30.09.2020. Therefore, although the receivable dividend of the shareholder becomes an unconditional and claimable due, owing to the special provision of law, the five-year period of prescription will stop until the date of 30.09.2020[29]. Herein, in case that

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26 **Pulaşlı,** p. 617; **Yasaman,** p. 192.

27 Decision Date: 14.01.2020, Docket No: 2019/2145, Decree No: 2020/357, Access Address: https://kararara ma.yargitay.gov.tr/YargitayBilgiBankasiIstemciWeb/, Access Date: 24.04.2020.

28 **Ayhan,** Rıza/ **Çağlar**, Hayrettin/ **Özdamar**, Mehmet: Şirketler Hukuku Genel Esaslar, Ankara 2019, p. 430; **Pulaşlı,** p. 617; **Yasaman,** p. 192.

29 For the opinion in the same direction, see: **Dural,** H. Ali: *"COVID-19 Salgını Nedeniyle Türk Ticaret Kanunu'na 7244 Sayılı Kanunla Eklenen Geçici 13. Madde ile Sermaye Şirketlerinde Kâr Dağıtımına Getirilen Sınırlamalar",* Access Address: https://blog.lexpera.com.tr/covid-19-salgini-nedeniyle-turk-ticaret-kanununa-eklenen-gecici-13-madde-ile-sermaye-sirketlerinde-kar-dagitimina-getirilen-sinirlamalar/, Access Date: 22.04.2020. At this point, the concept of *"stopping the prescription"* is used consciously and completely different from *"interrupting of prescription"*. Because, the fact that the period of prescription does not start to work or stop working although it started is explained as stopping the prescription. Within this scope, in the first case the period did not start working. In the second case the period which started working was stopped. Therefore the period of prescription is expended as much as the time that it does not start working or stops after starting working. In cases where the prescription is interrupted, unlike the prescription is stopped, the prescription previously worked is eliminated and it results in as if it never worked. (**Eren,** Fikret: Borçlar Hukuku Genel Hükümler, Ankara 2019, p. 1443 ff). See also on the stop and interruption of the prescription: **Oğuzman,** Kemal/ **Öz**, Turgut: Borçlar Hukuku Genel Hükümler I, İstanbul 2019, p. 629 ff; **Nomer,** Haluk: Borçlar Hukuku Genel

the period which is appointed as 30.09.2020 is extended or shortened by the President in accordance with the temporary Art. 13/1 of TCC, the resumption of the stopped period of prescription will differ according to the new date.

Based on the wording of the provision, we reach the conclusion that the authorization which was given to the president by lawmaker for extending or shortening the period for three months within the scope of the temporary Art. 13/1 of TCC is for once. The relevant regulation is as follows: "*The President is authorized to extend and shorten the period specified in this paragraph for three months*." Besides, the three-month period determined related to the extension or shortening decision also does not grant a discretionary power in terms of upper or lower limit. If a discretionary power was granted, the provision should have included expressions such as *"until three months"* or *"not less than three months"*.

## III. LEGAL RESULTS OF CONTRADICTION TO PROVISION

Since they are legal transactions, the decisions of general assemblies of joint stock companies are subject to the limits of the freedom of contract in the Code of Obligations. According to the Code of Obligations, nullity is that a legal transaction does not have effect and bear consequence from the beginning, for the reason that it does not include the conditions for validity which are set forth by legal order[30].

The strictly mandatory provisions are directly related to public order and interests and their compliance and enforcement are absolutely unrelated to the discretion of the shareholders. This kind of provisions that take place in TCC and other codes are contrary to general assembly resolutions, are nullity[31].

In accordance with 447/1, c the resolutions which are contrary to the provision on capital maintenance are nullities[32]. *Kırca* has the opinion that the concept of *"capital"* in the wording of the provision should be interpreted broadly. In this context, the interest groups within the company should be evaluated as a whole and the decisions taken against the protection of company

Hükümler, İstanbul 2018, p. 447; **Tercier,** Pierre/ **Pichonnaz,** Pascal/ **Develioğlu,** Murat: Borçlar Hukuku Genel Hükümler, İstanbul 2016, p. 489 ff. For the evaluations regarding the periods in private law due to Covid 19, see: **Tüzüner,** Özlem: *"Yeni Tip Korono Virüs (Covid 19) Salgının Türk Borçlar Kanununa Bazı Etkileri",* Access Address: http://www.turkhukuksitesi.com/makale_2104.htm, Access Date: 29.04.2020.

30 **Pulaşlı,** Hasan: Şirketler Hukuku Şerhi II, Ankara 2018, p. 1016; **Karauz,** Agâh Kürşat: *"Anonim Şirket Genel Kurul Kararlarının Butlanı",* Akdeniz Üniversitesi Hukuk Fakültesi Dergisi, Y. 2013, Vol. 3, Issue 2, p.80.

31 **Moroğlu,** Erdoğan: Anonim Ortaklık Genel Kurul Kararlarının Hükümsüzlüğü, İstanbul 2014, p. 155 ff.

32 See examples in this content: **Korkut,** Ömer: Anonim Şirketlerde Genel Kurul Kararlarının Butlanı, Adana 2012, p. 125 ff; **Moroğlu,** p. 159 ff.

assets, which is the indicator of the financial structure of the company, should be accepted as nullity[33].

Since the temporary Art.13 of TCC basically aims to protect the company assets, we have the opinion that the resolutions that are contrary to the relevant provision are nullity. Besides, even if we make a narrow interpretation on the concept of capital, due to the fact that temporary Art. 13 of TCC is an imperative provision, in accordance with Art. 27 of Turkish Code of Obligation, the decisions taken against temporary Art. 13 must be applied by nullity sanctions.

There is no regulation and restriction for the persons who can file a case for the detection of the nullity in the TCC. Therefore, this lawsuit can be filed by anyone with a current interest that is legally protected. Anyone with current interest worth protecting such as shareholders, board of directors and individual board members, bankruptcy administration, creditors, beneficial owners, bondholders, independent auditor, Banking Regulation and Supervision Agency, Undersecretaries of Treasury, Ministry of Commerce, Capital Markets Board, competitors[34].

The nullity declaratory action can always be sued regardless of time. Also, being registered in the trade registry will not make a nullity legally valid as a rule[35]. Thus, the resolutions of general assembly regarding the distribution of dividends that are taken against temporary Art. 13 of TCC are nullities and will not be effective. According to the temporary Art. 13/2 of TCC, if the decision on the distribution of the dividends to shareholders has been taken but the shareholders have not yet been paid or have been partially paid, payments related to the part exceeding twenty five percent of the net profit of the year 2019 are postponed until the end of the date specified in first paragraph. Based on this, general assembly resolutions taken before the date of 17.04.2020, when Law No. 7244 came into force and covering the exceeding part of twenty five percent of the net profit of 2019 will not be nullity. However, the implementation of the decisions was postponed by a mandatory law provision. Nevertheless, decisions taken in contradiction with temporary Art. 13 of TCC after 17.04.2020 will be nullity.

In accordance with Art. 512/1 of TCC, the shareholders are obliged to return the dividends that they obtained by bad faith and in an unlawful way. Hence, the payments of dividends made in contradiction with temporary Art. 13 of TCC must be returned to the company by shareholders. Regarding the losses resulting from this point, in accordance with Art. 553 of TCC, the responsibility of board members may be discussed.

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33 **Kırca,** İsmail/ **Şehirali Çelik,** Feyzan Hayal/ **Manavgat,** Çağlar: Anonim Şirketler Hukuku, C. 2/2, Ankara 2013, p. 47.

34 **Kırca/ Şehirali Çelik/ Manavgat,** C. 2/2, p. 272; **Karauz,** p. 92 ff.

35 **Kırca/** Şehirali **Çelik/ Manavgat,** C. 2/2, p. 274.

## CONCLUSION

By the provision of temporary Art. 13 of the TCC, some restrictions on the distribution of dividends in joint stock companies have been introduced. Accordingly, it can be decided to distribute only up to twenty-five percent of the net profit for the period of 2019 within the periods specified in the article, previous year profits and independent capital reserves cannot be distributed, general assembly cannot authorize the board of directors to distribute advance dividends; if the general assembly has decided to distribute dividends for the accounting period of 2019, but the shareholders have not yet been paid or have been partially paid, payments related to the part exceeding twenty-five percent of the net profit of the year 2019 are postponed until the date of 30.09.2020.

Mentioned limitations serve the principle of protecting assets, which is one of the basic principles that dominate joint stock companies. In this context, with the temporary Art. 13 of TCC the choice of the lawmaker has been to keep the creditors in the foreground among the interest groups within the company. In other words, the lawmaker puts the creditors' interests in the first place before shareholders' interests in compliance with the general systematic of Turkish Commercial Code. However, considering the interests of the company, this situation may have consequences for the benefit of all interest groups in the long term.

Despite the possibility that the restriction on dividend distribution is tried to be overcome by the shareholders' borrowing to the company, we have the opinion that, in addition to the criteria set forth in Art. 358 of TCC regarding the shareholders can borrow to the company, there should be a limitation regarding their borrowing amounts and terms specified in temporary Art. 13.

If the general assembly of joint stock company has decided to distribute dividends for the accounting period of 2019, but the shareholders have not yet been paid or have been partially paid, the dividend of shareholder will not be demanded owing to the special provision, although it becomes an unconditional and claimable due. Thus, the five-year period of prescription determined in Art.147/1,5 of Turkish Code of Obligation will stop until the date of 30.09.2020.

If the period specified in temporary Art. 13 of TCC is extended or shortened by the president for three months, the resumption of the prescription period will differ according to the new date. This authority, which the lawmaker has granted to the president regarding the deadlines, does not grant a discretionary power in terms of upper or lower limit (for three months only), besides it is one-time use.

Action for the nullity against the general assembly resolutions that were taken in contradiction with the temporary Art. of TCC can be sued without

depending on the time. Besides, the dividends paid in contradiction with temporary Art. 13 of TCC, in accordance with Art. 512/1 of TCC, dividend payments must be returned to the company by shareholders. Regarding the losses resulting from this, in accordance with Art. 553 of TCC, the responsibility of board members may be discussed.

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