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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

The Evidential Value of Interrogation in the Law of Civil Procedure

Medeni Usul Hukuku'nda İsticvabın Delil Değeri

Mert Namli[1]

Abstract
Since the end of the nineteenth century, there has been debate in many countries whether a reform of the regulations on interrogation is necessary. These debates have been developed around the idea of accepting an interrogation instead of the "oath" institution that is within the legal system. Some national legal systems (e.g. Austria and Switzerland) accepted this idea and introduced interrogation as admissible evidence in the civil justice. On the other hand, some other nations (e.g. Germany) took a more conservative attitude in this matter and accepted the interrogation as "auxiliary evidence".

The Turkish law-maker set forth the evidence in the Fourth Section of Code of Civil Procedure and decided not to include interrogation as evidence. Therefore, in Turkish Law, interrogation is in general a tool for obtaining evidence and eliminating uncertainties about cases.

The main purpose of this study is to examine the evidence value of interrogation in Civil Procedure Law. Comparative law research will be used as the main data collection method and the position of Turkish Law will be determined.

Keywords
Civil Procedure, Interrogation, Oath, Evidence, Proof

Öz
19. yüzyılın sonlarından itibaren, birçok ülkede, isticvaba ilişkin düzenlemelerde bir reform yapılmasının gerekli olup olmadığı tartışması yaşanmaya başlamıştır. Bu tartışmalar, hukuk sisteminde yer alan "yemin kurumu yerine isticvabın (*"interrogation"*) delil olarak kabul edilmesi düşüncesi etrafında gelişmiştir. Bazı kanun koyucular (örneğin Avusturya ve İsviçre) bu düşünceyi kabul etmişler ve isticvabı, hukuk yargısında bir delil olarak düzenlemişlerdir. Buna karşılık diğer bazı kanun koyucular (örneğin Almanya) ise bu konuda daha muhafazakâr bir tutum izlemişler ve isticvabı bir *"tâli delil"* olarak kabul etmişlerdir.

Türk kanun koyucu, delilleri Hukuk Muhakemeleri Kanunu'nun Dördüncü Kısmı'nda düzenlemiş ve isticvaba deliller arasında yer vermemeyi tercih etmiştir. Bu nedenle isticvap, Türk Hukuku'nda, genel olarak bir delil elde etme ve vakıalar hakkındaki belirsizlikleri giderme aracı konumundadır.

Bu çalışmanın temel amacı, Medeni Usul Hukuku'nda isticvabın delil değerinin incelenmesidir. Burada temel veri toplama yolu olarak karşılaştırmalı hukuk araştırması kullanılacak; Türk Hukuku'nun konumu belirlenecektir.

Anahtar Kelimeler
Medeni yargı, İsticvap, Yemin, İspat, Kanıt

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The Evidential Value of Interrogation in the Law of Civil Procedure

Introduction

The idea of utilization of the parties as instruments of proof in the Law of Civil Procedure brought along heated debates in almost all legal systems by the early 19th century. In addition to several other reasons, the thought that the parties themselves would be the ones who would know about the dispute the best on one hand, and the concern that the parties would be the most suspicious witnesses in their own procedures on the other hand, have led legal systems to make different arrangements in terms of the evidential value of the testimonies of the parties.

In Turkish Law, in Law No. 1086 on Civil Procedure (CCP)[1], the institutions of "comperendinatio" (CCP art. 75/2) and "interrogation" (HUMK art. 230-235) have been accepted in terms of utilization of the parties as sources of information in a trial. Law No. 6100, the Code of Civil Procedure (New CCP)[2] also made some changes, while preserving both institutions in the general sense. In this study, we will examine the institution of interrogation that has been regulated in arts. 169-175 in HMK. In this context, we will firstly determine the position of interrogation in the Turkish Law of Civil Procedure, and by also considering comparative law, we will try to determine the position this institution needs to have. After this, we will make effort to bring solutions to problems that are faced by discussing legal arrangements in terms of the subject matter and procedure of interrogation, relevant doctrine debates and the decisions of the Court of Cassation regarding the issue.

I. The Concept of Interrogation and Its Definition

The concept of interrogation in Turkish, *isticvap*, is one of the words in the heritage of Turkish from Ottoman Turkish, and in terms of its dictionary definition, it means "*asking an receiving answers, making [one] say with the purpose of receiving an answer, questioning*". The Lawmaker used *'isticvap'* with this meaning also in various parts of the Law No. 1086 on Civil Procedure. For example, in HUMK art. 270, it is stated that "*if the witness does not speak Turkish, interrogation is achieved with the help of a translator*"[3].

Other than its dictionary definition, the legal definition of the word interrogation could also be discussed. Accordingly, this word may be defined as verbally

1 RG, 2-4.07.1927, no: 622-624.

2 RG, 12.01.2011, no: 27836.

3 Another example of this is HUMK art. 266: "*The judge interrogates witnesses himself/herself."* Likewise, the word 'interrogation' was also used with its dictionary meaning in HUMK arts. 150/III, 216, 241/II, 267, 279, 309/I and 378. The concept of 'interrogation', which is used with its dictionary definition in the Law on Civil Procedures was changed in the Code of Civil Procedure. Such that, for example, in HMK art. 263 which corresponded to HUMK art. 270, the statement "*if the witness does not speak Turkish, they are heard with a translator*" was preferred. The case is the same for the other articles that are mentioned above; the term 'interrogation' in these articles was changed in general with the term 'being listened to'.

questioning the parties before the court regarding the facts that form the foundation of the proceedings or issues that are related to these[4]. Law No. 6100, the Code of Civil Procedure (New CCP) was rearranged between the items 169 through 175 by accepting 'interrogation' only by its technical definition.

II. Field of Application and Subject Matter of the Interrogation

After determining the legal status of interrogation, in which civil proceedings interrogation could be referred to should be considered. In the doctrine, it is accepted that interrogation may find an area of application in cases where the principle of arrangement of the case material by the parties is practiced[5]. The main justification for this is shown as that the concession of the parties in these trials would not be binding for the judge[6]. In French CPC art. 184, it is projected that the judge may arraign the parties or one of them in terms of any issue. At this point, in French Law, it is accepted that an idea such as "interrogation cannot be resorted to in cases where concession does not bind the judge" would not be correct, because interrogation is not an institution that only aims to acquire concession, but it also serves to enlighten the facts that form the reason for the trial[7]. Hence, interrogation in French Law is an institution with a broad area of implementation that may be resorted to in all courts regarding all kinds of issues[8].

We also have the view that the objective of interrogation cannot be reduced to merely "acquisition of concession"[9]. In our opinion, interrogation, other than acquisition of concession, is also an institution for the judge to obtain information and form an opinion. While it may be suggested that there is the institution of "listening to the parties" for this purpose against this proposition, interrogation is

4 Ergun Önen, *Medeni Yargılama Hukuku* (Sevinç, 1979), p. 185; Saim Üstündağ, *Medeni Yargılama Hukuku (*7. éd, Nesil, 2000), p. 757; Baki Kuru, *İstinaf Sistemine Göre Yazılmış Medenî Usul Hukuku*, (Yetkin, 2017), p. 227**;** R. Arslan, E. Yılmaz and S. Taşpınar Ayvaz, *Medenî Usul Hukuku* **(**Yetkin 2018), p. 369; H. Pekcanıtez, O.Atalay and M. Özekes, *Medenî Usûl Hukuku,* (6.éd., Vedat 2018), p. 288; Muhammet Özekes, *Pekcanıtez Usûl Medenî Usûl Hukuku (*15. éd, On İki Levha, 2017), p. 1368; Süha Tanrıver, *Medenî Usûl Hukuku* (Yetkin, 2016) p. 712; Oruç Hami Şener*, 'Medeni Yargılama Hukukunda Tarafların İsticvabı',* (1990) 1-2, YD, 59; İlker Hasan Duman, *'Hukuk Mahkemesinde Tarafların Sorgusu',* (1985) 3 AD, 715; Abdurrahim Karslı, *Medeni Muhakeme Hukuku Ders Kitabı* (4.éd., Alternatif, 2014), p. 580; Erdal Tercan, *Medenî Usûl Hukukunda Tarafların İsticvabı* (Yetkin, 2001), p. 47; Mehmet Akif Tutumlu, *Bilimsel Görüşler ve Yargıtay Kararları Işığında Medenî Yargılama Hukukunda Delillerin İleri Sürülmesi* (3. Éd., Seçkin, 2005), p. 677; Gérard Chabot**,** 'Comparution Personnelle', (2016) RPC, 1; Gaëlle Deharo, 'Comparution Personnelle Des Parties', (2017) Encyclopédie Juris-Classeur Procédure Civile, 2; Serge Guinchard*, Lexique Des Termes Juridiques* (Dalloz, 2016*),* p. 699-700.

5 Kuru (n 4) p. 228; B. Kuru, R.Arslan and E.Yılmaz*, Medenî Usul Hukuku* (21. Éd., Yetkin, 2010); p. 371; Arslan, Yılmaz and Taşpınar Ayvaz (n 4), p. 369; Tanrıver (n 4), p. 712; Pekcanıtez, Atalay and Özekes, (n 4), p. 289; Özekes (n 4), p. 1386.

6 Kuru (n 4) p. 228; Arslan, Yılmaz and Taşpınar Ayvaz (n 4) p. 369; Tanrıver (n 4) p. 172; Pekcanıtez, Atalay and Özekes n 4) p. 289.

7 C. Chinais, F. Ferrand and S. Guinchard, *Procédure Civile-Droit Interne Et Européen Du Procès Civil* (33. Éd., Dalloz, 2016), p 483; P. Julien and N. Fricero, *Droit Judiciaire Privé* (3. Éd., LGDJ, 2009), p. 256; Chabot (n 4) p. 23; Christophe Lefort, *Procédure Civile,* (4.éd., Dalloz, 2011), p. 347.

8 Chainais, Ferrand and Guinchard (n 7) p. 483; Deharo (n 4) no: 8.

9 Özekes (n 4) p. 1386.; Nur Bolayır*, Hukuk Yargılamasında Delillerin Toplanmasında Tarafların ve Hâkimin Rolü* (Vedat, 2014), p. 480-481.

a more effective method as it involves interrogation of the parties by the judge by following a certain procedure[10]. For this reason, interrogation could play a role the most in divorce proceedings where concession does not bind the judge[11]. The Court of Cassation is also of the opinion that interrogation may be used with the parties in divorce proceedings if needed[12].

As clearly arranged by New CCP art. 169/2, the subject matter of interrogation would consist of the facts that form the foundation of the trial and the issues related to these facts[13]. According to CPC art. 191/1 in Swiss Law, interrogation may be used with the parties regarding the facts that form the basis of the trial.

III. Result Attributed to the Statements Obtained in Interrogation in Various Legal Systems

A. German Law

In the period where *gemeines Recht* was being applied in German Law, the only institution that allowed utilization of the statements of the parties was the oath[14]. In that period, there were two types of oaths that were accepted as oath ex officio and oath of parties. Oath ex officio could be applied only when proof could not be achieved despite the existence of *prima facie* elements and exhaustion of other evidence[15]. An oath of parties did not require these conditions, and it could be requested any time[16].

It is seen that the evidential value of interrogation was focused on in the German doctrine in the mid-19th century. Such that, in their work dated 1867, von Bar, as a result of their studies on British Law, emphasized that testimonies of parties were now starting to be utilized as evidence[17]. Nevertheless, the German Lawmaker was not concerned with this opinion and did not include interrogation in evidence by including the oath as evidence in the 1877 Code of Civil Procedure (*Zivilprozessordnung*). The reason for this attitude of the Lawmaker is shown as that interrogation would not be

10 Özekes (n 4) p. 1386.

11 Sabri Şakir Ansay, *Hukuk Yargılama Usulleri* (7. Éd, 1960), p. 250; İsmail Hakkı Karafakih, *Hukuk Muhakemeleri Usulü Esasları* (AÜSBF 1952)**,** p. 156; İlhan Postacıoğlu, *Medeni Usul Hukuku Dersleri,* (İstanbul 1975), p. 171; Şener (n 4) p. 60; Tercan (n 4) p. 331. Kuru thinks that the parties cannot be subjected to interrogation in divorce proceedings that are followed with proxy, but they could be listened to. See. Kuru (n 4) p. 228.

12 Y. 2. HD., 25.02.2013, 18738/4757, (www.kazanci.com).

13 The subject matter of interrogation was described in HUMK art. 230/II, with an unsuccessful expression in our opinion, as follows: "*İsticvap is required for concerns on the object of demand or facts in the case of situations that are related to it."* With this unclear statement of the law, in the doctrine and the decisions of the Court of Cassation, it was accepted that facts would constitute the subject matter of interrogation. See Önen (n 4) p. 186; Kuru, Arslan and Yılmaz (n 5) p. 371; Şener (n 4) p. 66; H. Pekcanıtez, O. Atalay and M. Özekes, *Medenî Usûl Hukuku* (9. Éd., Yetkin 2010), p. 369.

14 Paul Oberhammer, 'Parteiaussage, Parteivernehmung und freie Beweiswürdigung am Ende des 20. Jahrhunderts', (2000) ZZP, 312.

15 Oberhammer (n 14) 297.

16 Oberhammer (n 14) 297.

17 Carl Ludwig Von Bar, *Recht und Beweis im Civilprocesse, Tauchnitz* (Leipzig, 1867), p. 157.

suitable with the German system of civil procedure with its then dominant principle of being brought upon by the parties[18].

The existing skeptical approach despite the respect received by testimonies of the parties in civil proceedings in German Law started to lose its strength after World War I. Such that, in the reform of 1924, *Parteianhörung*, which could be defined as listening to the parties for the purpose of eliminating the incomplete or ambiguous parts in the petitions of the parties, became more prominent, and the position of the judge in direction of the judging process was made stronger[19].

In the years that followed the 1924 reform, debates on recognizing the evidential value of interrogation continued around especially the idea of harmonization of the civil procedure systems of Germany and Austria. Hence, in 1931, *Juristentag* made a proposal to legislate interrogation as a piece of evidence by itself[20]. Nevertheless, in the 1933 reform, the Lawmaker showed more conservative attitude. Such that, the Lawmaker not only accepted interrogation (*Parteivernehmung*) instead of oath of the parties but also looked for the same conditions in the oath of the parties for interrogation[21]. Accordingly, based on ZPO § 445/1, the party on whom the burden of proof falls could request interrogation in the case that they cannot completely prove their claim with other evidence. Likewise, the court could also decide upon the interrogation of the parties ex officio (§ 448). If the party to be arraigned does not agree to be arraigned, does not attend the summons of the court or does not answer questions without a valid reason, the court would assess these behaviors freely (§ 452).

B. Austrian Law

Austria is prominent as a legal system that pioneered the recognition of the evidential value of interrogation. Such that, in Austrian Law, especially as a result of the comparative examinations with British Law, the idea of accepting interrogation as evidence instead of an oath was adopted[22]. As a consequence of this, interrogation was accepted as evidence in *Bagatellverfahren* for small disputes in just 1873[23].

After the successful results obtained in *Bagatellverfahren*, in the Austrian Law on Civil Procedure dated 1895, the Lawmaker recognized interrogation as evidence

18 Oberhammer (n 14) p. 301.

19 P. Oberhammer and T. Domej, *'Germany, Switzerland and Austria'*, European Tradition In Civil Procedure, Antwerp 2005, p. 257.

20 This proposal by *Juristentag* is significant because this value was not recognized for interrogation even in Austrian Law at that period.

21 Oberhammer and Domej (n 19) p. 258.

22 Julius Anton Glaser, '*Über den Haupteid",* Allgemeine österreichische Gerichtszeitung, 1865, p. 311; Philipp Harras Von Harrasowsky**,** *Die Parteienvernehmung und der Parteieneid nach dem gegenwärtigen Stande der Civilprocessgesetzgebung,* (Vienna, 1876), p. 102.

23 Oberhammer (n 14) p. 299.

in all civil code. In the background of this preference, there was the idea that the evidence of the oath - which had strict formal conditions - did not comply with the principle of free assessment of evidence[24]. Despite being included among forms of evidence, until the year 1983, interrogation was considered to be "collateral evidence" in Austrian Law[25]. Such that, it could be resorted to only in the case that proof cannot be achieved by other evidence. This limitation in resorting to interrogation was lifted in *Zivilverfahrens-Novelle* approved in 1983, and interrogation was accepted as evidence with the same power of proof as testimony[26].

C. Swiss Law

Until the entry into force of the Swiss Federal Code of Civil Procedure, there were differences among the cantons in terms of the evidential value of interrogation. Some cantons did not recognize the evidential value of interrogation.

Some other cantons, while recognizing the evidential value of interrogation, brought some limitations or conditions with it. For example, the Lawmaker recognized the status of interrogation defined as *Beweisaussage* as collateral evidence in the Zurich Code of Civil Procedure and accepted that this evidence could be admissible in the case that proof is not possible by other evidence.

In the third group, there were cantons which accepted interrogation as evidence by itself without any preconditions. The Bern Canton may be an example of this. Accordingly, forms of evidence were listed in Bern CPC art. 212, and these also included interrogation. Nevertheless, pursuant to Bern CPC art. 280, the judge would freely asses the testimonies of the parties during interrogation[27].

Forms of evidence are defined in Art. 168 of the Swiss Federal Code of Civil Procedure. Here, the Lawmaker resorted to the method of listing evidence in a restrictive manner[28], and accordingly, forms of evidence included witnesses, bonds, discoveries, experts, written information and interrogation and testimonies of the parties.

Two issues get the attention within the framework of this arrangement in the law. The first of these is accepting interrogation (*interrogatoire, Parteibefragung, interrogatorio*) that is utilized as a source of information from the party and testimonies of the parties *(déposition de partie, Beweisaussage, deposizioni delle parti)* among

24 Oberhammer and Domej (n 19) p. 257.

25 Oberhammer and Domej (n 19) p. 257.

26 Oberhammer (n 14) p. 299; Oberhammer and Domej (n 19) 257.

27 A similar arrangement was also found in Fribourg Code of Civil Procedure.

28 F.Bohnet and others, *Code De Procédure Civile Commenté,* (Helbing Lichtenhahn 2011), art. 168, no: 1. The French text of the article uses the statement "*les moyens de preuve sont.*" Additionally, the statements "*sind zulässig*" in the German text and "*sono ammessi*" in the Italian text more clearly show that the forms of evidence were established as *numerus clausus*.

evidence. The second important point is that the Swiss Lawmaker did not include the oath among the forms of evidence. As seen here, the Lawmaker accepted interrogation as evidence rather than evidence of oath. Moreover, in the Swiss Federal Code of Civil Procedure, interrogation is not in the position of "collateral evidence" that can be resorted to in cases where proof cannot be achieved with other evidence. Such that, interrogation has the same evidential value as testimony, and the judge would assess these freely.

D. French Law

In the French Code of Civil Procedure that was enacted on 14 April 1806 and had been in effect for exactly 170 years, two institutions in terms of listening to the parties by the judge as *interrogatoire sur les faits* and *comparution personnelle* were proposed. While these two institutions had different characteristics to each other, it was accepted that both had the objective of "acquiring concession"[29]. Therefore, these two institutions could be considered as "instruments of obtaining evidence" rather than "instruments of proof".

The most important difference between these two institutions was the formal rules they were subject to. *Interrogatoire sur les faits*, because it was subject to highly strict formal rules, was considered to be both inefficient and a large factor in slowing down the judicial process, whereas this situation was resulting in failure to apply the process listening to testimonies regarding facts in practice[30]. The Lawmaker that considered this situation abolished "*interrogatoire sur les faits*" with the law approved on 23 May 1942.

In the French Civil Code dated 01.01.1976, the institution of "*comparution personnelle*" (interrogation of the parties) was established in detail between articles 184 and 198. At this point, it could be argued that an important step was taken in terms of the legal status of interrogation in Fr. CPC art. 198. Accordingly, based on the provision in question, the judge could derive all types of legal results based on all statements of the parties, absences or refusals to answer and accept these to be equivalent to commencement of written proof. During the enaction works of the New French Code of Civil Procedure, with the purpose of harmonizing the Code of Civil Procedure and the Civil Code, a similar provision was added to the third paragraph of article 1347 of the French Civil Code (CC). Accordingly, the statements made by a party before the judge, denial of response or failure to appear before the judge could be equivalent to commencement of written proof.

29 Edouard Bonnier, *Des Preuves En Droit Civil et En Droit Criminel*, (Paris 1873), p. 470-471; Charles Eugène Camuzet, *Manuel Des Matières du Code de Procédure Civile* (Paris 1878), p. 168; René Japiot, *Traité Elémentaire de Procédure Civile et Commerciale (*Paris 1929), p. 505; René Moret, *Traité Elémentaire de Procédure Civile* (Paris 1932), p. 542-543; Jean Sicard, *La Preuve En Justice Après La Réforme Judiciaire,* (Paris 1968), p. 198.

30 Sicard, p. 199.

As seen here, in French Law, by paving the way for recognition of "evidential status" even though limited to the statement made before the judge, the judge gained judicial discretion. Accordingly, in French Law, where the rule of proof by deed was adopted as in the case of Turkish Law, the rule of proof by deed was made flexible by accepting behaviors of the parties during interrogation to be equivalent to commencement of written proof.

E. English Law

In British Law, interrogation corresponds to the very broad category of discovery (or *disclosure* with its expression today)[31]. *Discovery* is a procedural institution where the parties force each other to provide information regarding the proceedings, where one of the ways of transferring information here is interrogation[32].

The history of appealing to the interrogation of the parties may be dated back long ago in English Law, especially proceedings held at the *Courts of Chancery*[33]. In addition to this, the interrogation process practices at the *Courts of Chancery* was not in the form of an institution that is utilized to prove facts but in the form of an institution to gather evidence[34]. For this reason, petitions for proceedings included a section that determined the questions to be asked to the corresponding party starting with the late 17th century[35].

Discovery, as an instrument of gathering evidence, started to lose its prominence as a result of reduction of the strict nature of the law of evidence. Such that, in the *Civil Evidence Act* dated 1851 which was prepared with the effect of the New York Code of Civil Procedure dated 1848, where it was established that the parties could be witnesses for or against themselves in every proceeding heard before all courts in the Union[36].

The *Rules of Supreme Court* dated 1883 brought a significant change in terms of the application area of interrogation. Accordingly, an interrogation could be applicable in claims for damages originating from fraud or exploitation of trust without needing permission from the court, while it would require permission from the court in other cases[37]. Nevertheless, before this change could be practiced for much longer, in 1893, applying interrogation was subjected to permission from the court in all cases[38]. After this, courts started to allow interrogation only when they reached the opinion that it

31 Cornelis Hendrik Van Rhee, *'England and Wales',* European Tradition In Civil Procedure, Antwerp 2005, p. 261.

32 Van Rhee (n 32) p. 261.

33 William Searle Holdsworth, *A History of English Law*, (3.éd., Methuen, Sweet&Maxwell 1944), p. 194.

34 Robert Wyness Millar, *Civil Procedure Of The Trial Court In Historical Perspective*, (New York 1952), p. 202.

35 Millar (n 34) p. 202-203.

36 Millar (n 34) p. 212; Van Rhee (n 32) p. 262.

37 John Anthony Jolowicz, *On Civil Procedure,* (Cambridge University Press 2000), p. 42-43.

38 Jack Jacob, *'The Administration of Civil Justice',* The Reform Of Civil Orocedural Law and Other Essays in Civil Procedure (Sweet&Maxwell 1982), p. 316.

would be required as a part of the right to a fair trial, and consequently, interrogation disappeared almost completely in practice[39].

In terms of the applicability of interrogation, the *Civil Procedure Rules (CPR)* dated 1999 carries great significance. Section 18 of CPR, which abolished most of the old terms and the term "interrogatory" in this context, considers the interrogation of the parties under the name of "heading of further information". Hence, according to Section 18.1 of CPR, the court would always be authorized to order a party to explain or provide more information on an issue related to the dispute. At this point, while CPR art. 18 rather establishes the institution of "listening to the parties", it is also possible for the court to question the parties in this framework[40].

F. Turkish Law

1. In the Period of Law on Civil Procedures (1927)

Considering the systematic of the Law No. 1086 on Civil Procedures, interrogation was established in the seventh paragraph with the title "*interrogation of both parties by the examining judge*" and not in the eight sub-section of the second section of the law titled "*evidence and proceedings*".

This form of establishment in the law led to debates on the issue of the legal status of interrogation, or more accurately, whether or not it would serve as "evidence". In the doctrine, two different views were proposed on this topic. Authors who defend the first view accept that interrogation does not have the quality of "evidence"[41]. The main justification of this view is that interrogation is established in the law not in "*evidence*" but in a different paragraph[42]. Some authors who defend this position stated that interrogation is "*an instrument to shed light on the trial*"[43], while some others considered it to represent an "instrument of acquiring concession"[44].

The second view in the doctrine argues that interrogation constitutes "*evidence*". Among the authors who defend this point, Üstündağ explained the denial of interrogation as an instrument of proof by confusion between the institutions of listening to the parties and interrogation[45]. According to the author, interrogation is not a collateral instrument of proof that is resorted to in the case of the absence or

39 Jacob (n 38) p. 316-317.

40 Van Rhee (n 32) p. 264-265.

41 Ansay (n 11) p. 249-250; Kemal Onsun, *'Senet ve İmza Hakkındaki İsticvap Davetine İcabet Etmemek İkrar Sayılabilir mi?'*, (1948) 13 HİD, 1; Postacıoğlu (n 11) p. 565; Şener (n 4) p. 61; Kuru, Arslan and Yılmaz (n 5) p.371; Pekcanıtez, Atalay and Özekes (n 11), p. 369.

42 Onsun (n 41) p.1; Pekcanıtez, Atalay and Özekes (n 11) p. 369.

43 Şener (n 4) p. 561; Kuru, Arslan and Yılmaz (n 5) p. 371.

44 Postacıoğlu (n 11) p. 565.

45 Üstündağ (n 4) p. 759.

inadequacy of other evidence, but it is an instrument of proof that may be combined with other evidence[46]. Likewise, some authors in the doctrine considered the issue in terms of normative law, and they argued that interrogation should be accepted as "*evidence*" in terms of the modern proof theory that utilizes the parties as a "source of information" and the objectives of civil procedure[47].

In a decision dated 1987, the Court of Cassation decided that the judge is bound by the requests and pieces of evidence shown by the parties, but in the case that the gathered evidence falls short in making a conviction, the judge must find the truth by inquiry ex officio by utilizing institutions written in the procedural law as interrogation and oath[48]. Although the decision in question gives an impression that the Court of Cassation considered interrogation as an "*instrument of proof*", in many of its decisions later, the Court of Cassation decided that interrogation is not an instrument of proof, but it is a procedural process that may be employed by the own decision of the judge or upon the approval of a request from one of the parties with the purpose of clarifying certain facts in a proceeding and achievement of the concession of the party with the favor against it in terms of a fact's existence and absence[49].

2. In the Period of Code of Civil Procedure (2011)

The form of establishment of interrogation in the law is also similar in the Code of Civil Procedure. Such that, Section 4 of New CCP has the title of "*proof and evidence*". The Code did not include interrogation in this section and preferred to establish this institution as the sixth distinction of Section 5 titled "*inquiry and inquiry-related special cases*" in the third part titled "*written trial procedure*".

It is seen in the works written in the period of HMK that debates on the legal status of interrogation are less heated. Accordingly, a large part of the authors in the doctrine argue that interrogation does not have an evidential status by itself based on the systematic of the law[50]. In the doctrine, Kuru and Arslan/Yılmaz/Taşpınar Ayvaz explained the reason for making such a choice with the justification that the parties are the most suspicious witnesses in their own proceedings[51]. While some authors in the literature stated that interrogation tends towards the purpose of "*proving*", they did not argue that it has an "evidential" position[52]. Another view that is proposed in

46 Üstündağ (n 4) p. 759.

47 Y. Alangoya&M. K.Yıldırım&N.Deren-Yıldırım, *Hukuk Muhakemeleri Kanunu Tasarısı*, (İstanbul 2006), p. 103-104; Tercan (n 4) p. 134-135; Tutumlu (n 4) p. 668.

48 Y. 1.HD., 02.04.1987, 1347/2838, 02.04.1987 (www.kazanci.com).

49 Y. 13. HD., 19.02.2001, 2467/3419 (www.kazanci.com); Y. 3. HD., 19.02.2001, 1153/1539 (www.kazanci.com).

50 Kuru (n 4) p. 228; Ejder Yılmaz, *Hukuk Muhakemeleri Kanunu Şerhi* (3. Éd. Yetkin, 2017), p. 2213; Arslan, Yılmaz and Taşpınar Ayvaz (n 4) p. 370; Tanrıver (n 4) p. 712; Pekcanıtez, Atalay and Özekes (n 4) p. 288; Bolayır (n 9) p. 480; Uğur Yağcı, *'İsticvaba İlişkin Olarak Hukuk Muhakemeleri Kanunu İle Getirilen Düzenlemeler'*, (2012) 1-2 EÜHFD, 2012, p. 289.

51 Kuru (n 4) p. 228; Arslan, Yılmaz and Taşpınar Ayvaz (n 4) p. 370.

52 Karslı (n 4) p. 581; Özekes (n 4) p. 1372-1373.

terms of the legal status of interrogation is that, based on the form of its establishment in the law, it is an "institution towards the objective of acquiring concession"[53]. The Court of Cassation also stated in its decisions made in the period of New CCP that interrogation would not constitute evidence by itself[54]. According to the Court of Cassation, interrogation is a procedural process that is closely related to proof and employed with the purpose of acquiring concession or eliminating ambiguities[55].

As stated at the beginning of our study, interrogation is one of the two institutions established for the court to be able to utilize the parties as a source of information. With its form of establishment in the law, arguing that interrogation is "*evidence*" would be a stretch in our opinion. In addition to this, one should not doubt that interrogation is an effort towards "*proof*". Accordingly, the court would question the parties about the facts that are against their favor, and as a result of this, it would reach a decision about the accuracy of those facts. Hence, in our opinion, assuming that interrogation is merely an "effort towards the purpose of obtaining concession" will also negatively affect the productivity of this institution[56]. In this case, if the concession of the party is not obtained as a result of interrogation, there will be no worth to the statements provided by the party within the interrogation. At this point, as we support the rule of proof by deed, as in the case of French Law, allowing assessment of the statements of the party within the context of interrogation as "*commencement of evidence*" would be a suitable solution[57]. In this framework, the Court of Cassation hold that, in the case of the absence of hard evidence in situations where the rule of proof by hard evidence is applicable, after determining the parties of the contractual relationship by employing interrogation, the party should be reminded that they have the right to offer oath[58]. As seen here, the Court of Cassation merely attributed the value of an "instrument to eliminate ambiguities" for interrogation. Nevertheless, in another relatively newer decision, the Court of Cassation decided that interrogation cannot be employed in cases where the rule of proof by hard evidence is applicable, and interrogation is already not evidence by itself[59].

In Turkish Law, testimonies of the parties are considered as evidence under "oath" (HMK art. 225). An oath is evidence that originates from religious traditions and sacred beliefs[60]. With this aspect, an oath may be considered as an effective inspection mechanism that intends that individuals tell the truth under the pressure of the sacred

53 Tanrıver (n 4) p. 712.

54 Y. 3. HD., 04.04.2012, 5520/9054 (www.kazanci.com).

55 Y. 15. HD., 14.04.2016, 3605/2312 (www.kazanci.com).

56 For the view that interrogation is not only about "acquiring concession", see. Bilge Umar, *Hukuk Muhakemeleri Kanunu Şerhi*, (2. Éd., Yetkin 2014), p. 500-501; Pekcanıtez, Atalay and Özekes (n 4) p. 289; Özekes (n 4) p. 1372-1373.

57 Kuru (n 4) p. 228.

58 Y. 15. HD., 04.04.2007, 1025/2099 (www.kazanci.com).

59 Y. 6. HD., 21.05.2012, 4304/7562 (www.kazanci.com).

60 Heinrich Nagel, *Die Grundzüge des Beweisrechts im europaeischen Zivilprozess*, (Baden 1967), p. 144-145.

values of social life in the past. However, as these effects have relatively decreased the value attributed to the admissibility of the oath is questioned in modern legal systems, and interrogation is employed instead of oath[61]. We also believe that, in terms of normative law, accepting an interrogation instead of an oath as evidence in modern trials would be appropriate in terms of "*reaching the truth*", which is the objective of civil procedure.

As we also stated above, considering its form of arrangement in New CCP, it would not be possible to consider interrogation as evidence by itself. However, interrogation is an institution that has great significance in modern procedural law in terms of reaching the truth in the context of a judge's utilization of the parties by questioning them as a source of information. In this context, considering the decisions made by the Court of Cassation in recent times, it is seen that the Court of Cassation considered a lack of employment of interrogation in terms of the facts constituting the subject matter of proof as a shortcoming that would require overturning the decision[62]. In our opinion, while these decisions are appropriate and highly encouraging in terms of broadening the application area of interrogation in civil procedure, in fact, accepting interrogation as evidence by itself rather than "*collateral evidence*" would be more appropriate in terms of normative law.

Conclusion

Considering the provisions of New CCP art. 169, etc., as generally accepted in the doctrine and stated in various decisions of the Court of Cassation, it is not possible to accept interrogation as evidence by itself in Turkish Law. In addition to this, other than obtaining concession, interrogation is also an institution towards the judge to obtain information and form an opinion. For this reason, today, while there are some differences, German, Austrian and Swiss Law removed the oath as evidence and replaced it with interrogation. Nevertheless, in French Law where the rule of proof by deed is accepted, it was established that the statements and behaviors of the parties during interrogation could be considered as "commencement of written proof." Considering this trend in the Law of Civil Procedure, in our opinion, an opportunity has been missed regarding the evidential value of interrogation in the Code of Civil Procedure. In terms of normative law, beyond being an "instrument of collateral evidence", interrogation should be included as evidence in the place of "oath".

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61 As mentioned above, the situation is so in Austrian and Swiss Law. See Seda Özmumcu, *'Medeni Yargılama Hukukundaki Yemin Delili ile Vergi Yargılaması Hukukundaki Yemin Delili Hakkında Genel Bir Değerlendirme'*, (2019) 1 ABÜHFD, p. 77.

62 Y. 15. HD., 02.11.2015, 943/5482 (www.kazanci.com); Y. 15. HD., 22.01.2014, 6172/461 (www.kazanci.com); Y. 22. HD., 24.09.2013, 25574/19749 (www.kazanci.com).

Abbreviations

ABD : Ankara Barosu Dergisi
AD : Adalet Dergisi
art. : Article
AÜHFD : Ankara Üniversitesi Hukuk Fakültesi Dergisi
BGB : Bürgerliches Gesetzbuch
c. : Cilt
CC : Civil Code
CPC : Civil Procedure Code
CPR : Civil Procedure Rules
DEÜHFD : Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi
ed. : Edition
f. : Fıkra
Fr. : French
HD : Hukuk Dairesi
HFD : Hukuk Fakültesi Dergisi
HGK : Hukuk Genel Kurulu
HMK : Hukuk Muhakemeleri Kanunu
HUMK : Hukuk Usulü Muhakemeleri Kanunu
İBD : İstanbul Barosu Dergisi
İBK : İçtihadı Birleştirme Kararı
İÜHFM : İstanbul Üniversitesi Hukuk Fakültesi Mecmuası
m. : Madde
no : Numero
p. : Page
RG : Resmi Gazete
S. : Sayı
Somm. : Sommaire
t. : Tome
TBBD : Türkiye Barolar Birliği Dergisi
v. : volume
Y. : Yargıtay
YD. : Yargıtay Dergisi
YKD : Yargıtay Kararları Dergisi
ZPO : Zivilprozessordnung
ZZP : Zeitschrift für Zivilprozessrecht

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