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RES JUDICATA IN CIVIL PROCEEDINGS IN COMMON LAW AND CIVILIAN SYSTEMS WITH SPECIAL REFERENCE TO TURKISH AND ENGLISH LAW*

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● The differing approaches to res judicata in common law and civilian legal systems

1. Introduction

The law of *res judicata* is an area of civil procedure where the most complex substantive and procedural issues come together. Because of its complexity in substance, the doctrine of *res judicata* is both in common law and civilian systems is heavily loaded with a technical terminology which hinders the access of the jurists in each of these legal system to the other.

However, since common law and civilian doctrines of *res judicata* serve for the same purpose[1] and share some common history [2], an understanding of each system can contribute to the understanding of the other. As will be submitted below, such mutual understanding will also call for a critical approach to each system.

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(1) Namely relieving the parties of the expense and vexation of repeated litigation, upholding the stability of an avoiding coflict among judicial decisions, and lastly saving the time and working capacity of courts. For common law see E.W. Cleary, "*Res Judicata* Re-examined," 57 Yale L.J.(1948) 339 at 345-8; 65 Harv.L.Rev. 820(1952). For the almost identical arguments of civil law see *Üstündağ*, Medeni Yargılama Hukuku(1989) 572; *Kuru*, B. Hukuk Mukameleri Usulü, IV. Cilt, 4. Bası(1984) 3525-6 (Turkey), and *L. Rosenberg*, and K.H.*Schwab*, Zivilprozessrecht, 40. Auflage(1986) 970-1; *Arens*, P. Zivilprozessrecht, 4. Auflage(1988) 236 (Germany).

(2) See infra. pp. 7-8

In England the need for such an approach has recently shown itself with respect to the scope of preclusion (estoppel) effect of judgments in civil proceedings; the House of Lords, Court of Appeal and High Court of Justice having rendered three separate judgments concerning the so called issue estoppel since the beginning of 1990[3-4].

In all systems of law *res judicata* is basically a bar to the repeated litigation of an identical dispute between the same parties. To quote from a general definition: "*res judicata* can be asserted if the same question reappears between the same parties"[5].

In giving a comparative analysis, the scope of the paper is limited to the "identity of subject matter" element (i.e "the same question" element in above definition) of *res judicata*, and leaves aside the "identitiy of parties" and procedural requirements. The comparison takes mainly English and Turkish law as its reference points, but German and united States law are also considered.

2. Judgment as a conclusive evidence

By the way of introduction, it must firstly be noted that, both English and Turkish judgments of civil tribunals have the same "conclusive evidence" effect,[6]. Normally all the judgments of civil tribunals, regardless of whether they are *in rem* or *in personam*, give rise to conclusive evidence in terms of their legal effects (e.g a dissolution of a marriage) and *contents* (e.g. **A** is adjudicated to pay £100 to **B**) and the accuracy of these effects and contents (as distinct from the accuracy of the grounds of the judgments), between the parties the against each other. Thus the existence and the accuracy of the legal effects or contents of previous judgment cannot be challenged in a subsequent suit between the same parties.

The difference of this effect from the "claim preclusion" (=cause of action estoppel) is that, claim preclusion prevents (*inter alia*) the re-litigation of the con-

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(3) Respectively *Thrasyvoulou* v. *Secretary of State for the Environment* [1990]1 All E.R. 65; *Arnold* v. *National Westminster Bank* [1990]1 All E.R. 529; *Crown Estate Commissioners* v. *Dorset County Council* [1990]1 All E.R. 19.

(4) The terms "claim preclusion" and "issue preclusion" adopted below (including their subdivisions) are suggested by the writings of A. Vestal, and subsequently accepted by Restatements (2nd) of Judgments (para. 13 et seq.) They are being used in the United States alternatively with the older nomenclature which is based on the distinction between *res judicata* (counterpart of the term "claim preclusion") and estoppel by judgment (counterpart of the term "issue preclusion"). See, A. Vestal, *Res Judicata*/Preclusion: Expansion 47 So. Cal. L.R. 357 and the other papers mentioned at the n. 1 of that article.

(5) D.44.2,3 (*Ulpianus libro quinto decimo ad edictum*) *Iulianus libro tertio digestorum respondit exceptionem rei iudicatae obstare, quotiens eadem quaestio inter easdem personas revocatur*... D.44, 2,3 (from the 15th book of the Ulpianus's commentaries on the Edict) Iulianus responds in the third book of the Digests that, *res judicata* can be asserted if the same question reappears between the same persons. For the Turkish translation, **Erdoğmuş** B. ***Bis De Eadem Re Ne Sit Actio*** **(1988)**

(6) See Turkish Code of Civil Procedure (hereafter "Turkish Code") Art. 295 (1).

tents of the judgment when the same relief (demand) is sought[7] by the plaintiff, whereas the conclusive evidence effect prevents the re-litigation of the contents of the same judgment when it is asserted as a ground of another claim.

The *inter omnes* effect of *in rem* judgments is, for example, a conclusive evidence effect. To illustrate, if the legal fact that "the parties are divorced" is an issue in maintenance proceedings brought by the ex-wife of the defendant, and the divorce is proved by a judgment, the defendant cannot dispute the fact that he is divorced.[8] But the conclusive evidence effect is not peculiar to *in rem* judgments, although not many actual examples can be found of cases where the contents or legal consequences of a previous *inter partes* judgment have been in issue as an element of other claim or defence. For this latter case, a defendant's set-off against the plaintiff's claim can be given as an example: if the defendant proves a previous money judgment to prove a debt owed by the plaintiff, that previous judgment will constitute a conclusive evidence against that particular plaintiff; (although that previous money judgment has no *inter omnes* effect).

3. Preclusion

a) Historical background

Below, following the American terminology, claim preclusion (cause of action estoppel) and issue preclusion (issue estoppel)[9] will be discussed separately. However, historical aspects of the distinction between claim and issue preclusion must be noted first. Claim Preclusion or, in the English phraseology, "cause of action estoppel", is a feature of Roman law, namely the concept of *"res judicata"* which was borrowed by English law (at the latest) in the12th century[10-11]. Until then the only preclusive effect of a former litigation (*whether it had gone to judgment or not*) was

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(7) Indeed more generally (in England): when the same cause of action is asserted.

(8). Salvesen v. *The Administration of Austrian Property* [1927] A.C.641. The other examples of in rem judgments are decisions such as a bankruptcy order (Bankruptcy Act 1914 ss.138(2), 173(2); Insolvency Act 1986 s.278) which determine the matrimonial or financial status of a person, or such judgments as the condemnation of a ship by Prize Court (*Geyer* v. *Aguilar* (1798) 7 Term. Rep.681; *Bernardi* v. *Motteux* (1781) 2 Doug. 575) or a determination of a street as a highway (*Wakefield Corporation* v. *Cooker* [1904] AC.31) which determine the status of a thing against all persons or "against all the world" as it is sometimes formulated.

The common feature of all these examples is that, all persons in subsequent proceedings will be "estopped from adducing evidence to contradict the legal results affected [that is, the legal status of the thing or person which has been determined] by the judgment" (Keane, A. *The Modern Law of Evidence* 2d ed. (1989) 427) Thus in the above examples the Prize Court and Bankruptcy Court decisions will respectively preclude all persons from denying the non-neutral nature of the relevant cargo and the bankruptcy of the relevant individual.

(9) For this distinction see *Arnold* v. *National Westminister Bank* (1990) 1 All E.R. 529

(10) see Millar, R.W. The Historical Relation of Estoppel by Record to Res Judicata (1941)35 ILL.L.Rev.41, at 41-4

(11) For that reason the term *"res judicata"*, till the end of the last century in England, was employed solely to refer to the claim preclusion effect of judgments, excluding the issue preclusion (idem. 54-6). This is still the case in the United States phraseology.

issue estoppel, an "estoppel" within the true nature of the concept, i.e. which depend not on the judgment but on the allegations of the parties which had taken place in the "record" and was so binding upon them as to preclude them from making any later allegations conflicting with that record. There was no claim preclusion.

Historically the case was not different in Germanic systems on the Continent until the Roman concept of *res judicata* was adopted. In the time of the so called "common-law" then the only preclusive effect of former litigation was the issue estoppel[12].

As will be seen below for Germany, later in the 19th century during the codification of continental civil procedures, the concept of issue preclusion was abondoned by civilian systems. The English estoppel by record ("issue preclusion" as it was then called) has, on the other hand, survived the adoption of *res judicata* and still co-exists with the latter in the common law systems[13].

It follows from this introduction that, it will not be surprising if we find continental doctrine to be broadly similar to the English theory with respect to claim preclusion, whereas there are substantial differences between the two systems in terms of issue preclusion.

b) Claim Preclusion

(aa) English Law. In common law systems the termination of litigation by a final judgment, regardless of the fact that it is for or against the plaintiff, extinguishes the *cause of action* which has been the subject matter of that litigation. That is, speaking with respect to the plaintiff's position, neither the very same claim nor any other claim arising from *the same cause of action* can be (re)litigated,[14-15].

Thus, "cause of action" is the crucial concept to complete the definition of

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(12) "[I]n adjudicated matters, under the Frankish law, as under the other Germanic systems, a new proceeding and a new decision were always possible and permissible... "The lacking preclusive effect of the judgment [used to find] its substitute in what may be called the principle of the perdurance of the established state of the controversy. What a party in due form admitted, ... what the parties [had] sworn these [used to retain] significance for all time to come". (Seelman, *Der Rechtszug im altern deutschen Recht* (1911) pp. 103 and 198, referred and translated by *Millar* op.cit. supra n.10 pp. 41-2.)

(13). See R.W. Millar, The Premises of the Judgment as *Res Judicata* in Continental and Anglo-American Laws"(1940) 39 Mich. L.R. 1-36 (Part I), 239-266 (Part II: This second Part appears as "Part III" because of a misprint).

(14). In the case of a judgment in favour of the plaintff, all those claims are said to be "merged into", and in the case of a judgment against the plaintiff "barred with" the first judgment.

(15). 1. The term cause of action is employed in a broad sense in English law as it refers not only to the subject matter (the grounds and the object) of the action but also to the parties. In other words a cause of action is distinguished from another not only by its subject matter but also by the parties. However, the following paragraphs will only deal with the identity of subject matters, given the identity of parties is satisfied.

2. To avoid confusion it must also be noted that the term cause of action (*causo actionis*) is used in an even narrower sense in continental phraseology. Namely it only refers to the "grounds" of the action, excluding the "object" (the so called final demand=the remendy or demand which has been sought) of it.

the claim preclusion, since here the identity of subject matter literally amounts to the identity of cause of action of the two suits. The scope of claim preclusion depends on how broad a meaning is given to the concept of cause of action.

There ise no categorical definition given to the "cause of action" in common law. The basic principle is that, a cause of action involves a particular "life event" or a "legal relationship" (say a traffic accident or contract) between the parties, and refers to all the possible legal consequences ("demands") which can be drawn from that particular life event or legal relationship (say all the damages and injuries which have been caused by that traffic accident or all the present liabilities which have arisen from that contract)[16].

However, the identity of two causes of action in terms of *res judicata* may be given a broader or narrower meaning. Thus a broad approach is taken when the limitation which is applied to the scope of the so called "life event" is drawn in such a way as to cover many related "side events", and the scope of the legal consequences which fall in that life event is drawn in such a way as to cover many possible demands which are directly or indirectly related to that event. When the scope of the life event focuses on a very particular material fact and the scope of the possible demands focuses on the immediate consequences of that material fact (or even only some of them), on the other hand, a narrow approach can be said to be taken. The broad approach amounts to wide *res judicata* as it precludes a wider range of claims, and vice versa.

As has been said elsewhere (within another context[17])the aims of civil procedure support a wide doctrine of *res judicata* since "legal certainty", "legal peace" and "judicial economy" call for the entire dispute to the settled at once[18]. Considerations of the protection of private rights do, on the other hand, support a narrow *res judicata* since it can be harsh to a party to force him to sue an entire complex of claims at once where he could save and freely allocate his effort and his financial means by splitting his various demands (or even parts of the same demand) into more than one lawsuit.

A broad approach is taken in England. The present law can be summarised as follows:

aaa) Partition of the same demand into several lawsuits. Partition of the same demand into several lawsuits is not possible under English law. That is, a plaintiff cannot "split" his one demand into several quantitative parts with a view to suing for one part after the other. For example the whole amount of damages arising

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(16). The terms here translated as "life event" and "demand" are borrowed from the German and Turkish phraseologies, (respectively: "*Lebensverhaeltnis*" and "*netice-i talep*").

(17). For issue preclusion, (without mentioning the term) *Stein-Jonas Kommentar zur Zivilprozessordnung*, 20. Auflage 15. *Lieferung* (1987)193 (para.322, VI,1).

(18). However the authors are sceptical about this conclusion, see ibid. para. 76-7.

from a traffic accident should be sued at once, as a single claim; if only a partial amount is sued, the judgment which has been given in this first action (regardless of whether it is in favour of or against the plaintiff) will preclude the residual part from being sued for in a second action. A £100 debt arising from a contract cannot be sued for in two separated £50 claims one after the other. A plaintiff having a claim of £7000 against his agent, who has sued and recovered £4000 of it, is precluded from suing for the remaining £3000 in a second action [19]. A plaintiff, having a claim against a defendant for the negligence in the carriage of eight sacks of flour, who has sued and recovered in respect of six sacks of flour, is precluded from suing for the remaining two sacks[20]. Thus, one can say in a homely phrase, a party is not entitled "to take two bites at the same cherry"[21].

bbb) *Several demands arising from he same life event or legal relationship, (as compared with United States law).* The answer to the question whether two separate demands arising from the same life event or the same legal relationship can be sued for separately, depends on whether those two separate demands fall into the scope of the same "cause of action". Thus, a plaintiff cannot split his cause of action under English law, i.e. several demands falling into the scope of the same cause of action cannot be sued for separately one after the other. What constitutes a cause of action is however not categorically defined. The tests applied in this respect vary both in England and amongst the different jurisdictions of the United States[22].

One conception of "cause of action" which has been called the "destruction of prior judgment test", focuses on the question whether a decision in the second action would contradict the first judgment. If this is the case, that action is regarded as falling within the same cause of action as the first one, and accordingly it will be precluded by the first judgment[23]. If all the implied terms of the first judgement are required not to be contradicted, this approach will be extremely broad.

A second approach which has been called the "primary rights tests" looks to whether the same rights and wrongs are involded in the two actions. Accordingly, if the second action depends on a separate right, it will constitute a new cause of action and therefore will not be precluded by the first judgment. For example, personal injuries and property damages caused by the same wrongful act can be sued for separately under this test[24]. The main difficulty here is to identify what costutites a

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(19). Lord Bagot v. Williams (1824) 3 B&C 235.

(20) *Russel and Sons* v. *Waterford and Limerick Rail Co.* (1885) 16 L.R. Ir. 314; for more examples see S. Bower, and A.K. Turner, *Res Judicata* 2nd ed. (1969) 380, Note 1.

(21). Bower and Turner, *ibid.*

(22) The following two paragraphs are written following J.H. Friendenthal, Kane M.K. and Miller, A.R. *Civil Procedure* (1989) 619-29; English and Canadian cases are interpolated.

(23) For example an action for the annulment of a marriage is, under this definition, held to be barred by a previous judgment of a decree of separation, since the validity of the marriage was a necessary "basis" of the first judgment which could not be contradicted by a later claim, *Statter* v. *Statter* 2 N.Y. 2nd 668.

(24) "The collusion with the defendant's van did not give rise to only one cause of action: the plaintiff sus-

single right or wrong. In this respect, referring to the old common law writ system (in which a separate writ would amount to a separate legal right) is no longer acceptable[25]. Besides this, it has been held that depending on a different statute[26] or seeking different remedies[27] in a second action will amount to litigation of a separate legal right, even if the material facts remain the same as the first suit.

A third approach, which, can be called the "same evidence test" considers any two claims which depend on the same evidence (material facts) as being parts of a single cause of action. This test is based on the idea that the effort undertaken for fact-finding in the first suit should not be duplicated. Accordingly if the same evidence will be necessary to support the two claims, a judgment for the first will preclude the plaintiff form suing for the second in a separate action[28].

Finally, according to a very broad approach which is taken by most of the United States jurisdictions, all the possible demands falling into a particular life event or legal relationship are regarded as being covered by a single cause of action. In the wording of the *Restatement (Second) of Judgments*(1982), a cause of action will include (or a final judgment will extinguish) "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose"[29-30].

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tained bodily injuries, he was injured in a distinct right, and he became entitled to sue for cause of action distinct form the cause of action in respect of the damages to his goods: therefore the plaintiff is at liberty to maintain the present action" *Brunsden* v. *Humphrey* 14 QBD 141 (1884), at 145 per **Brett M.R.**, also see 148-9 per **Bowen, L.J.**

(25) See *United Australia, Ltd.* v. *Barclays Bank, Ltd.* (1941) AC 1(HL) where Lord Atkin protested against such a course with the words "when these ghosts of the past stand in the path of justice clanking their medieval chains the proper course for the judge is to pass through them undettered", (at 29). Also see the Canadian case *Cahoon* v. *Franks* 63. D.L.R. (2nd) 274.

(26). See *Harrington v. Workmen's Compensation Appeals Board* 15 Pa. Cmwlth. 119 (1974) where a first judgment given under the Civil Service Regulation was held to be no bar to a second action depending on the Workmen's Compensation Act, even though the material facts (a traffic accident) and the demand (compensation for personal injuries) remained the same.

(27) See *Pennsyvania Dept. of Environmental Protection* v. *Pennsylvania Power Co.* 34 Pa. Cmwlth 546 (1978) where a contempt action against a power company for ignoring a court order to prepare plans to lower pollution levels was held to be no barrier to a second action for civil damages resulting from the company's delay in that respect.

(28) "Different tests have been applied for the purpose of ascertaining whether the judgment recovered in one action is a bar to subsequent action… [o]ne of them is…whether the same sort of evidence would prove the plaintiff's case in the two actions. Apply that test to the present case. In the action brought in the county court, in order to support the plaintiff's case, it would be necessary to give evidence of the damage done to plaintiff's vehicle. In the present action it would be necessary to give evidence of the bodily injury occasioned to the plaintiff, and of the suffering which he has undergone, and for this purpose to call medical witnesses. This one test shows that the cause of action as to the damage done to the plaintiff's cab, and as to the injury occasioned to the plaintiff's person, are distinct." ***Brunsden* v. *Humphery*** 14 QBD 141 (1884) at 146. Also see ***Martin* v. *Kennedy*** (1800) 2 B.&P. 71; ***Conquer* v. *Boot*** [1928] 2 KB 336.

(29) para. 24.

(30) The term "transaction" here is used in a loose sense as including life events other that transactions in the literal sense. Thus it is intended to refer to "a natural grouping or common nucleus of operative facts". Accordingly all the facts which are connected to each other in time, space, origin or motivation, and which form a convenient litigation unit may be regarded as a single cause of action, provided that treating them as a single transaction confirms with the parties' expectations and business practice. (*ibid.* comment b).

Accordingly a plaintiff, for example, who has once sued an insurance company for a refusal to pay upon an insurance policy, is precluded from bringing a second action against the same defendant for punitive damages grounded on the same refusal to pay (*i.e.* the same cause of action)[31]. Similarly, giving an example from Canadian law, property damage and personal injuries which have been caused by the same accident fall into the scope of the same cause of action[32], and therefore cannot be sued for separately.

Now this last approach is usually accompanied by [33] (or indeed will pragmatically amount to) a rule of compulsory joinder for claims. Hence it requires the plaintiff to plead all his possible claims which have arisen from a particular "transaction" within the same lawsuit[34]. Such a rule does not however exist in English law[35]. This makes this approach incompatible with the present English system.

To conclude, it can be said that though no categorical definition is given to the concept of cause of action in English law, the last test favoured in the United States law and the very first one, which depends on the old common law system of writs do not appear to be accepted; the other above mentioned tests do seem to be taken into consideration with regard to the circumstances of each case[36-37]

bb) Turkish law. Under the Turkish Code[38]" in order to be said that there is a conclusive judgment... the thing which has been claimed and the cause which has been based upon must be identical". In a more commonly used phraseology, the identity of subject matter in terms of claim preclusion is determined by the identitiy of the "final demands" and the "grounds" of the two actions.

The term "final demand" here stands for the particular relief which has been sought by the plaintiff, (*e.g.* a payment of 100 Liras or a declaration of the dissolution of a marriage).

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(31) Fox v. Connecticut Fire Insurance Company 380 F 2d 360 (10th Cir. 1967).

(32) *Cahoon* v. *Franks* 63 D.L.R. (2d) 274.

(33) See for example *Michigan General Court Rules*, Rule 203.

(34) There are also similar rules for the so called "compulsory counterclaims" in the United States. That is, a defendant is required to assert all his "transactionally" related counterclaims against the plaintiff, and if he fails to do so he is precluded from raising those claims in a separate action; *e.g. see Federal Rules of Civil Procedure*, Rule 13 (a). The tests which are used to determine whether a particular counterclaim is transactionally related to the main claim are also similar to those which are used to determine the scope of a cause of action; see M.K. Kane, *Civil Procedure* 2nd ed. (1985) 121 *et seq*. Such a "compulsory" counterclaim is not recognised in England; however see Langan and Henderson *Civil Procedure* 3rd ed. (1983) 83-4.

(35) See Bower and Turner *op.cit. supra* no.20 at 167; *Brunsden* v. *Humphery* 14 QBD 141 (CA) (1884) at 151 per Bowen L.J.; and *Gleeson* v. *J. Wippel & Co Ltd.* (1977) 3WLR 54, at p.62.

(36) For some other examples from the case law see Bower and Turner *op.cit*. n.20 at 372 et seq.

(37) In addition, the inherent jurisdiction of the English courts to avoid vexatious and frivolous litigation applies also with respect to claim preclusion. That is, claim preclusion may be applied even when the technical requirements of one of the above tests cannot be satisfied. See *Greenhalgh* v. *Mallard* [1947] 2 ALL E.R. 255, at 257H and 259H-260A; *Green* v. *Weatherill* [1929] 2 Ch.213, at 221.

(38) Art. 237(2).

The scope of the phrase "ground of action"[39] is however, one of the most controversial issues of the law of civil procedure in Turkey.

One of the two main theories, which can be translated in English as the "individualisation theory", defines the ground of action as a particular individual legal relationship. This "individual legal relationship" is defined (individualised) by the legal rights of the plaintiff which have been based on (or the legal rights of the defendant which have been challenged) in the petition, regardless of the context of the petition in terms of the material facts mentioned. Thus, different material events will fall into the scope of the same ground of action under this test, provided that the legal rights on which the action is based (or which are in issue) remain the same. Very broadly this definition ressembles the above mentioned "primary rights test", and again very broadly, leads to the same difficulties of identifying a single legal right[40].

The second theory, which has found a wider acceptance, can be translated in English as the "material facts theory". Referring back to another statutory definiton"[41], this theory interprets the term ground of action as "the material facts on which the claim of the plaintiff is based". Thus a different set of material facts (*i.e.* a different event), will amount to a separate cause of action under this test, even when the legal rights in the issue are the same. Again very roughly this approach resembles the above-mentioned "same evidence test" and provides a more flexible rule which enable the plaintiffs to re-litigate the same issue under a new set of material facts. However a similar difficulty arises here of identifying a "new set of material facts" from minor amendments to the same set of material facts which would not be sufficient, even under this theory, to costitute a new ground of action[42-43].

However, these difficulties of defining the ground of aciton do not have a serious effect on the Turkish law of *res judicata* with respect to the element "identity of subject matter". Hence, it is to be borne in mind that, statutorily both the final de-

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(39) A better accepted term for he ground of action is the "cause of action" (*dava sebebi*) in Turkish, however to avoid confusion with English doctrine here the "ground of action" is preferred; see supra Note 15.2.

(40) See *Üstündağ* op.cit. supra n.1 at 586.

(41) Turkish Code Art 179 (re contents of a petition)

(42) *c.f. Üstündağ op.cit. supra* n.1 at 580-1, 586.

(43) Different conclusions produced by the two theories can be illustrated by an action for the annulment of a contract. According to *individualisation theory* an action which is brought for the annulment of a contract will dispose of the claim under any possible ground (material fact) which could be relied on by the plaintiff, provided that the legal right in the issue (the contract) remains the same. (Referring to a later discussion in this paper it must be noted by the way that, even if this theory were applied in practice, it would not amount to a "non-issue estoppel" (see infra. n. 82), because even under this theory the issue of fact "which could be relied on" are not disposed of by the judgment entirely. Those omitted issues of fact can be litigated in a subsequent action, provided that this second action depends on a different claim i.e. a different demand on a different individual relationship. However, under the *material facts theory* the same plaintiff who has failed in his first action which had been based on a "mistake" for example, can bring a second action for the annulment of the same contract depending on "incapacity" (a different material fact) without being estopped by the first judgment. (for further discussion see *Üstündağ op.cit. supra*. n.1 at 579-87)

mand and the ground of action must be identical for the identity of subject matter. Thus there will be no identity of subject matter (and therefore no claim preclusion will arise) if a different "demand" is sought in a second action, even when the second action depends on the same "ground" as a previous judgment and vice versa.

The following colclusions may be drawn from this survey.

aaa) Partition of the same demand into several lawsuits. Unlike English law, partition of the same demand into several lawsuits is possible under Turkish law. A plaintiff can "split" his one demand into several quantitative parts with a view to suing for one part after the other. A judgment given on a so called "partial claim"[44] does not constitute a claim preclusion to a second action for the residual part of the same claim. The reason for this is that, since, the demand in the second action will not be identical with the first one, there will be no identity of subject matter in such a case. Therefore, the definiton given to the claim preclusion is categorical in this system. A judgment is *res judicata* only for the "final demand" which has been sought in the relevant lawsuit. Thus, a judgment never provides an answer to the question whether the plaintiff has some other (different) or further (residual) good demands against the same defendant even with respect to the same ground of action.[45-46]

Apart from this theoretical ground, it has been said that partial claims enable a plaintiff to learn the court's opinion without risking his entire claim and without undertaking large expenses for the litigation[47]. Thus it can be said, with regard to this particular context, that the Turkish system depends on "considerations for the protection of private rights" as opposed to the common law system where "the aim of civil procedure" prevails[48].

bbb) Several demands arising from the same life event or legal relationship.

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(44) *Kısmi dava*; similar in Germany: *Teilklage*

(45) 1. see *Üstündağ* 273-4; Rosenberg/Schwab *op.cit. supra,* n.1 at 990-2 (para. 156 III).

2. In Turkey this conclusion may also be drawn from Art.4 of the Turkish Code which provides special rules for jurisdiction relating to partial claims.

3. In Germany this conclusion may also be derived from Art. 322 (1) of he German Code of Civil Procedure (hereafter "German Code") Rosenberg/Schwab *op.cit supra,* n.1 at 990; see *post*.

(46) However, it must be added that in Turkish and German law it is controversia whether an action can be defined as a partial claim even when it has not been expressly stated by the plaintiff to be a partial claim. Turkish case law answers this question negatively. That is, when a plaintiff does not expressly state his action to be a partial claim, the judgment given in that action will extinguish the whole demand and therefore the residual part will be "merged" in the first judgment. The reason for this is that, in this case the plaintiff is regarded as having waived the residual part of his demand, (*e.g.* see 2HD 6.4.1974, 1974 ABD 590). The same effect is grounded in German law upon Art. 323 of the German Code. Hence it has been said that since Art. 323 provides a special provision for exclusion of the residual part of a claim from the effect of *res judicata* (claim preclusion), in all the other situations where there exists no such special provision the scope of *res judicata* must cover the unexpressed residual part, (see and *c.f.* Rosenberg/Schwab *op.cit. supra* n.1 at 991).

(47) Rosenberg/Schwab *op.cit. supra,* n. 1 at 990; *Üstündağ op.cit. supra,* n.1 at 273.

(48) See ante.

The theoretical grounds and the practical considerations which have just been discussed with respect to partial claims apply to this second situation *a fortiori*. Several demands arising from the same life event can be sued separately. To illustrate, using a previous example, personal injuries and property damage caused by the same accident can be sued separately and the judgment which will be given in the former action will not constitute a bar or merger for the latter. Similarly a judgment for the capital does not extinguish the separate claim for the interest arising from the same debt[49].

The American rule of compulsory joinder of claims[50] is, of course, not compatible with and has no equivalent in Turkish law[51].

(c) Issue Preclusion

In its very nature a judgment is a logical process. Namely, what a court does, in a course of trial, is to apply a minor premise (the established material facts) to a major premise (the legal norm) with a view to reaching a conclusion (the judgment)[52]. Accordingly, speaking in terms of logic, if a given judgment is true, the construction of the relevant material facts and the application of the legal norms to those material facts should also be true.

Again in its very nature, *res judicata* says that the correctness of a judgment should not be challenged by (or within the course of) a subsequent litigation. It does not however follow from this that "the construction of material facts" and "the application of legal norms"[53] are necessary elements of the effect of res judicata. When it comes to defining the scope of *res judicata*, the flow of logic leaves its place to the ruling of law. The doctrine of *res judicata* is based, as is any other legal rule, on some legal policy consideration. Thus, since there is no inevitable need to adopt the doctrine of *res judicata* at all[54], there is no necessity to extend its scope to the limits of the above mentioned logical deduction.

Thus, it has been said elsewhere, what constitutes the subject matter of *res judicata* cannot be found just by means of logical deductions or just by looking at the nature of judgment or the nature of *res judicata*. The question is to be answered by positive legal rules (legislation), and the legislature here can take either a broad or narrow approach[55]. One may doubt the propriety of regulating such a general field of Evidence by means of legislation in a common law system[56]. Nonetheless

(49) See *Üstündağ op.cit. supra* n.1 at 273; Rosenberg/Schwab *op.cit. supra* n.1 at 991

(50) See *ante*.

(51) A compulsory joinder of parties may, however, be required by substantive law in certain situations which are irrelevant to this context.

(52) Rosenberg/Schwab *op.cit. supra*. n.1 at 979 (para. 154, II)

(53) Which hereafter -following *Millar*- will together be called *the premises of judgment*.

(54) The history of the law provides examples (at least for the claim preclusion), see *Millar op.cit. supra* n.13

(55) Stein-Jonas 193 (para. 322, VI, 1).

(56) However see *post* 25.

the main point made above remains true; that is to say it is the legal policy considerations which should be taken into account by the law-maker (either the Parliament or the judge), and there is no answer to be found in the "nature" of the doctrine.

In fact, bearing in mind the previously mentioned policy considerations, two extreme approaches may be taken in this respect; the scope of *res judicata* may either be focused on the very terms (dispositive part) of the judgment, or be spread over all the premises of judgment. (A detailed study might have shown that some of the legal systems hold a middle way between these two). In the case where *res judicata* is spread over some of the premises of the judgment, the common law speaks about *issue preclusion* or (as it is said in England) *issue estoppel*.

Below the application of issue estoppel will be discussed with reference to German, English and Turkish law respectively.

(aa) German Law

aaa) Historical background. The texts of Roman law relating to the (existence of) issue preclusion, that is whether the scope of *res judicata* spreads over the premises of judgment, are controversial[57]. Later, among the 18th century jurists of Germany (unlike the medieval Italian doctrine) the weight of opinion was to apply *res judicata* only to the dispositive part of the judgment and not to the premises[58].

In the first half of the 19th century an extensive debate arose in Germany[59] concerning the conclusiveness of the premises of judgments. The first of these opposing views was the theory of *Savigny*[60] who distinguished between "objective" and "subjective" grounds of judgment. Accordingly *objective grounds (premises) of judgment*[61] refers to the concrete legal relationships upon which the dispositive part of the judgment depends, while *subjective ground of judgment* refers to the reasoning which personally moves the judge to his conviction as to these legal relationships.

Thus, according to this theory, objective grounds of judgment should be included within the scope of res judicata; which amounts to the conclusion that all the "legal relationship" underlying a judgment, i.e. all the relevant rights and counter rights (*e.g.* set-off) of the parties[62] would be determined conclusively, provided that these determinations were the necessary grounds of the dispositive part of the judgment[63].

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(57) For some examples supporting the existence of issue estoppel in Roman law see *Erdoğmuş, op.cit. supra* n.5 at 23-4.

(58) Millar *op.cit. supra,* n.13 at 9-10.

(59) See *ibid.*

(60) F.K. von Savigny, System des Heutigen Römischen Rechts (1847) 351-68 (Bd. VI, para.291)

(61) Which Savigny also called "the elements of judgment: die *Elemente des Urteils* "(*ibid.* 358) and in later times established as a term as *die Urteilselemente*.

(62) Stein-Jones *op.cit. supra,* n. 17 at 194.

(63) von Savigny *op.cit. supra,* n. 58 at 358.

At the end of the day it was however the opponents of *Savigny* who were the victorious party in this debate. Hence, in 1877, the German Code of Civil Procedure adopted the second view point which will be summarised below.

Under Art. 322(1) of the German Code "judgments are capable of being *res judicata* only as far as the decided demand which has been advanced by the claim or the counter-claim". This provision is an express rejection of *Savigny's* theory, since it restricts *res judicata* as only applicable to the "direct subject-matter of judgment" or (in other words) the particular "legal result"[64] which has been involved in it.

This feature of the law is usually decribed as "grounds of decision not taking place in *res judicata;*" and the following conclusions[65] have been drawn.

bbb) Application of the rule: (i) No *res judicata* arises with respect the decided issues of fact. The issues of fact which have been decided by the court and which have been taken as the ground of the judgment are not *res judicata.*

Thus a judgment dismissing a claim in contract, on the ground of a "mistake" or "fraud" will give rise to *res judicata* with respect to the fact that "the claim in contract is bad by reason of mistake or fraud". But it does not follow from this that the "mistake" or "fraud" will be established as *res judicata*. Therefore if the defendant to this first lawsuit later sues the plaintiff for compensation for loses which are claimed to be caused by the same "mistake" or "fraud", the court in this second suit can decide that the mistake or fraud did not take place[66].

(ii) No *res judicata* arises with respect to the decided "pre-judicial legal relationship"[67]. The pre-judicial legal relationships (speaking in terms of logic "*premises*") which have been decided by the court in the course of its judgment concerning the claim, do not amount to *res judicata* as independent from the dispositive part (*deduction*) of the judgment.

To illustrate, a judgment for the payment of a particular instalment of a periodical rent, and another judgment for the payment of a -so called- default interest will not constitute *res judicata* for the existence or non-existence of the relevant tenancy and loan respectively[68].

(iii) No res judicata arises with respect to decided defences. Similarly defences which have been given a decision by the court (again in the course of its judg-

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(64) Stein-Jonas *op.cit. supra,* n. 17 at 194.

(65) These conclusions will be written as following Rosenberg/Schwab *op.cit. supra,* n. 1 at 979 *et seq*. (para. 154, III); the cases which will be referred are also mentioned there.

(66) RG 94, 195.

(67)"*präjudizieller Rechtsverhältnisse*". The term "prejudicial", as distinctly spelt here, is not related to the ordinary meaning given to he "prejudicial" in English. A "pre-judicial *point*" -as it is defined by *Chieven-da* (1923)- is an issue of fact or law "which the court encounters in the chain of its reasoning and which is the logical antecedent of the final question", see *Millar op.cit. supra,* n. 13 at 2-3.

(68) RG 70, 27.

ment concerning the plaintiff's claim) are not res judicata. Here the term defence should be understood as including the assertion of counter-rights (*e.g.* right of retention) [69] which have not been advanced in the form of a counter-claim. Thus a defendant who seeks to obtain a *res judicata* referring to his counter-right should file a counter-claim[70].

(iv) No *res judicata* arises with respect to "legal definitions". Lastly, the legal basis of judgment, that is the definition of the established material facts under a certain law is not a matter of *res judicata*. At least such a definition is not res judicata independant from the dispositive part of the judgment.

Thus, for example, if some affairs of the defendant are found to fall within the scope of a certain provision of the Civil Code in a judgment, that judgment will not be *res judicata* with respect to the application of that provision to those affairs of the defendant when the same event is brought before the court a second time for another claim of compensation[71].

(ccc) Declaratory judgments. The narrow scope of German res judicata is balanced by the remendy of declatory judgments[72]. Thus a person who seeks to obtain a judgment which is conclusive upon a legal relationship in its entirety, may bring an action for a declaratory judgment, (declaratory action).[73]

Under the German Code a declaratory complaint may also be made as a so called interlocutory declaratory claim[74]. That is, a plaintiff who wants to obtain a judgment which is *res judicata* regarding a "pre-judicial legal relationship", or a defendant who wants to obtain judgment which is *res judicata* regarding his defence may (respectively) file a supplementary complaint or an interlocutory counter-claim for declaratory relief[75].

(bb) English law

(aaa) Principle. A lot has been said in recent English case law about the definition of the English doctrine of issue estoppel[76]. We have also touched on the historical

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(69) RG 8, 364.

(70) German Code Art. 322 (1); the second paragraph of the same article however provides an exception to this rule for the set-off, (for the interpretation of this example see Rosenberg/Schwab *op.cit. supra*, n. 1 at 981).

(71) See *idem*. 982.

(72) German Code Art. 256 (1)

(73) Declaratory judgments are also recognised in English law (RSC. Ord. 15 r.16), in the United States (28 USCA para. 2201 (1989); Federal Rules of Civil Procedure, (Rule 57) and Turkish (*e.g.* İİK. 72) law. Unlike Germany however, these jurisdictions hold declaratory judgments to be an alternative remedy for binding declarations of rights, instead of being a substitute for the issue preclusion. (Generally see for Turkish law B. Kuru, *Tespit Davaları*, (1963); for English law I. Zamir, *The Declaratory Judgment*, (1962).)

(74) *Zwischenfeststellungsklage*

(75) See German Code Art. 256 (2).

(76) See *supra*. n. 3.

(77) See p. 7 *ante*.

roots of the doctrine[77]. For the sake of clarity however, it can be added here that the above outline of the German system also amounts to a negative definition of issue preclusion. That is, an English judgment is normally *res judicata* with respect to the above mentioned "decided issues of fact"[78], "decided pre-judicial legal reliatonships"[79-80], and "decided legal definitions (issue of law)"[81] which underlie its dispositive part. Indeed issue estoppel goes even beyond this, extending to issues which have not been litigated. They may be *res judicata* provided that they serve as necessary premises of the judgment: non-issue estoppel.[82]

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(78) See, *e.g. R. v. Matthews* (1795) 5 Price 202 where the condemnation of a boat for having smuggled goods on board was held to be conclusive about the smuggling of the goods.

(79) See, *e.g. Dublin City Distillery Ltd.* v. *Doherty* [1914] A.C. 823 where the judgment which held the plaintiff to be entitled to a lien an certain debentures was itself held to be conclusive about the fact that those debentures were valid.

(80) Examples given for issues of fact and issues of law will also hold for "defences". In fact, since a defence will depend either upon a right (or counter-right) of the defendant or upon a different construction of the factual situtation, to mention conclusiveness of "decision upon defences" as a distinct aspect of issue preclusion is an unnecessary over-categorisation.

(81) *e.g.* see *Arnold* v. *National Westminister Bank* [1990] 1 All ER 590, where the issue was the definition of a statutory term ("fair market rent") in a rent review clause in a lease; (however issue estoppel did not apply there for certain reasons which are irrelevant to this context).

(82) As it was said in a frequently quoted authority (**Henderson v. Henderson** 67 E.R. 313 at 319; 3 Hare 100 (1843) at 115) which is originally a case of cause of action estoppel, but which is often referred to as applied to issue estoppel see **Arnold v. National Westminster Bank** supra n.3) "[t]he plea of res judicata applies, except in special cases, not only to the points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the litigation, and which the parties might have brought forward at the time". Hence issue estoppel "applies to the case, where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed" (**Haystead v. Taxation Commissioner**, [1926] AC. 115 at 165-6, which has been said to "[retain] its authority as a statement of the general principles governing issue estoppel", see **Bower** and **Turner** op.cit. supra n. 20 at 161)

Accordingly, in **Woodland v. Woodland** [1928] P 129 for example, the defendant was held to be bound by the issue estoppel (concerning the validity of his marriage) even though that issue had not been actually litigated -but only "might [have been] traversed"- in the first suit. Similarly a custody order in favour of the Wife which has been given **by default** of the Husband, and which has (**as a ground of the custody order**) held that the child was in fact the son of the Husband, was later held to give rise to an issue estoppel as it estopped the Husband from denying the paternity of the Child in subsequent maintenance proceedings (again brought by the Wife), **B. v. A.-G** [1965] P 278 at 279-80.

Actually, in **Arnold v. National Westminster Bank** the Court of Appeal seems to have "no doubt" about such conclusions. There, this effect has paradoxically been called a "non-issue estoppel", implying that a matter of fact or law which is amongst the necessary premises of a judgment will fall within the scope of the issue preclusion even if it has not been an actual "issue" in the relevant proceedings: "**All are agreed that**... where a party did not raise an issue in the earlier proceedings, but could and should have done so, he will not normally be allowed to raise that issue in later proceedings (this I would call, with somewhat perverse logic, non-issue estoppel) ... [And this should be distinguished from the] case, where the issue was raised and decided in the earlier proceedings" (per **Staunghton** L.J. at 541 "[i]ssue estoppel can **no doubt** be divided into subspecies... where a question has been raised in previous litigation and decided, or [and] where a question could have been raised but for some reason was not" (per **Mann** L.J. at 543). Emphasis added.

This different approach of English law from the American system, depends on the fact that the English principle of res judicata is closer to the historical starting point of the common law principle of estoppel (estoppel by record) than the American doctrine. Hence, when the so-called "estoppel by record" is regarded as a true estoppel, what precludes the parties from disputing an issue in a second action is their allegations and admissions (which can also be shown by not contesting an issue) in the first suit.

In this context, the question whether the issue has been actually litigated is immaterial (irrelevant). Accordingly, allegations of an issue in the second suit can be estopped by issue estoppel if it is in conflict with the conclusions or grounds of the first judgment, even if that issue has not been actually litigated in the first suit (viz. when the parties have not disputed the issue or the first judgment was "by consent" or "by default")

The particular problems which arise from the application of the doctrine are beyond the scope of this study. However, suffice it to say that, most of the controversial questions arising on the application of *res judicata*, are related to issue estoppel.

(bbb) Application of the rule. This controversial nature of the doctrine is probably what leads courts to approach issue estoppel with some caution. General definitions about issue estoppel, therefore, are usually qualified by a reservation such as "except in special cases" or "except in special circumstances"[83]. And in a recent judgment in this context[84] the Court of Appeal has classified the principle (which had there been drawn from a series of previous authorities) that the binding nature of issue estoppel may be qualified both as a result of "new developments in law" or by "new facts" which are brought forward in a second action with a "sufficient cogency".

However since "sufficient cogency" is not a concept of categorical definition, this qualification (at least with respect to the "new facts") amounts to hardly more than a reference to a general discretionary power to ignore an issue estoppel;[85].

(cc) Turkish law

(aaa) Principle. Exclusion of the issue preclusion, which has been illustrated above by the German Procedure, is a principle which has been generally accepted by the other continental systems.[86]

The Turkish Code has also put the principle as "[t]he conclusive judgment is only valid (applicable) with respect to the point which constitutes its subject matter"[87]. It must be admitted that this provision is not as clear as its German counterpart,[88] since the German phrase "the *demand* which has been advanced by the claim or the counter-claim" is countered here by a less informative wording: "the *point* which constitutes its [the judgment's] subject matter". Nonetheless such an indirect formulation is not unusual for a continental legislation, and indeed even the German provision does not directly state that the premises of judgment are excluded from *res judicata*: the idea of such an exclusion can only be derived from the words "only as far as",[89] which are also present in the Turkish provision as "only valid

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(83) *e.g. Handerson* v. *Handerson* (1843) 3 Hare 100, 67 E.R. 313 at 319, and *Fidelitas Shipping Co. Ltd.* v. *V/O Exportchleb* [1965] 2 All E.R. 4 at 8-9.

(84) See *Arnold* v. *National Westminster Bank* [1990] 1 All E.R. 590.

(85) C.f. the cases where *inherent jurisdiction* is exercised in favour of *res judicata*, where some of the requirements for its application are not satisfied but it is suggested necessary to apply the doctrine. See *supra*. n. 37.

(86) See Millar *op. cit. supra* n. 13 at 13-36, where the other jurisdictions including France, Italy, Austria, Hungary, Denmark, Norway, Sweden, Poland and Spain are considered, (as the law was then, in 1940).

(87) Art. 237 (1).

(88) For the test see *ante*. p. 17

(89) *"nur insoweit"*

with respect to". Morever the Turkish word "the point"[90] in this context can only be understood as referring solely to the dispostive part of a judgment, not only because of its literal meaning but also because of its singular from which is by no means conveninent to refer to the premises of judgment which may involve a series of material facts and legal definitions. And lastly, the exclusion of issue preclusion seems to be the only reasonable interpretation which can be given to the restrictive language of the Article 237(1).

Such an interpretation, however, is not made in Turkish law. In fact, it can be said that, no clear interpretation is given to the above mentioned provision. The cases concerning the material effect of conclusive judgment seldom mention the first paragraph of the Article 237. And though the rule that "the grounds of a decision do not take place in *res judicata*" is pronounced in Turkey[91] as often as in Germany, the meaning of this cliché is not taken in. Indeed the position which the present law has reached is just the opposite.

Thus what emerges from the mass of the rather unsettled case law is that, issue preclusion does apply in Turkey.

The present law can be illustrated as follows.

(bbb) Application of the rule. (i) Issue preclusion arises with respect to the decided issue of fact. Court of Cassation[92] has held that an issue of fact which has been decided as a ground of a previous judgment is *res judicata* in subsequent litigation between the same parties.

According to the Court, for example:

"Every action is made of two parts. The first part covers the declaration and the second covers the performance. In this case, the fact which is advanced by the plaintiff that he has given some money to his wife to buy an immovoble constitutes the declaratory part of the action. Now, in the first lawsuit, it has been held by he court that the husband [plaintiff] had not given money to this wife but the woman had bought these [immovables] with her own money... [t]hus, *the material fact,* that is, the fact that the husband has not bought an immovable for his wife is verified; in this way the declaratory part of the action has become a conclusive judgment [:res judicata] as it has been put by the defendant's defence. *Although, as a rule, only the judgment paragraph [dispositive part] of the decision constitutes a conclusive judgment, the*

(90) "husus"

(91) e.g. **Kuru**, (IV) op.cit. supra n. 1 at 3562; 2. HD 1.6.1971 2640/3531, 1971 RKD 327.

(92) Court of Cassation (Yargıtay) is the highest rank court in civil and commercial matters. Although there is no rule such as Rule of Precedent (**stare decisis**) in Turkey, the precedents of the Court of Cassation are upheld by the courts of first instance and therefore they represent the law in practice.

reasonings which necessitate the judge to give the judgment also have the conclusive judgment effect".[93]

(ii) Issue preclusion arises with respect to the decided "pre-judicial legal relationship". A judgment gives rise to an issue estoppel with respect to the pre-judicial legal relationship in Turkey.

Under this practice, a judgment of performance, for example, which has been given as concerning only one of the periodical or partial claims which arises from a continuing contractual relationship (*e.g.* a periodical rent or wages arising from a tenancy or employment), is held to be *res judicata* with respect to the existence and validity of that contractual relationship for the subsequent litigation of residual or future claims of performance stemming from the same contractual legal relationship.[94]

(iii) Issue preclusion arises with respect to the decided defences. Conclusive judgments are held to give rise to the issue estoppel with respect to the decided defences[95]. To quote an example:

> "The counsel for the defendant, the Village, had [in a previous action]... defended on the basis that the plaintiff's deed of real estate was legally worthless since it was in the matter of a pasture; [however] at he end, this defence was rejected by the court when giving the judgment... The Court of Cassation, by its well established practice, holds that a rejected defence cannot be later put forward as a ground of action, and in such a case there *is* a conclusive judgment, provided that the other requirements are also satisfied"[96].

(iv) "Non-issue estoppel" does not apply in Turkey. Despite this similarity to the English law no authority has been found here supporting the so called non-issue estoppel in Turkey. Indeed, this is not unexpected, since the basic concept of "estoppel" which underlies the non-issue estoppel -*i.e.* an obligation of full disclosure of one's case where necessary, and the obligation to adhere and not to contradict that case in a later course of action- is unknown to Turkish legal theory.[97]

(ccc) The positive ground of the practice. Above is said that the scope of the material effect of conclusive judgment should be based on a positive law (legislation) in a continental system.[98]

Here, referring back to the previous discussion about the Article 237 of the

(93) 2.HD 11.2.1982 8582/1186, 1982 YKD 784 (emphasis added); similarly see 15.HD 3.5. 1979 511/1044 (Kuru (IV) *op.cit. supra*, n. 1 at 3570), HGK 11.2.1982 10/472-64, 1981 İKİD 476.

(94) See 2.HD 29.1.1976, 1976 YKD 452, and HGK. 20.1.1988 1987-10-517/1988-37, 1988 YKD 1626.

(95) See 3.HD 25.4.1973 1/1630-355, 1973 İKİD 2198

(96) 7.HD 29.6.1971 4774/4681, 1971 RKD 387.

(97) See *supra* p. 7

(98) *Ante.* p. 16

Code, it can be said that the practice of the Court of Cassation is a *contra legem* interpretation of law. However, another provision which purports to be a ground of issue preclusion in Turkey[99] should also be considered in this context. Under the Article 295 of the Turkish Code

> "[c]opies of court decisions and deeds which has been prepared by the notaries public... are conclusive evidence unless their falsity is proved. Save that, if the court sees any indication which causes suspicion about those documents, it may require information from the oficce which has prepared ... them".

According to the Court of Cassation "issue preculison" (though no such a similar term is used) on prejudicial legal relationships is a necessity of this provision. Hence, it has been said that

> "[t]he judgment which is given in favour of the plaintiff in a partial claim constitutes a conclusive evidence for the residual claim. Thus, *it is the necessity of the Article 295/1* of [the Turkish Code] that, the judgment in favour of the plaintiff in a partial claim and the part [of that judgment] where the existence of the legal relationship is established... is a conclusive evidence with a binding effect on the residual claim",[1].

However, such a conclusion cannot be drawn from Article 295. Hence that provision is not related to the *preclusion (estoppel) effect* of conclusive judgments, but it only purports to provide for *conclusive evidence effect*. That is, it concerns the effect which upholds the existence and accuracy of the "legal effects" and "contents" of a judgment, as distinct from the accuracy of the grounds of a judgment or any preclusion effect of a judgment.[2] This fact can firstly be seen from the context of the provision, since it takes place under "Part Four" of the Code which deals with "Deeds", and the wording of the article again concerns not only court decisions but also deeds prepared or authenticated by the notaries public. Secondly the wording of the article cannot be regarded as concerning *res judicata*, since it does not even mention the term "conclusive judgment" but it only refers to the "copies of court decisions"[3]. Thirdly, if the issue preclusion effect of the Article 295 is true, one should also accept that the trial court, which has doubts about such an effect in a particular case, may "require information" from the previous judge (or even may be from the clerk's office) which has "prepared" the copy of the decision. It cannot reasonably be thought that the Code -jumping over some 60 articles- has ordered such a practice to be applied to Article 237.

As a result it can be said that the present practice of the Court of Cassation has no positive legal ground in Turkey.

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(99) See *Kuru op.cit.*, Cilt 1 (=Vol.1) (1979) 968 *et seq.*, 986 *et seq.*, and infra. n. 100

(1) 13.HD 24.3.1981 1462/2089, 1981 Yasa 818 (emphasis added).

(2) See ante. p. 6

(3) "*Mahkeme ilamları*"

4. Conclusion

In terms of its subject matter *res judicata* is twofold. First it is conclusive evidence: when the "legal effects" or "contents" of a judgment is one of the "premises" of a subsequent claim between the same parties, it constitutes a decisive evidence of that point.

Here, *res judicata* does not preclude further litigation, but only provides conclusive evidence for the proof of a particular premise of the claim. This feature is shared both by the common law and the civil law, and it is distinct from Preclusion.

Secondly, *res judicata* has an effect of Preclusion. Preclusion may be given a broader or a narrower scope. Accordingly, preclusion may preclude only the litigation of a "claim" *or* it may also prevent the litigation of an "issue": (*claim preclusion/ issue preclusion*). Besides, preclusion may apply only to the claims and issues which have "actually been litigated" or it may also apply to claims and issues which "should have been litigated": (*prohibition of splitting a cause of action/non-issue estoppel*). Lastly when Preclusion is applied to what "should have been litgated", the scope of that concept may be drawn broader *or* narrower: (What constitutes a "cause of action"? What is the scope of the "issue which should have been litigated"?).

All these different aspects of Preclusion must be clearly identified and categorised, *i.e.* a careful terminology must be used. Unless this is done, it is not possible to understand and to apply the law correctly. The law of a particular jurisdiction must draw the limits of preclusion clearly by using a stable terminology. Neither the Turkish nor the English law has such a clarity. However, although a clear categorisation is crucial, the development of the law cannot be maintained by speculations on categories. The law of preclusion is not an area for *conceptualism*, but is an area of legal policy.

As we have seen the broad and the narrow approaches to this area represent respectively the preference for the"aim of civil procedure" and the protection of private rights". Specifically, the *broad approach* aims to maintain the legal certainty, legal peace and the judicial economy by settling a controversy with its entirety in a single litigation, whereas the *narrow approach* regards the litigation as a device to protect the private rights and provides a flexible procedure by which the plaintiff can allocate his effort and financial means freely by splitting his cause of action into several lawsuits, and in which none of the parties is deprived of the chance of relitigating an issue to support a subsequent defence or claim.

We have seen above that English law is ambiguous in its terminology and the Turkish case law is inclined towards a *contra legem* construction of the law. Thus, both of them need to be clarified by a clear statement of the law. Here the lawmaker (whether the judge or parliament) should refer back to legal policy considerations. Neither the broad nor the narrow approach is "good" or "bad" in the first place. But it must be kept in mind that there is no virtue in going back to the history

case law (as is done in England) or going through the texts of Roman law (as was done once in the Continent).

To sum up the comparison, the following conclusions may be drawn. The conclusive evidence effect of judgments is recognised by all four jurisdictions which have been considered: England, Turkey, Germany and the United States. On the Continent *res judicata* generally means claim preclusion only, excluding the issue preclusion . At the western and the eastern ends of the mainland however, the scope of *res judicata* covers the issue preclusion as well as claim preclusion. This is also the case in the United States. Here England goes further than Turkey and the United States, because it applies issue preclusion even to issues "which should have been litigated" (non-issue estoppel) as well as to issues which "actually have been litigated". On the other hand, when claim preclusion is considered both the English-speaking countries apply preclusion to the claims "which should have been litigated" (*i.e.* the claims falling within the scope of the same cause of action), whereas Turkey and Germany restrict claim preclusion by permitting the splitting of a cause of action and even so-called "partial claims". Thus the comparison may be schematised as shown by the figure overleaf:

This paper suggests an improvement in the categorisation of both the English and Turkish law of *res judicata*. The conclusive evidence and preclusion effects, and the subdivisions which have been given for the preclusion effects must be clearly distinguished. It is worth repeating here that there has been developed a distinct category in Turkish case law which is the equivalent of English issue estoppel[4], and therefore in practice (though *contra legem*) the grounds for a judgment do have a part in the Turkish doctrine of *res judicata*.

In relations to this, this study further suggests that the rule in of any jurisdiction concerning the scope of res judicata should be stated clearly by positive law. In England this might alternatively be done by the case law, if a case involving aspects of *res judicata* were considered in the entire context of the doctrine, with a view to drawing the necessary distinctions and establishing a coherent terminology. However, when the general "case by case" nature of case law is considered, and when we recall that English law adopts in the matter of *res judicata* a particularly broad discretion on a case by case basis, instead of establishing and adhering to categorical rules, it can be seen that legislation is the best way to clarify the law of *res judicata* in England as well.[5-6]

In Turkey if the effect of the issue preclusion is to be kept, the first paragraph of Article 237 of the Code of Civil Procedure must be amended.

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(4) Though Turkish law excludes the non-issue estoppel.

(5) Indeed such a positive provision (dealing with double jeopardy) has already been suggested for criminal procedure; see *A Criminal Code for England and Wales, Report and Draft Criminal Code Bill* (Law Com. No. 177), April 1989 p. 48 (section 11).

(6) The phraseology used here, which has partly depended on the legal writings of **Vestel**, is recommended. The term "estoppel" must be dropped from the law of *res judicata*, see Millar *op.cit. supra* no. 10 and *c.f. idem.* 59.

		England	U.S.	Turkey	Germany
CONCLUSIVE EVIDENCE EFFECT		+	+	+	+
claim preclusion	actually litigated	+	+	+	+
	should be litigated	+	+	-	-
PRECLUSION					
issue preclusion	actually litigated	+	+	+	-
	should be litigated	+	-	-	-