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THE EDITOR'S LETTER

Dear Scholar and Jurist,

We are pleased to publish the 2018th issue of Annales de la Faculté de Droit d'Istanbul *(Annales)* one of the most important contributions of the Faculty of Law of Istanbul University to the law society. Annales has been the first and only law journal to be published in English, German, and French in Turkey, and has served as a platform for Turkish and international researchers and academics to publish their articles in the above-mentioned languages since 1951. Since the first issue, the law society has been showing consideration to our journal. On one hand, this indicates that our journal is appreciated by the law society, on the other hand, it puts a huge responsibility on our shoulders as the editorial board.

However, due to some setbacks which prevented us from publishing the journal on a regular basis, we have not been able to publish the journals on a timely basis. In other words, we had to publish the issues a year later than they were supposed to be published. Unfortunately, the same thing happened this year too. We have always been aware of our responsibilities, and thanks to encouraging researchers and academicians, we have been endeavoring to solve this problem, and to publish the journal timely as we did it before. Now, we are pleased to announce that in addition to this latest issue, we will publish the next issue of the journal by the end of 2019. From now on, we will do our best to provide our readers with the journal in a timely fashion.

Our top priority is to increase the number of indexes that covers Annales to make it an internationally recognized journal again. In this regard, we would like to announce that this issue of the journal will include the comprehensive abstracts -in English- of the articles published and we will start using OSCOLA rules in the next issue and onwards.

Finally, we would like to express our gratitude to the editorial team who spent every effort to publish the latest issue, and to the academicians who contribute as referees. We further express our gratitude to all researchers who contributed their precious articles to the journal.

Editors-in-chief, Annales de la Faculté de Droit d'Istanbul.
Prof. Dr. Abuzer KENDİGELEN
Doç. Dr. H. Burak GEMALMAZ

DER BRIEF VON EDITORS

Sehr geehrte Wissenschaftlerinnen und Wissenschaftlers, Juristinnen und Juristen,

Wir freuen uns, Ihnen die Ausgabe 2018 von Annales de la Faculté de Droit d'Istanbul *(Annales)* vorzustellen, einen der wichtigsten Beiträge der Juristischen Fakultät der Universität Istanbul zur türkischen Rechtsgemeinschaft. Annales ist das erste und bis heute das einzige juristische Journal in der Türkei, in dem seit 1951 die Veröffentlichungen nur in Englisch, Deutsch und Französisch erfolgt und es ist die einzige Plattform für die türkische und ausländische Forscherinnen und Forschers, Wissenschaftlerinnen und Wissenschaftlers, die im Rechtsbereich in den genannten Sprachen publizieren möchten. Die türkische und ausländische Rechtswissenschaftlerinnen und Rechtswissenschaftlers haben von Beginn bis zu dieser Ausgabe große Wertschätzung gegenüber unserem Journal gezeigt. Einerseits wird deutlich gezeigt, inwieweit der Wert unseres Journals von den Betreffenden honoriert wird, und auf der anderen Seite bedeutet dies auch gleichzeitig eine große Verantwortung für unsere Redaktion.

Aufgrund einer Reihe von Vorfällen in den letzten Jahren wurden die regelmäßigen Veröffentlichungen unserer Journale beeinträchtigt, dies hat zur Verzögerungen der Veröffentlichungen der letzten Ausgaben unseres Journals geführt, deswegen wurden die neueste Ausgaben nicht mit dem Jahreszahl der Veröffentlichung, sondern mit dem vorletzten Jahreszahl veröffentlicht. Leider hat sich diese Beeinträchtigung auch auf diese Ausgabe unseres Journals ausgewirkt. Indem wir uns unserer Verantwortung bewusst sind, haben wir mit dieser Ausgabe aufgrund der Anerkennung und Arbeiten wertvoller Wissenschaftlers und Wissenschaftlerinnen, Forschers und Forscherinnen ein Treffen mit den Lesern zu dem Zwecke verwirklicht, die Verzögerungen zu beheben und auch unser Vorstoß unser Journal in die glorreichen Tage seiner Vergangenheit zurückzuversetzen. Wir freuen uns dass wir vor Ende 2019 eine neue Ausgabe neben dem Aufleben dieser Ausgabe veröffentlichen werden. Von jetzt an versprechen wir die notwendigen Anstrengungen zu unternehmen, um unser Journal rechtzeitig zu veröffentlichen.

Wir bemühen uns vor allem Annales erneut zu einer international anerkannten Zeitschrift zu machen und so auch die Anzahl der durchsuchten Indizes von Annales zu erhöhen. In diesem Zusammenhang haben wir die Ausgabe damit eingeleitet, dass englische Kurzfassungen erweitert veröffentlicht wurde, und wir werden mit der nächsten Ausgabe die OSCOLA Standards einhalten.

Zu guter Letzt möchten wir uns bei der Redaktion und bei allen Akademikers und Akademikerinnen bedanken, die als Schiedsrichter für diese Ausgabe mitgewirkt haben. Abschließend möchten wir uns bei allen Forschers und Forscherinnen bedanken, die mit ihren wertvollen Artikeln zu dieser Ausgabe unseres Journals beigetragen haben. Wir hoffen auf ein Wiedersehen in der nächsten Ausgabe...

Chefeditore von Annales de la Faculté de Dorit d'Istanbul.
Prof. Dr. Abuzer KENDİGELEN
Doç. Dr. Burak GEMALMAZ

LETTRE DES EDITEURS

Chers chercheurs scientifiques et juristes,

Nous sommes ravis d'avoir publié le numéro 2018 des Annales de la Faculté de Droit d'Istanbul *(Annales)*, l'une des contributions la plus notable de la Faculté de Droit de l'Université d'Istanbul à la doctrine turque. Etant la première et toujours la seule revue de droit publiée spécifiquement en anglais, allemand et français en Turquie, *Annales* sert aux chercheurs et cadres académiques turcs et étrangers qui ont l'intention de publier leurs articles dans ces langues mentionnées, comme une plate-forme unique depuis 1951. Le soutien des juristes turcs et étrangers montre d'une part à quel point *Annales* est appréciée par le monde juridique et d'autre part augmente la responsabilité du comité de rédaction.

Toutefois, à cause de quelques incidents survenus dans les dernières années qui nous ont empêchés de publier régulièrement *Annales*, nous avons dû publier les numéros de notre revue une année plus tard que prévu. Malheureusement, ce nouveau numéro a été aussi touché par la même situation. Cependant, nous sommes vraiment heureux et excités d'annoncer que, grâce aux soutiens des chercheurs et des cadres académiques, nous sommes très proches à résoudre ce problème, et que nous envisageons de publier, à la suite de ce numéro le prochain *Annales* jusqu'à la fin de cette année. Désormais, nous nous engageons de faire notre mieux pour fournir *Annales* à nos lecteurs régulièrement.

Parmi nos priorités concernant *Annales*, nous envisageons que *Annales* redevienne une revue renommée au plan international comme elle était auparavant et que *Annales* soit indexée par les indexes les plus reconnues. À cet égard, nous voudrions annoncer que le prochain numéro comprendra les résumés complets -en anglais- des articles et que nous commencerons à suivre les règles OSCOLA.

Enfin, nous voudrions exprimer notre gratitude à l'équipe éditoriale qui s'est efforcée de publier ce numéro et aux cadres académiques qui ont agi en tant que critiques. Nous exprimons en outre notre gratitude à tous les chercheurs qui ont contribué avec leurs précieux articles à *Annales*. À la prochaine…

Rédacteurs en chef,
Prof. Dr. Abuzer KENDIGELEN
Doç. Dr. H. Burak GEMALMAZ

EDİTÖRDEN MEKTUP

Değerli Bilim İnsanları ve Kıymetli Hukukçular,

İstanbul Üniversitesi Hukuk Fakültesi'nin Türk hukuk camiasına sunduğu en önemli katkılardan bir diğeri olan Annales de la Faculté de Droit d'Istanbul'un *(Annales)* 2018 sayısını sizlerle buluşturmanın mutluluğunu yaşıyoruz. 1951 yılından bu yana yalnızca İngilizce, Almanca ve Fransızca dillerinde yayın yapan, bu niteliği haiz ilk ve hâlen de tek Türk hukuk dergisi olan Annales, hukuk alanında anılan dillerde yayın yapmak isteyen Türk ve yabancı araştırmacı ve akademisyenlerin bu arzularını gerçekleştirebilecekleri yegâne platform olarak hizmet vermektedir. Yayın hayatına başladığı günden elinizdeki bu sayıya kadar Türk ve yabancı hukuk araştırmacılarının göstermiş olduğu teveccüh, bir yandan dergimizin kıymetinin ilgililerince ne derecede idrak edilmekte olduğunu açıkça göstermekte, diğer yandan da yayın kurulumuza büyük bir sorumluluk yüklemektedir.

Ne var ki, geçtiğimiz yıllarda meydana gelen ve dergimizin her sene düzenli olarak çıkarılmasını olumsuz olarak etkileyen birtakım aksaklıklardan dolayı, bir süredir dergimizin en son sayısı, yayınlandığı senenin değil bir yıl öncesinin tarihiyle çıkmaktadır. Maalesef, dergimizin bu sayısı da anılan aksaklıktan nasibini almıştır. Yüklendiğimiz sorumluluğun farkında olarak, hem bu aksaklığı gidermek, hem de dergimizi geçmişinin ihtişamlı günlerine döndürmek adına başlattığımız atılımın değerli akademisyen ve araştırmacılar nezdinde karşılık görmesi sonucu okuyucuyla buluşan işbu sayının hayat bulmasının yanı sıra, 2019 yılı sona ermeden bir sayının daha yayınlanacak olmasından büyük bir heyecan ve mutluluk duyuyoruz. Bundan sonra da dergimizi zamanında okuyucuyla buluşturmak için gereken çabayı göstermeyi taahhüt ediyoruz.

Gerçekleştirmeye çalıştığımız, Annales'i uluslararası alanda yeniden tanınır bir dergi hâline getirme hedefi doğrultusundaki önceliklerimizden bir diğeri Annales'in tarandığı dizin sayısını artırmaktır. Bu kapsamda işbu sayıdaki makalelerin genişletilmiş İngilizce özetlerine yer verildiği gibi, bir sonraki sayıdan itibaren OSCOLA atıf standartlarını benimseyeceğimizi şimdiden duyurmayı uygun gördük.

Son olarak, bu sayının yayınlanabilmesi için ciddi bir uğraş veren editör ekibine ve bu sayıda hakemlik görevini gerçekleştiren tüm akademisyenlere teşekkür ediyoruz. Nihayet dergimizin işbu sayısına çok değerli yazıları ile katkı veren tüm araştırmacılara katkılarından ötürü şükranlarımızı sunuyoruz. Bir sonraki sayıda görüşmek dileğiyle…

Annales de la Faculté de Dorit d'Istanbul Baş Editörleri
Prof. Dr. Abuzer KENDİGELEN
Doç. Dr. H. Burak GEMALMAZ

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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

Ein Überblick über die Rechtsentwicklungen zur Vereinigungsfreiheit im öffentlichen Dienst der Türkei im Lichte der Urteile des Europäischen Gerichtshofs für Menschenrechte

An Overview of Legal Developments Regarding Freedom of Association of Civil Servants in Turkey in the Light of the Decisions of the European Court of Human Rights

Avrupa İnsan Hakları Mahkemesi Kararları Işığında Türkiye'de Kamu Görevlilerinin Sendikal Özgürlüğüne İlişkin Yasal Gelişmelere Genel Bir Bakış

Ayse Ledun Akdeniz[1]

Zusammenfassung

In Bezug auf die Vereinigungsfreiheit der Beschäftigten im öffentlichen Dienst gibt es viele Urteile des EGMR. Insbesondere das Urteil *„Demir und Baykara"* hat hier eine leitende Rolle gespielt. Die bisherige Rechtsprechung zur Vereinigungsfreiheit im öffentlichen Dienst wurde maßgeblich durch Fälle gegen die Türkei geprägt. Dementsprechend werden in diesem Beitrag ein paar EGMR-Urteile, in denen der Gerichtshof festgestellt hat, dass die Türkei „das Recht auf Versammlungs- und Vereinigungsfreiheit" gemäß Art. 11 der Europäischen Menschenrechtskonvention verletzte, summarisch erwähnt und jüngste wichtige rechtliche Entwicklungen in Bezug auf das Recht Koalition und Kollektivvertrag von Beschäftigten im öffentlichen Dienst, behandelt. Andererseits sind die Entscheidungen des Oberverwaltungsgerichts und des Verfassungsgerichts über kurzfristige Arbeitsniederlegungen von Angehörigen im öffentlichen Dienst von Bedeutung. In einigen dieser Entscheidungen werden kurzfristige (ein oder zwei-tägige) Arbeitsniederlegungen der Lehrer und Lehrerinnen für zulässig erachtet, wenn sie im Rahmen einer von der Gewerkschaft organisierten und angekündigten Aktion erfolgten. Es kann jedoch immer noch nicht behauptet werden, dass diese jüngsten Rechtsentwicklungen in völliger Übereinstimmung mit den in den Entscheidungen des EGMR festgelegten Grundsätzen stehen.

Schlüsselwörter

Vereinigungsfreiheit, Angehörigen im öffentlichen Dienst, Gewerkschaften, Kollektivverhandlung, Streik

Abstract

There are many decisions of the ECHR regarding to the freedom of association of civil servants. In this area, especially the Grand Chamber's decision of *"Demir and Baykara"* is considered as a cornerstone. It has been observed that Turkey is a party in many disputes brought before the ECtHR regarding freedom of association of civil servants. Accordingly, in this study, some decisions of the ECtHR in which the Court held that Turkey violated "the right to freedom of assembly and association" under Article 11 of the European Convention on Human Rights are mentioned briefly and recent important legal developments regarding the right of civil servants to organize and to bargain collectively in Turkey are stated. On the

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other hand, the decisions of Council of State and the Constitutional Court in Turkey regarding short-term work stoppages of civil servants are noteworthy. In some of these decisions, short-term (lasting one or two days) work stoppages in accordance with a decision of a trade union are considered as an excuse. However, it is still not possible to state that these recent developments are completely in coherence with the principles set forth in the decisions of the ECtHR.

Keywords
Freedom of association, Civil servants, Trade unions, Collective bargaining, Strike

Öz
AİHM'nin kamu görevlilerinin sendikal hakları konusunda vermiş olduğu pek çok kararı bulunmaktadır. Bu alanda özellikle, Büyük Daire'nin *"Demir ve Baykara"* isimli kararının yol gösterici nitelik taşıdığı kabul edilmektedir. Kamu görevlilerinin sendikal özgürlüklerine ilişkin olarak, AİHM'nin önüne gelen uyuşmazlıkların pek çoğunda Türkiye'nin taraf olduğu görülmektedir. Bu doğrultuda çalışmamızda, AİHM'nin, Avrupa İnsan Hakları Sözleşmesi'nin 11. maddesinde düzenlenen "Toplantı ve dernek kurma özgürlüğü"nün Türkiye tarafından ihlal edildiği sonucuna vardığı bir kısım karara kısaca yer verilmiş ve yakın zamanda Türkiye'de kamu görevlilerinin sendikalaşma ve toplu sözleşme haklarına ilişkin önemli yasal gelişmeler aktarılmıştır. Öte yandan Danıştay ve Anayasa Mahkemesi'nin de kamu görevlilerinin kısa süreli iş bırakmalarına ilişkin ilgi çekici kararları bulunmaktadır. Bazı kararlarda öğretmenlerin sendikanın aldığı bir karar sonucunda kısa süreli (bir ya da iki günlük) iş bırakmalarının mazeret olarak kabul edildiği görülmektedir. Ancak yine de yakın zamana ilişkin bu gelişmelerin, AİHM kararlarında yer verilen esaslar ile tam olarak uyumlu bir halde olduğunu söylemek mümkün gözükmemektedir.

Anahtar Kelimeler
Örgütlenme özgürlüğü, Kamu görevlileri, Sendikalar, Toplu pazarlık, Grev

Extended Summary

The jurisprudence of the European Court of Human Rights bears a certain relevance to the national legal systems of the member states of the Council of Europe. Many decisions of the European Court of Human Rights pertain to the freedom of association of civil servants. In particular, the Grand Chamber's decision of *"Demir Baykara"* is considered to be a cornerstone in this area. The Grand Chamber has decided in this case that the freedom of association under Article 11 of the European Convention on Human Rights includes the right to form a trade union and become a member of a trade union. It has been observed that Turkey is a party to many disputes brought before the European Court of Human Rights regarding the freedom of association of civil servants. The cases are related to *the forming of unions, the temporary work stoppage of civil servants* and *the effective exercise of the right to freedom of assembly and association in the civil service.* This study gives a brief overview of some decisions of the European Court of Human Rights in which the Court held that Turkey violated "the right to freedom of assembly and association" under Article 11 of the European Convention on Human Rights.

In Turkish law, numerous legislative changes, including amendments to the Constitution, have taken place in recent years. The restrictions on freedom of association have been abolished step by step. The abolishment of the restrictions on

freedom of association was initiated by individual efforts of citizens and trade unions in the civil service. In accordance with legal developments, trade union confederations can conclude collective agreements in the civil service, but their members are not allowed to strike. A right to strike is a foreign term to the Law on Trade Unions and Collective Agreements of Civil Servants No.4688. If the parties cannot agree upon and conclude a collective agreement, they must apply to the Arbitration Committee of Civil Servants and a protocol must be submitted thereto. The agreement concluded after negotiation with the Arbitration Committee of Civil Servants is binding as a collective agreement. Therefore, the Law on Trade Unions and Collective Agreements of Civil Servants No.4688, as well as the relevant legislation, needs to be revised. This need for reform has long been emphasized in the academic literature. This study outlines recent important legal developments regarding the right of civil servants to organize and to bargain collectively in Turkey.

In fact, the European Court of Human Rights considers a ban on strikes for certain professional groups to be admissible. However, an absolute strike ban for civil servants that does not take into consideration the distinctions between civil servants exercising authority in the name of the State and those who do not exercise such an authority is incompatible with the latest developments regarding the right of association in the civil service. For this reason, the recent case law of the Turkish courts should be taken into consideration. The decisions of the Council of State and the Constitutional Court in Turkey regarding short-term work stoppages of civil servants are noteworthy. In some of these decisions, teachers' short-term work stoppage (lasting one or two days), in accordance with a decision of a trade union, are considered excused. Yet, there are also decisions for one or two-day work stoppages in civil service that conflict with the decisions mentioned above by deeming conditions of the concrete case to be different.

The aim of this study is to represent the influence of these decisions on Turkish law and to describe the current law in Turkey in this context. The study concludes that it is still not possible to state that these recent developments are completely in coherence with the principles set forth in the decisions of the European Court of Human Rights.

Ein Überblick über die Rechtsentwicklungen zur Vereinigungsfreiheit im öffentlichen Dienst der Türkei im Lichte der Urteile des Europäischen Gerichtshofs für Menschenrechte

I. Einleitung

Die Rechtsprechung des Europäischen Gerichtshofs hat auf die nationalen Rechtsordnungen der dem Europarat angehörenden Staaten eine gewisse Relevanz. Die bisherige Rechtsprechung des Europäischen Gerichtshofes zur Vereinigungsfreiheit im öffentlichen Dienst wurde maßgeblich durch Fälle geprägt, denen Eingaben türkischer Beschwerdeführer zugrunde lagen[1]. Entscheidende Bedeutung kommt dem Urteil in der Rechtssache *Demir und Baykara*[2] zu, in dem der EGMR – ebenso wie auch in der nachfolgenden Entscheidung *Enerji Yapı Yol Sen*[3] – die Koalitionsfreiheit des Art. 11 der Europäischen Menschenrechtskonvention neu ausgerichtet hat[4].

Die Fälle über die Vereinigungsfreiheit im öffentlichen Dienst sind zwar im Grunde genommen miteinander verknüpft. Dabei lassen sich drei hauptsächliche Fallgruppen unterscheiden, nämlich die Gründung von Gewerkschaften im öffentlichen Dienst, die vorübergehende Arbeitsniederlegung von Angehörigen des öffentlichen Dienstes und die wirksame Ausübung der Vereinigungs- und Versammlungsfreiheit von Angehörigen des öffentlichen Dienstes. In diesem Beitrag werden ein paar EGMR-Urteile summarisch erwähnt. Dieser Beitrag hat zum Ziel, die Einflüsse der EGMR-Urteile auf das türkische Recht darzustellen und in diesem Rahmen das geltende Recht zu schildern.

II. Drei Fallgruppen der Vereinigungsfreiheit im öffentlichen Dienst

A. Gründung einer Gewerkschaft im öffentlichen Dienst

1. Das EGMR-Urteil *Tüm Haber Sen u. Çınar*[5]

Gegenstand des Urteils *Tüm Haber Sen u. Çınar* war die von einem türkischen Gericht angeordnete Auflösung der Gewerkschaft „*Tüm Haber Sen*", die von Angehörigen des öffentlichen Dienstes gegründet worden war. Der Ansicht des nationalen Gerichts, im öffentlichen Dienst Beschäftigten sei die Gründung von Gewerkschaften versagt, erteilte der EGMR eine klare Absage. Die Straßburger Richter betonten, dass der Staat, auch soweit er selbst als Arbeitgeber auftrete,

1 **Klaus Lörcher**, "Aktuelle Streikrechtsverfahren vor dem Europäischen Gerichtshof für Menschenrechte", AuR, 7/8, 2013, S. 290

2 EGMR, Große Kammer, Urt. vom 12.11.2008 – Nr. 34503/97.

3 EGMR, 3. Sektion, Urt. vom 21.04.2009 – Nr. 68959/01.

4 **Klaus Lörcher,** "Das Menschenrecht auf Kollektivverhandlung und Streik – auch für Beamte", AuR,7/8, 2009, S. 229 ff.

5 EGMR, 2. Sektion, Urt. vom 21.02.2006 – Nr. 28602/95.

die wirksame Ausübung der Koalitionsfreiheit garantieren müsse und von dieser Freiheit nicht eine bestimmte Gruppe von Beschäftigten ausnehmen könne. Das Urteil war somit ein Beleg dafür, dass das nationale Recht in diesem Punkt hinter den aktuellen Entwicklungen des Europäischen Arbeitsrechts zurückgeblieben war.

2. Das EGMR-Urteil *Demir und Baykara*[6]

In den 90er Jahren war die Gründung von Gewerkschaften im öffentlichen Dienst der Türkei noch nicht gesetzlich geregelt. Seinerzeit konnten nur Arbeitnehmer Gewerkschaften gründen und ihnen beitreten. Dementsprechend sah die türkische Verfassung seinerzeit vor, dass Kollektivverhandlungen nur zwischen Arbeitgebern und Arbeitnehmern geführt werden konnten. Dessen ungeachtet schloss die Gewerkschaft *Tüm Bel Sen* im Jahre 1993 für ihre Mitglieder einen Kollektivvertrag mit dem Stadtrat Gaziantep. Aber kurz danach stellte der Stadtrat sich auf den Standpunkt, dass die Gründung einer Gewerkschaft im öffentlichen Dienst im türkischem Recht nicht vorgesehen und der Kollektivvertrag somit nichtig sei. Herr *Demir* verklagte den Stadtrat von Gaziantep und das Zivilgericht erster Instanz von Gaziantep gab dem Beschwerdeführer Recht. Das Urteil der ersten Instanz wurde jedoch vom 4. Rechtssenat des Kassationshofes aufgehoben und zurück an das Zivilgericht erster Instanz verwiesen. Da nach türkischem Zivilprozessrecht die Zurückverweisung für die Vorinstanz nicht bindend war, bestätigte das Zivilgericht erster Instanz im Jahre 1995 sein früheres Urteil. Es war der Auffassung, dass die Gesetzlücke durch Anwendung der von der Türkei ratifizierten ILO-Konventionen[7] geschlossen werden müsse. Somit kam die Sache vor den Großen Zivilsenat des Kassationshofs. Er gab dem 4. Rechtssenat des Kassationshofes Recht. Die Gewerkschaft hatte also keine juristische Persönlichkeit erworben. Als Herr *Demir* die nationalen Rechtsbehelfe ausschöpfte, fand in der Türkei im Jahr 1995 eine kleine Verfassungsänderung statt. Im Zuge der Änderung bekamen die Angehörigen des öffentlichen Dienstes ein Recht Gewerkschaften zu gründen. Der geänderte Art. 53 der türkischen Verfassung sah vor, dass Näheres durch ein Gesetz geregelt wird[8]. Spätere Verfassungsänderungen konnten aber nichts daran ändern, dass die Gewerkschaft eine Rechtsfähigkeit erworben hatte. Hierin entschied die 2. Sektion des EGMR, dass Art. 11 EMRK verletzt wurde[9]. Darauf wurde die Große Kammer des EGMR von der Türkei angerufen[10] und

6 EGMR, die Große Senat, Urt. vom 12.11.2008 – Nr. 34503/97.

7 Das ILO-Übereinkommen Nr. 87 wurde von der Türkei im Jahre 1993 ratifiziert.

8 Dieses Gesetz (Gesetz Nr. 4688) wurde im Jahre 2001 verabschiedet.

9 EGMR, 2. Sektion, Urt. vom 21.11.2006, Nr. 34503/97.

10 Die türkische Regierung hat vor der Großen Kammer zwei Einsprüche gegen das Urteil der 2. Sektion des EGMR erhoben. In Bezug auf den ersten Einwand machte die Regierung geltend, dass der Gerichtshof durch eine Auslegung der Konvention keine neuen Verpflichtungen für Vertragsstaaten begründen könne, die in der Konvention nicht vorgesehen seien. Art. 5 (zum Koalitionsrecht) und Art. 6 (zum Kollektivrecht) der Europäischen Sozialcharta waren nicht von der Türkei ratifiziert worden. Im zweiten Einwand stützte sich die Regierung auf die in Artikel 11 letzter Satz des EKMR vorgesehene

sie hat in diesem Verfahren entschieden, dass die Vereinigungsfreiheit des Art. 11 EMRK das Recht, eine Gewerkschaft zu gründen und Mitglied einer Gewerkschaft zu werden, umfasse. In dieser Entscheidung erkannte die Große Kammer des EGMR erstmals ein Recht auf Kollektivverhandlungen[11].

B. Die vorübergehende Arbeitsniederlegung im öffentlichen Dienst

1. Das EGMR-Urteil *Karaçay*[12]

Der Beschwerdeführer *Karaçay*, ein Ingenieur im öffentlichen Dienst, wurde wegen der Teilnahme an einer Demonstration, zu der eine Gewerkschaft von Angehörigen des öffentlichen Dienstes aufgerufen hatte, schriftlich verwarnt. Hierin sah er einen Eingriff in sein Recht auf Vereinigungsfreiheit. Die Straßburger Richter gaben ihm Recht[13]. Gleichwohl dauerte es noch einige Zeit, bis auch andere Beschäftigte im türkischen öffentlichen Dienst an solchen Demonstrationen ohne Verwarnung teilnehmen konnten.

2. Das EGMR-Urteil *Dilek et. al.*[14]

Dilek und die anderen Beschwerdeführer waren Mitglieder einer Gewerkschaft von Angehörigen des öffentlichen Dienstes. Die Beschwerdeführer arbeiteten am Maut-Schalter auf der Bosphorus-Brücke in Istanbul. Als sie, um an einer von der Gewerkschaft angekündigten Aktion teilnehmen zu können, ihren Arbeitsplatz für mehrere Stunden verließen, konnten die Fahrzeuge also den Kontrollpunkt unentgeltlich passieren. Aus diesem Grund entgingen der öffentlichen Hand Maut-Einnahmen. Wegen dieser Einnahmeausfälle wurden sie von einem Zivilgericht zu Schadensersatzzahlungen verurteilt. Der Europäische Gerichtshof für Menschenrechte sah hierin eine Verletzung von Art. 11 EMRK und begründete dies damit, dass eine solche Maßnahme in einer demokratischen Gesellschaft nicht notwendig sei. Die 2. Sektion des EGMR ist durch diese Entscheidung erstmals so weit gegangen, implizit ein Streikrecht im Rahmen von Art. 11 EMRK anzuerkennen[15].

Beschränkung hinsichtlich der Anwendbarkeit dieser Bestimmung. Türkische Beamte, einschließlich städtischer Beamter, wurden durch das Gesetz über den öffentlichen Dienst (Gesetz Nr. 657) spezifischen und sehr detaillierten rechtlichen Vorschriften unterworfen, wodurch sie von anderen Mitarbeitern unterschieden wurden.

11 **Achim Seifert**, "Recht auf Kollektivverhandlungen und Streikrecht für Beamte- Anmerkungen zur neuen Rechtsprechung des EGMR zur Vereinigungsfreiheit", KritV, No. 4, 2009, S. 359.

12 EGMR, 2. Sektion, Urt. vom 27.03.2007 – Nr. 6615/03.

13 Für die Anmerkung, siehe **Klaus Lörcher**, "Entscheidungen mit Anmerkungen: Menschenrecht auf Streik im öffentlichen Dienst – Keine Disziplinierung bei Teilnahme", AuR, 7, 2011, S. 306 ff.

14 EGMR, 3. Sektion, Urt. vom 17.07.2007 – Nr. 74611/01, 26876/02 und 27628/02.

15 **Seifert**, S. 358.

3. Das EGMR-Urteil *Enerji Yapı Yol Sen*[16]

Die Gewerkschaft „*Enerji Yapı Yol Sen*" plante einen Aktionstag mit dem Ziel, dass auch Gewerkschaften von Angehörigen des öffentlichen Dienstes das Recht zugebilligt würde, Kollektivverhandlungen zu führen und Kollektivverträge abzuschließen. Fünf Tage vor der für den 13. April 1996 angekündigten Aktion veröffentlichte die Personalabteilung des Premierministers den Runderlass 1996/21, in dem es hieß, dass Arbeitsniederlegungen im öffentlichen Dienst grundsätzlich verboten seien. Der Mitglieder des Verwaltungsrates der Gewerkschaft, die trotz dieser Warnung an der Aktion teilnahmen, wurden mit Disziplinarstrafen belegt. Der Gerichtshof in Straßburg entschied zwar, dass das Streikrecht nicht absolut sei und seine Ausübung somit beschränkt werden könne. Ein Streikverbot, so der Gerichtshof weiter, könne im Falle solcher Angehörigen des öffentlichen Dienstes, die im Namen des Staates Hoheitsgewalt ausübten, grundsätzlich mit der Koalitionsfreiheit vereinbar sein. Das Streikrecht wurde aber für alle Angehörigen des öffentlichen Dienstes von dem Runderlass 1996/21 verboten. Im vorliegenden Fall sah der Gerichtshof auch die Besonderheit darin, dass der Streik aus Sicht der Gewerkschaft gerade dazu diente, sich Gehör zu verschaffen, um für das Recht, Kollektivverträge abzuschließen, zu kämpfen. Dabei betonte der Gerichtshof, dass die Gewerkschaftsmitglieder von ihrem Recht auf friedliche Versammlungsfreiheit Gebrauch gemacht hätten. Unter Abwägung der widerstreitenden Belange kam der Gerichtshof somit zu dem Ergebnis, dass der Runderlass und die auf seiner Grundlage getroffenen Maßnahmen keinem „dringenden sozialen Bedürfnis" entsprochen hätten. Die 3. Sektion des Gerichtshofs entschied mit ihrer Entscheidung zum ersten Mal ausdrücklich, dass das Streikrecht –auch für Beamte- von Art. 11 EMRK geschützt sei[17]. Somit unterstützte das *Enerji Yapı Yol-Sen* Urteil die Vereinigungsfreiheit im türkischen öffentlichen Dienst.

4. Das EGMR-Urteil *Kaya und Seyhan*[18]

Die Beschwerdeführer *Kaya* und *Seyhan* waren Lehrer und gehörten einer Ausbildungsgewerkschaft an. Sie nahmen an einem nationalen Aktionstag teil, um gegen den Gesetzentwurf über die Organisation des öffentlichen Dienstes zu protestieren, der seinerzeit im Parlament diskutiert wurde. Wegen dieser Teilnahme erhielten sie als Disziplinarmaßnahme eine Verwarnung. Sie machten geltend, dass diese Sanktionen gegen von der Türkei eingegangene internationale Verpflichtungen und gegen nationale Vorschriften zum Schutz der Koalitionsfreiheit verstießen. Der EGMR betonte, dass die Beschwerdeführer mit ihrer Teilnahme an der Demonstration von ihrer Versammlungsfreiheit Gebrauch gemacht hätten. Die angefochtenen Sanktionen, so gering sie auch gewesen sein mögen, seien

16 EGMR, 3. Sektion, vom 21.04.2009 – Nr. 68959/01.

17 **Seifert**, S. 359.

18 EGMR, 2. Sektion, Urt. vom 15.09.2009 – Nr. 30946/04.

geeignet, Gewerkschaftsmitglieder von der Teilnahme an rechtmäßigen Streiks oder sonstigen Aktionen zur Verteidigung ihrer Interessen abzuhalten[19]. Der Gerichtshof stellte fest, dass die Disziplinarmaßnahmen gegenüber den Beschwerdeführern keinem zwingenden sozialen Bedürfnis entsprochen haben und deshalb nicht in einer demokratischen Gesellschaft notwendig gewesen seien[20]. Dieses Urteil des Gerichtshofes diente – wie auch die oben genannten Urteile – dem Schutz der vorübergehenden Arbeitsniederlegung im öffentlichen Dienst, sicherlich unter den im Urteil erwähnten Voraussetzungen.

C. Die wirksame Ausübung der Vereinigung- und Versammlungsfreiheit von Angehörigen des öffentlichen Dienstes

1. Das EGMR-Urteil *Çerikçi* [21]

Der Beschwerdeführer *Çerikçi* verließ am 1. Mai 2007 seinen Arbeitsplatz, um den Tag der Arbeit zu feiern. Deswegen wurde er mit einer Disziplinarmaßnahme belegt. Seinerzeit, im Jahre 2007, war der 1. Mai in der Türkei – anders als heute – noch kein gesetzlicher Feiertag. Herr *Çerikçi* konnte gegen diese Verwarnung wegen derzeit geltenden Rechts nicht vor das Verwaltungsgericht ziehen, weil Art. 136[22] des Beamtengesetzes (Gesetz Nr. 657) ihm eine gerichtliche Klage versagte. Der Europäische Gerichtshof für Menschenrechte sah auch hierin eine Verletzung von Art. 11 EMRK[23].

2. Das EGMR-Urteil *Sişman et. al*[24]

Şişman und die übrigen Beschwerdeführer brachten an einem „Schwarzen Brett" in ihrer zum öffentlichen Dienst gehörenden Dienststelle ein Plakat über den 1. Mai und seine Bedeutung als Tag der Arbeit an. Dies war ihnen gestattet. Weil sie jedoch auch an sonstigen Wänden und an Türen solche Plakate aufhingen, wurde gegen sie eine Disziplinarmaßnahme (Bußgeld) verhängt. Hiergegen verteidigten sie sich mit dem Argument, dass es in der Dienststelle üblich sei, auch die Wände und Türen mit Plakaten zu bekleben, und dass in ihrem Fall die Disziplinarstrafe nur verhängt worden sei, weil das Plakat den Tag der Arbeit zum Gegenstand gehabt

19 Auch im Falle *Urcan / Türkei* (EGMR, 2. Sektion, Urt. vom 17. 7. 2008 – 23018/04) stellte der EGMR fest, die gegen Lehrer und Lehrerinnen angefochtene Sanktionen seien geeignet, Gewerkschaftsmitglieder zur Verteidigung Ihrer Interessen abzuhalten.

20 Für die Anmerkung, siehe **Lörcher**, "Anmerkungen mit Entscheidungen", S. 306 ff.

21 EGMR, die 2. Sektion, Urt. vom 13.07. 2010 – 33322/07.

22 Auch im Falle *Kaya und Seyhan* (EGMR, 2. Sektion, Urt. vom 15.09.2009 – Nr. 30946/04) wurde ihre Beschwerde auf Grundlage Art. 136 des Gesetzes über die Staatsbeamten Nr. 657 zurückgewiesen. Art. 136 des Gesetzes Nr. 657 wurde am 25.02.2011 außer Kraft gesetzt.

23 Für die Anmerkung, siehe **Lörcher**, "Anmerkungen mit Entscheidungen", S. 306 ff.

24 EGMR, 2. Sektion, Urt. vom 27.09.2011 – 1305/05.

habe. Nachdem sie sich beschwerten, wurde das Bußgeld zwar in eine Ermahnung umgewandelt. Gleichwohl gab der Gerichtshof den Beschwerdeführern Recht, weil er hierin einen Eingriff in das durch Art. 11 EMRK geschützte Recht sah.

III. Einflüsse der EGMR-Urteile auf das türkische Recht und die Rechtsentwicklung

Im türkischen Recht fanden in den letzten Jahren zahlreiche Gesetzesänderungen – darunter auch Verfassungsänderungen– statt. Die Einschränkungen der Koalitionsfreiheit konnten somit Schritt für Schritt abgeschafft werden. Lässt man die Periode zwischen den Jahren 1965-1971 außer Acht[25], sind die gesetzlichen Bestimmungen über die Gewerkschaften im öffentlichen Dienst als relativ jung zu bewerten[26]. Das Gesetz über Gewerkschaften im öffentlichen Dienst wurde im Jahre 2001 verabschiedet[27]. Bis zu diesem Zeitpunkt konnte die Vereinigungsfreiheit im öffentlichen Dienst durch die Runderlasse des Premierministeriums erfolgen. Besonders zu erwähnen ist die Verfassungsänderung im Jahre 1995, wobei die Vereinigungsfreiheit auch für die Beschäftigten im öffentlichen Dienst anerkannt wurde[28]. Durch die Änderung in Art. 53 sah die Verfassung vor, dass Näheres durch ein Gesetz geregelt wird. Im Jahre 1997 wurde Art. 22 des Beamtengesetzes (Gesetz Nr. 657) auch neugeregelt. Im Zuge dieser Änderung, durften die Staatsbeamten nach den Bestimmungen, die in der Verfassung oder im Gesetz geregelt wurden, Koalitionen gründen und ihnen beitreten.

Das betreffende Gesetz über Gewerkschaften im öffentlichen Dienst wurde im Jahre 2001 verabschiedet[29]. In der Begründung des Gesetzes wurde folgende internationale Rechtsinstrumente erwähnt: die Allgemeine Erklärung der Menschenrechte, Art. 11 der Konvention zum Schutze der Menschenrechte und Grundfreiheiten, der Präambel und dem ersten Teil des Europäischen Sozialcharta, Präambel der Verfassung der Internationalen Arbeitsorganisation, ILO-Übereinkommen über die Vereinigungsfreiheit und den Schutz des Vereinigungsrechtes (Übereinkommen Nr. 87), ILO-Übereinkommen über den Schutz des Vereinigungsrechts und über Verfahren zur Festsetzung der Beschäftigungsbedingungen im öffentlichen Dienst (Übereinkommen Nr. 151), ILO-Übereinkommen über die Anwendung der

25 Das im Jahre 1965 verabschiedete Gesetz Nr. 624 regelte zum ersten Mal das Koalitionsrecht der Beschäftigten im öffentlichen Dienst. In der Lehre wird das Gesetz Nr. 624 als ein restriktives Gesetz angesehen, das Gewerkschaftstätigkeiten unmöglich macht. siehe **Aziz Çelik**, "Mücadeleden Vesayete Türkiye'de Kamu Görevlileri Sendikacılığı", Eleştirel Pedagoji Dergisi, 2014, 34, S. 2. Kurz nach dem Memorandum vom 12. März 1971 wurde das Gesetz Nr. 624 aufgehoben, sodass die gegründeten Gewerkschaften ihre Rechtspersönlichkeit verloren. Ein Teil der gegründeten Gewerkschaften führte ihre Arbeit danach als Verein fort, siehe **Melda Sur**, İş Hukuku Toplu İlişkiler, 8. Aufl., Ankara, Turhan, 2019, S. 205.

26 **Sur**, S. 204.

27 Das Amtsblatt der Republik Türkei, Nr. 24460 vom 25.06.2001.

28 Zur Bewertung der Verfassungsänderung vom 1995, siehe **Mesut Gülmez**, " Anayasa Değişikliği ve Memur Sendikacılığı", Amme İdaresi Dergisi, 1995/4, S. 36 ff.

29 Amtsblatt Nr. 24460 vom 25.06.2001.

Grundsätze des Vereinigungsrechtes und des Rechtes zu Kollektivverhandlungen (Übereinkommen Nr. 98).

Kurz nach dem das Gesetz über Gewerkschaften im öffentlichen Dienst verabschiedet war, wurde der Ausdruck „Arbeitnehmer" des Art. 51 der türkischen Verfassung im Jahre 2001 durch „Beschäftigter" ersetzt, wobei mit „Beschäftigter" sowohl Arbeitnehmer im Sinne des Zivilrechts als auch Beschäftigte im öffentlichen Dienst gemeint sind[30]. Gemäß dem Gesetz Nr. 4688 konnten im öffentlichen Dienst die Tarifpartner tarifvertragsähnliche Abkommen, also *Quasi-Kollektivverträge*, schließen. Allerdings bedurften diese *Quasi-Kollektivverträge* in jedem Einzelfall der Zustimmung des Kabinetts. In der Lehre wurde hervorgehoben, dass dieses Abkommen auf keinem Fall als Kollektivvertrag bezeichnet werden konnte und es ganz fragwürdig ist, inwieweit dieses Abkommen Rechtsverbindlichkeit trägt[31].

Im Jahre 2010 gab es eine weitere Verfassungsreform[32], durch die das Erfordernis, dass solche *Quasi-Kollektivverträge* vom Kabinett gebilligt werden müssen, abgeschafft wurde. Seitdem können im öffentlichen Dienst ohne Zustimmung des Kabinetts Kollektivverträge geschlossen werden. Aus diesem Grund wurde nach der Verfassungsreform auch der Name des aus dem Jahr 2001 stammenden Gesetzes geändert[33]; es heißt nun „*Gesetz über Gewerkschaften und Kollektivverträge im öffentlichen Dienst"*. Somit kann man nun von einem Recht auf Kollektivvertrag sprechen[34].

Auch wenn aber die Gewerkschaftsbünde[35] im öffentlichen Dienst Tarifverträge abschließen können, dürfen ihre Mitglieder nicht streiken. Im Vergleich zu dem Streikrecht der Arbeitnehmer besteht hier ein wesentlicher Unterschied. Ein Streikverbot wurde sowohl im Art. 27 vom Staatsbeamtengesetz als auch im Art. 14 des Dekrets (Verordnung mit Gesetzeskraft) Nr. 399 vorgesehen. Hingegen wurde im türkischen Strafgesetzbuch hinsichtlich der beruflichen und sozialen Rechte der Amtsträger eine Besonderheit vorgesehen. Art. 260 Abs. 2 des türkischen Strafgesetzbuches lautet: „*Haben Amtsträger ihre Tätigkeit im Zusammenhang mit beruflichen und sozialen Rechten in einer Weise, die nicht geeignet ist, den Dienst zum Erliegen zu bringen, vorübergehend und für kurze Zeit niedergelegt oder*

30 Amtsblatt Nr. 24556 (Mükerrer) vom 17.10.2001. Die vorangegangene türkische Verfassung (1961) sah zwar die Koalitionsfreiheit für die Beschäftige im öffentlichen Dienst vor, wurde jedoch im Jahre 1971 geändert. Die danach in Kraft getretene türkische Verfassung (1982) erkannte auch die Koalitionsfreiheit nur für die Arbeitnehmer an. Dies änderte sich im Laufe der Zeit. Zur Entwicklungsgeschichte siehe **A. Can Tuncay / Burcu Savaş Kutsal**, Toplu İş Hukuku, 6. Aufl., İstanbul, Beta, 2017, S. 492 ff; **Sur**, S. 204 ff.

31 **Sur**, S. 209.

32 Amtsblatt Nr. 27580 vom 13.05.201.

33 Amtsblatt Nr. 28261 vom 11.04.2012.

34 **Sur**, S. 211.

35 Für die Beschäftigten im öffentlichen Dienst ist nicht die Gewerkschaft selbst, sondern der Gewerkschaftsbund – ein Zusammenschluss von fünf Gewerkschaften – tarifvertragsfähig.

verlangsamt, so kann die zu verhängende Strafe herabgesetzt oder auch vor Strafe abgesehen werden." [36].

Dennoch, ein Streikrecht ist dem Gesetz über Gewerkschaften und Kollektivverträge im öffentlichen Dienst ein fremder Begriff. Bis zum heutigen Tage ist den Beschäftigten im öffentlichen Dienst folglich ein Streik verboten. Wenn die Vertragspartner sich nicht einigen und keinen Kollektivvertrag abschließen können, muss ein Protokoll zum Schiedsausschuss weitergeleitet werden. Die Vereinbarungen nach Verhandlung mit dem Schiedsausschuss sind als Kollektivvertrag bindend.

Der EGMR hält ein Streikverbot für bestimmte Berufsgruppen zwar für zulässig. Allerdings ist ein absolutes Streikverbot für die Beschäftigten im öffentlichen Dienst, ohne zu differenzieren, ob die hiervon betroffenen Beschäftigten staatliche Hoheitsgewalt ausüben oder nicht, mit den aktuellen Entwicklungen über das Vereinigungsrecht im öffentlichen Dienst nicht in Einklang zu bringen. Gerade deshalb ist die jüngere Rechtsprechung der türkischen Gerichte zu beachten[37]. Auch wenn das Gesetz kein Streikrecht vorsieht, steht die neueste Auffassung des Obersten Verwaltungsgerichtes im Einklang mit der Rechtsprechung der EGMR. In mehreren jüngeren Entscheidungen der zwölften Rechtskammer des Oberstes Verwaltungsgerichts[38] und des Großen Senats des Obersten Verwaltungsgerichts[39] wurden ein-, beziehungsweise zweitägige Arbeitsniederlegungen der Lehrer und Lehrerinnen für zulässig erachtet, wenn sie im Rahmen einer von der Gewerkschaft organisierten und angekündigten Aktion erfolgten. In diesem Falle wurde also eine Disziplinarmaßnahme aufgrund der Abwesenheit der Beschäftigten aufgehoben. An dieser Stelle möchten wir auch darauf hinweisen, dass die im Jahre 2004 in Art. 90 der türkischen Verfassung vorgenommene Änderung[40] hier ebenfalls eine wesentliche Rolle spielt. Gemäß dem hinzufügten Satz zum Abs. 5 Art. 90 der türkischen Verfassung; „*Soweit Grundrechte und -freiheiten regelnde Vorschriften verfahrensmäßig in Kraft gesetzter völkerrechtlicher Verträge mit nationalen Bestimmungen mit gleichem Regelungsgehalt nicht übereinstimmen, finden die Bestimmungen der völkerrechtlichen Verträge vorrangig Anwendung.*" [41]. Dieser

36 Für die Übersetzung siehe **Silvia Tellenbach,** Das türkische Strafgesetzbuch/Türk Ceza Kanunu - Deutsche Übersetzung und Einführung, Duncker & Humblot, 2009, S. 167-168.

37 Für die Bewertung des Urteils zum Großen Senats des Obersten Verwaltungsgerichts (Urt. vom 22.05.2013, 1063/1998) siehe **Mesut Gülmez**, "Sendika Kararına Uyarak Toplu Eyleme Katılma, 'Disiplin Suçu' Değil 'Mazeret'tir - Danıştay İdari Dava Daireleri Kurulu Kararı Karar İncelemesi", Çalışma ve Toplum, 2014/2, S. 199-201. An dieser Stelle möchten wir darauf hinweisen, dass das Streiktätigkeiten auch für Beamte in Deutschland umstritten sind. Insbesondere im Hinblick auf Lehrerstreik siehe dazu, BVerfG, Urteil des Zweiten Senats vom 12.06.2018- 2 BvR 1738/12 (verfügbar unter, http://www.bverfg.de/e/rs20180612_2bvr173812.html, abgerufen am 13.09.2019).

38 Urt. vom 28.01.2016, 10829/345; Urt. vom 01.12.2015, 4412/6273; Urt. vom 04.12.2013, 972/9647 (verfügbar unter, www.kazanci.com, abgerufen am 24.03.2019).

39 Urt. vom 22.05.2013, 1063/1998; Urt. vom 20.03.2014, 4031/975 (verfügbar unter, www.kazanci.com, abgerufen am 24.03.2019).

40 Zur Bewertung der Verfassungsänderung vom 2004, siehe **Mesut Gülmez**, "Anayasa Değişikliği Sonrasında İnsan Hakları Sözleşmelerinin İç Hukuktaki Yeri Ve Değeri", Türkiye Barolar Birliği Dergisi, 2004, 54, S. 150 ff.

41 Für die Übersetzung siehe http://www.verfassungen.eu/tr/ (abgerufen am 13.09.2019).

Satz ist auch in Urteilen des Großen Senats der Obersten Verwaltungsgerichts enthalten[42].

Ebenso hat auch das Verfassungsgericht Entscheidungen in dieser Richtung getroffen. In einem behandelten Fall war der Beschwerdeführer war als Lehrer beschäftigt und zugleich Mitglied einer Gewerkschaft. Die Gewerkschaft forderte einen „Warnstreik" im ganzen Land, damit der im Parlament diskutierte Gesetzesentwurf über Grundschule und Erziehung zurückgezogen wird. Der Beschwerdeführer folgte diesem Aufruf und nahm an diesem Aktionstag teil. Das Verfassungsgericht betonte, dass die angefochtenen Sanktionen, so gering sie auch gewesen sein mögen, geeignet seien, Gewerkschaftsmitglieder von der Teilnahme an rechtmäßigen Streiks oder sonstigen Aktionen zur Verteidigung ihrer Interessen abzuhalten. Das Verfassungsgericht sah also hierin eine Verletzung der Koalitionsfreiheit[43]. In einer anderen Entscheidung hingegen, wo der Beschwerdeführer wieder als ein Lehrer tätig war, ist das Verfassungsgericht zu einem anderen Schluss gekommen. Das Verfassungsgericht hat diese Abweichung so begründet, dass die Aktion nicht direkt einschlägig mit dem sozialen und ökonomischen Interesse der Gewerkschaftsmitglieder ist, sondern in diesem Fall eine politische Tendenz überwiegt. Das Verfassungsgericht hielt die im unteren Grenzwert angesiedelte Kürzung des Entgelts als disziplinarische Maßnahme nicht für unverhältnismäßig[44].

In einem anderen Fall vor dem Verfassungsgericht war, der Beschwerdeführer kein Lehrer, sondern ein Rangierer (Zugoffizier) im öffentlichen Dienst. Nach dem Verfassungsgericht ist der Transport ein unverzichtbarer Bestandteil des Gemeinschaftslebens. Die Arbeitsniederlegung verursachte die Benachteiligung von Passagieren und die Absage des Güterzugverkehrs. Aus diesem Grund ist das Verfassungsgericht im Falle der eintägigen Arbeitsniederlegung des Rangierers zu einem anderen Ergebnis gekommen. Das Verfassungsgericht stellte fest, dass eine Verwarnung als Disziplinarmaßnahme dem zwingenden sozialen Bedürfnis entspricht und in einer demokratischen Gesellschaft notwendig ist. Daher wurde das Recht auf Koalitionsfreiheit des Beschwerdeführers nicht verletzt[45]. Man muss aber darauf hinweisen, dass mit dem Verweis auf das EGMR Urteil *Karaçay*[46] in der Entscheidung auch eine Gegenstimme festgehalten wurde.

42 Urt. vom 22.05.2013, 1063/1998; Urt. vom 20.03.2014, 4031/975. (verfügbar unter, www.kazanci.com, abgerufen am 24.03.2019). Für ausführliche Bewertungen siehe **Tolga Şirin,** Karşılaştırmalı Anayasa Hukukunda Kanun Kavramı, 2. Aufl. İstanbul, On İki Levha, 2019, S. 236 ff.

43 Urt. vom 18.09.2014, Beschwerde Nr. 2013/8463 (Amtsblatt Nr. 29195 vom 04.12.2014); Urt. vom 10.06.2015, Beschwerde Nr. 2014/7668 (Amtsblatt Nr. 29479 vom 18.09.2015).

44 Urt. vom 22.05.2019, Beschwerde Nr. 2017/29263 (Amtsblatt Nr. 30827 vom 10.07.2019).

45 Urt. vom 25.03.2015, Beschwerde Nr. 2013/7199 (Amtsblatt Nr. 29402 vom 30.06.2015).

46 EGMR, 2. Sektion, Urt. vom 27.03.2007 – Nr. 6615/03.

IV. Fazit

In der jüngeren Vergangenheit fanden im türkischen Recht wesentliche Änderungen hinsichtlich der Koalitionsfreiheit der Beschäftigten im öffentlichen Dienst statt. Sie wurden durch individuelle Bestrebungen von Bürgern und Gewerkschaften im öffentlichen Dienst veranlasst. Auch wenn die jüngere Rechtsprechung der türkischen Gerichte den aktuellen Entwicklungen im Vereinigungsrecht im öffentlichen Dienst weitgehend folgt, kann es jedoch immer noch nicht behauptet werden, dass diese jüngsten Rechtsentwicklungen in völliger Übereinstimmung mit den in den Entscheidungen des EGMR festgelegten Grundsätzen stehen. Entsprechend der Berichten der ILO-Kontrollorgane, die auch vom EGMR berücksichtigt werden, ist ein absolutes Streikverbot mit der Koalitionsfreiheit nicht vereinbar. Vor allem *das Gesetz über Gewerkschaften und Kollektivverträge im öffentlichen Dienst* und auch die einschlägigen Gesetzgebungen sind nach wie vor noch zu überarbeiten. Folglich besteht weiterhin ein Reformbedürfnis, wie es in der Lehre schon seit langem hervorgehoben wurde[47].

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47 **Şebnem Gökçeoğlu Balcı,** "Avrupa İnsan Hakları Mahkemesinin "Satılmış Ve Diğerleri/Türkiye" Kararı", Çalışma ve Toplum, 2008/2, S. 232; **Adnan Mahiroğulları,** "1965'ten 12 Eylül 2010 Halk Oylamasına Yasakoyucunun Memur Sendikacılığına Bakış Açısı ve ILO Normları", Sosyal Siyaset Konferanslar Dergisi, 2011/1, S. 84-86; **Metin Kutal,** "Kamu Görevlilerinin Örgütlenme Ve Toplu Pazarlık Hakları (Uluslararası Normlar, Yorumlar ve Türk Mevzuatında Durum)", Sosyal Haklar Uluslararası Sempozyumu V, İstanbul, Petrol-İş, Yayını 118, 2013, S. 178; **Aydın Başbuğ,** "Kamu Çalışanları Toplu Sözleşme Hakkı ve Toplu Sözleşme Görüşmelerine İlişkin Değerlendirme", Sicil, Nr. 29, 2013, S. 158.

Abkürzungsverzeichnis/List of abbreviations

Abs.	: Absatz
AİHM	: Avrupa İnsan Hakları Mahkemesi
Aufl.	: Auflage
AuR	: Arbeit und Recht
BVerfG	: Bundesverfassungsgericht
ECHR	: European Court of Human Rights
EGMR	: Der Europäische Gerichtshof für Menschenrechte
EMRK	: Die Europäische Menschenrechtskonvention
et. al.	: et alibi
ff.	: folgende
ILO	: International Labour Organization
KritV	: Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft
Nr.	: Nummer
Urt.	: Urteil
S.	: Seite

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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

Executive Decree Authority in Turkey Before the Constitutional Amendments of 2017: In Light of the Turkish Constitutional Court's Retreat*

2017 Anayasa Değişiklikleri Öncesinde Türkiye'de Yürütmenin Kararname Yetkisi: Anayasa Mahkemesi Kararları Işığında

Volkan Aslan[1]

Abstract
Since the incorporation of decree powers into the Turkish constitutional system in 1971, the Constitutional Court (the Court) had adopted a disposition which has tended to construe decree powers in a narrow margin. In this context, the Court looked for additional conditions besides the conditions set in the constitution for the empowerment of executive with decree powers: the tripartite test which required that the empowerment should be urgent, necessary and important. The Court acted in a similar way for emergency decrees by examining them - although the supervision of emergency decrees is prohibited in the constitution. Thanks to this attitude, decree powers both in ordinary times and emergencies were restricted and used with aims solely seen necessary to abolish the reasons which caused the usage of decrees. However, the Court changed its case law regarding decree powers and opened the way for the possibility of executive influence on law making. For ordinary decrees, it abandoned the practice of looking for "extra" conditions not present in the constitution's text in 2011. With its judgment in late 2016, the Court gave up controlling emergency decrees as well. This retreat by the Court has greatly influenced the recent inflation of executive dominance in Turkey.

Keywords
Turkish Constitutional Court, Executive decree authority, Judicial review, Emergency decrees, Nondelegation doctrine

Öz
Kanun hükmünde kararname çıkarma yetkisinin 1971 yılında anayasal dayanağa kavuşmasından bu yana Anayasa Mahkemesi (Mahkeme) kararname yetkisini oldukça dar yorumlama eğilimine sahip olmuştur. Bu çerçevede Mahkeme, kararname çıkarılması amacıyla yetki yasası çıkarılabilmesi için anayasada öngörülmeyen şartların varlığını aramış ve yetkilendirmenin acil, gerekli ve önemli olması gerektiğine hükmetmiştir. Mahkeme olağanüstü hâl kararnameleri ile ilgili olarak da benzer bir tutum takınmış; anayasada yasak olmasına rağmen bu kararnamelerin denetimini gerçekleştirmiştir. Böylelikle hem olağan hem de olağanüstü dönemlerde kararname yetkisinin bu yetkinin kullanılmasına neden olan sebeplerle ilgili olarak kullanılması sağlanmaya çalışılmıştır. Ancak Mahkeme 2011 ve 2016 yıllarında verdiği kararlarla söz konusu içtihatlarından dönmüştür. 2011 yılında verilen kararla, yetkilendirme için olması gerektiği varsayılan acillik, gereklilik ve önemli olma gibi koşulların artık aranmayacağına hükmedilmiş; 2016 yılında verilen kararla da olağanüstü

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hâl kararnamelerinin denetiminin yapılamayacağı kararlaştırılmıştır. Mahkeme'nin söz konusu içtihat değişikliklerinin son zamanlarda görülen, yönetimde yürütme organının ön plana çıkması olgusunun temel sebeplerinden birisi olduğu düşünülmektedir.

Anahtar Kelimeler
Türk Anayasa Mahkemesi, Yürütmenin kararname yetkisi, Yargısal denetim, Olağanüstü hâl kararnameleri, Yasama yetkisinin devredilmezliği ilkesi

Executive Decree Authority in Turkey Before the Constitutional Amendments of 2017: In Light of the Turkish Constitutional Court's Retreat

I. Executive Decree Authority in Ordinary Times

Ordinary decree power was introduced into Turkish law with constitutional amendments to the 1961 Constitution in 1971.[1] With these amendments, the Council of Ministers was empowered to promulgate decrees having the force of law only in ordinary times after being authorized by the Turkish Grand National Assembly.[2] However, the 1982 Constitution, which was accepted after the military coup in 1980, authorized the executive to issue ordinary decrees after enabling acts of the parliament and directly granted power to the executive to issue decree-laws in emergencies as well. Within this context, executive decree authority was used on a large scale in the 1980s and 1990s. In addition to issuing emergency decrees for territories which were under emergencies, governments used ordinary decrees to regulate vast areas including the economy, employment, the structures of ministries and public entities.

As noted above, the parliament had the power to enable the Council of Ministers to issue decrees having the same force as statutes before the latest amendments. However, the Council of Ministers was not able to regulate all spheres with ordinary decrees as the parliament could do with statutes. Especially in the field of basic

1 Such amendments were made during a period which was dominated by military. See, Ergun Özbudun, The Constitutional System of Turkey: 1876 to the Present, United States, 2011, pp. 9-15.

2 According to the article 64 of the (former) 1961 Constitution, "*The Turkish Grand National Assembly may authorize the Council of Ministers, by virtue of a law and for definite objects, to promulgate decrees having the force of law. The law concerning such authorization should clearly indicate the aim of the decrees to be promulgated, their extent and their principles, as well as the duration of the exercise of this right, and the provisions of law to be abrogated. The decree having the force of law should also indicate the law by virtue of which it is promulgated. These decrees shall go into force as of the day of their publication in the Official Gazette. However, a later date can be indicated in the decree as the date of its entry into force. Such decrees shall be submitted to Grand National Assembly on the day of their publication in the Official Gazette. The authorization laws and the decrees submitted to the Grand National Assembly are debated and decided upon in conformity with the rules established for the discussion of laws by the Constitution and by the internal regulations of the Legislative assemblies; however, they receive priority and urgency in the committees and plenary sessions of the Assemblies over other draft resolutions and bills of law. Decrees not submitted to the Turkish Constitutional Assembly on the day of their publication become ineffective as of that date; and those rejected by the Turkish Grand National Assembly shall cease to be effective as of the date of publication of such rejection in the Official Gazette. Modified provisions of decrees adopted under modification shall go into force as of the date of publication of these modifications in the Official Gazette. Basic rights and freedoms cited in the first and second chapters of Part II of the Constitution, and the political rights and obligations mentioned in chapter IV of the same Part cannot be regulated by decrees having the force of law. The Constitutional Court will also control the constitutionality of such decrees*." See The 1961 Turkish Constitution as Amended, Office of the Prime Minister, Directorate General of Press and Information, Ankara 1978, available at http://www.anayasa.gen.tr/1961constitution-amended.pdf, (last accessed on January 12 2018).

rights, ordinary decree power was largely limited on the subject matter. According to the former article 91 of the constitution, basic principles regarding fundamental rights (art. 12-16), individual rights and duties (art. 17-40), political rights and duties (art. 66-74) could not be regulated with ordinary decrees.[3] In this respect, the Constitutional Court had annulled ordinary decrees which contain regulations regarding such principles and rights.[4] On the other hand, it was possible to regulate social and economic rights and duties (art. 41-65) with ordinary decrees. However, it was not possible to restrict social and economic rights with ordinary decrees as well. Indeed, article 13[5] of the constitution states that basic rights and freedoms could be restricted only by statutes in ordinary times subject to the reasons specified for each right or freedom in the relevant article. Thus, ordinary decrees could regulate social and economic rights but such regulations could only foresee improvements, not restrictions of such rights.[6]

Former article 91 of the 1982 Constitution stated that enabling acts shall define purpose, scope, principles and expiration date of the decrees to be issued. It was also mandatory to regulate, whether it was possible to issue more than one decree in the designated time or not. When an ordinary decree was issued, it had to be submitted to the parliament on the day of its publication in the Official Gazette. Otherwise it used to lose its effect on the same day. Also, the decrees which were rejected by the parliament used to lose their effects on the day of publication of the rejections in the Official Gazette. Apart from these, there was no condition estimated in the constitution for the issuance of ordinary decrees. However, the Court had adopted a position which tended to construe decree powers in a narrower margin. In this regard, it looked for additional conditions besides the conditions set in the constitution for the authorization of executive with decree powers: The tripartite test which required that the authorization should be urgent, necessary and important. In its first judgment[7] in which it ruled that such requirements should be met, the Court held that, "*The use of decree-laws in situations which are not urgent and necessary, extensification and continuation of this practice means the transfer of legislative authority and forms*

3 Apart from these, article 163 of the constitution had prohibited the empowerment of the Council of Ministers to amend the budget by decree-laws.

4 See for instance, Turkish Constitutional Court, Date: 14/12/2016, E: 2016/148, K: 2016/189 (annulment because of containing a regulation regarding individual rights and duties); Turkish Constitutional Court, Date: 04/04/1991, E: 1990/12, K: 1991/7 (annulment because of containing a regulation regarding political rights and duties).

5 According to the article 13 of the constitution, "*Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality.*" This article wasn't changed in the latest amendments. Unless otherwise indicated, English version of the articles in Turkish Constitution are cited from the official page of the Grand National Assembly of Turkey. See https://global.tbmm.gov.tr/docs/constitution_en.pdf (last accessed on January 12 2019).

6 Nevertheless, these restrictions regarding the subject do not exist for emergency decrees as can be seen below.

7 See Kemal Gözler, Kanun Hükmünde Kararnamelerin Hukuki Rejimi, Bursa, 2000, p. 83. In one of its older judgments (Turkish Constitutional Court, Date: 16/05/1989, E: 1989/4, K: 1989/23) the Court had already mentioned about this trio but not as requirements, rather expectations to be met. See Gözler, Kanun Hükmünde Kararnamelerin Hukuki Rejimi, p. 82.

unconstitutionality."[8] In the following years, the Court maintained and matured this tripartite test jurisprudence and used the same justification as a template to annul enabling acts: "*In the 8th paragraph of the 91st article of the Constitution it is stated that enabling acts and decree-laws shall be negotiated in the committees and in the plenary session of the Grand National Assembly of Turkey with priority and urgency. Since the constitution even required the negotiation of decree-laws with priority and urgency, the decree power should be used in urgent situations like not being able to enact a statute because of scarcity of time.*"[9] According to the Court, as the enabling acts are contrary to the constitution and annulled, the decrees which are issued on the basis of such enabling acts were also contrary to the constitution and must be annulled: "*The situation of decrees which do not base on enabling acts, decrees which stand out of the scope of enabling acts or decrees whose enabling acts are annulled are the same. As the decrees are deprived of constitutional basis in such circumstances, they should be repealed even their contents are not contrary to the constitution.*"[10] Thanks to the Court's tripartite test, the parliament refrained from enacting too many enabling acts and accordingly, the executive didn't issue lots of decrees. While the parliament had enacted 13 enabling acts between November 9th of 1982[11] and February 1st of 1990,[12] it enacted 19 enabling acts between 1990 and 2011.[13] Similarly, 343 decrees were issued between November 9th of 1982 and February 1st of 1990, while 263 decrees were issued after the date the Court judged on the extra necessities for the first time until November 2011.[14] The interesting point is that, 240 of 263 decrees were issued before 2002, while 23 of them were issued after June 2011. As it is seen, there was a radical decrease in the numbers of enabling acts and decrees after the Court's restricting judgments. Of course, the issuance of enabling acts and decrees was influenced by many other factors, but in my opinion the Court's restricting judgments contributed to this development as well.

However, the Court changed its jurisprudence on the tripartite test regarding ordinary decrees in 2011 and abandoned the practice to look for "extra" conditions

8 Turkish Constitutional Court, Date: 01/02/1990, E: 1988/64, K: 1990/2.

9 Turkish Constitutional Court, Date: 16/09/1993, E: 1993/26, K: 1993/28; Turkish Constitutional Court, Date: 05/10/2000, E: 2000/45, K: 2000/27; Turkish Constitutional Court, Date: 20/03/2001, E: 2001/9, K: 2001/56.

10 Turkish Constitutional Court, Date: 17/05/2007, E: 2004/46, K: 2007/60; Turkish Constitutional Court, Date: 20/10/2006, E: 2006/138, K: 2006/100; Turkish Constitutional Court, Date: 27/06/2006, E: 2006/97, K: 2006/74; Turkish Constitutional Court, Date: 27/01/2004, E: 2004/6, K: 2004/5; Turkish Constitutional Court, Date: 19/09/2000, E: 2000/27, K: 2000/24; Turkish Constitutional Court, Date: 06/09/1995, E: 1995/47, K: 1995/40.

11 1982 Constitution came into force on November 9th of 1982.

12 The date when the Court judged for the first time that the requirements of urgency, necessity and importance should be met in order to enact an empowering act.

13 See Ender Türk, 1982 Anayasası'na Göre Kanun Hükmünde Kararnameler ve Yargısal Denetimi, Ankara, 2013, pp. 225-227.

14 See Türk, 1982 Anayasası'na Göre Kanun Hükmünde Kararnameler ve Yargısal Denetimi, pp. 163-224. From 1971 to military coup in 1980, 4 enabling acts and 34 decrees were issued. From military coup to November 9th of 1982, 2 enabling acts and 14 decrees were issued. See Türk, 1982 Anayasası'na Göre Kanun Hükmünde Kararnameler ve Yargısal Denetimi, pp. 163-227.

not present in the constitution's text. According to the Court, "*The matter in dispute is an enabling act which aims the issuance of ordinary decree-laws. There is not any provision in the constitution which requires urgent, necessary and important situation for the issuance of such decrees. In this respect, it is not possible to create new conditions which are not foreseen in the constitution for the supervision of decree-laws and enabling acts. Moreover, deciding what is important, urgent and necessary is not compatible with the operation of a judicial body which makes a review of constitutionality. There is no doubt that, such concepts are subjective and relative in nature. For this reason, the examination of the situation whether it is urgent, important and necessary to issue enabling acts and decree-laws could be equal to a supervision which exceeds the limits set by the constitution. Yet, the supervision of enabling acts should stay within such limits. Thus, it not necessary to examine whether the subject of the enabling law is urgent, important and necessary.*"[15]

Putting aside emergency decrees which were issued after the coup attempt in July 2016, only 17 decrees were issued after the Court had changed its case law in October 2011. What is more striking is, only one enabling act was issued thereafter. Thus, the Court's reversal didn't cause the executive dominance by ordinary decrees in rule making contrary to expectations. However, we can explain this "unexpected" result with respect to government structure. Between 2002 and 2018, the Justice and Development party had been a single ruling party in Turkey[16] and it had the majority of seats in the parliament. Besides the other factors which effect the use of decrees, it had not been so difficult for the government to enact statutes in the parliament quickly which lowered the need to resort to decrees. This claim could also be supported by the data regarding total enabling acts and decrees issued after 2002. After 2002, only 2 enabling acts and 40 ordinary decrees were issued until 9th of July, 2018. Another interesting point is that, 35 of such decrees were issued between 4th of June and 2nd of November 2011 and most of them were concerned with the formation and duties of ministries.[17] The remaining 5 decrees were issued in July 2018, just before the inauguration of President Recep Tayyip Erdoğan on 9th of July, 2018.

After all we can conclude that, other factors such as government structure and needs to adopt rapid reforms were as important as the effects of the Constitutional Court's judgments on the use of ordinary decree power. When the governments had no majorities in the parliament as in the period between 1991 and 2002, the restricting case law of the Court had significant influence on the issuance and adoption of enabling acts and decrees. On the contrary, when the governments did have sufficient

15 Turkish Constitutional Court, Date: 27/10/2011, E: 2011/60, K: 2011/147.

16 The only exception to this domination was the period between general election of June 7th 2015 and general election of November 1st 2015. As none of the parties held majority in the parliament and coalition talks didn't succeed after the June elections, the general election was made again in November. Justice and Development Party gained majority in the parliament after this election and formed the government alone.

17 I would like to state that general election was made on June 12th 2011.

majorities in the parliament, the need to resort to decrees went down as we witnessed after 2002. This assertion is further supported by the number of decrees issued before and after 2011- the year in which the Court reversed its case law.

As it is seen, the Court's influence on the executive decree authority in ordinary times was limited and mostly effected coalition governments, especially between 1991 and 2002. Apart from this period, it is not possible to tell the same. Conversely, the alteration of the case law of the Court regarding emergency decrees had highly important impacts on Turkish constitutional order.

II. Executive Decree Authority in Emergencies

Before the last constitutional amendments, the Council of Ministers, meeting under the chairmanship of the president, could issue decree-laws on matters necessitated by a state of emergency which could be declared because of natural disasters, economic crises, widespread acts of violence or severe deterioration of public order[18] pursuant to the former article 121 of the Turkish Constitution.[19] In this case, decree-laws had to be published in the Official Gazette and submitted to the parliament for the approval on the day of issuance. Moreover, emergency decrees were not subject to the limitations envisaged for ordinary decrees. In this respect, it was possible to regulate basic principles regarding fundamental rights, individual rights and duties, political rights and duties and restrict them as well.[20] However, the constitution had determined a core area in article 15[21] which could not be restricted even during the emergencies.

According to the former article 148 of the Turkish Constitution, decrees issued during a state of emergency, martial law or in time of war could not be brought before

18 As Göztepe stated, although natural disasters and economic crises are also envisaged as the reasons of state of emergency, governments did not choose to declare a state of emergency because of natural disasters or economic crises. For example, after the devastating earthquake in 1999 or the economic crises in 1994 and 2001 a state of emergency was not declared. Therefore, it could be said that governments generally use the emergency tool to battle widespread acts of violence or deterioration of public order. See Ece Göztepe, "Ein Paradigmenwechsel für den Sicherheitsstaat: Die Praxis des Ausnahmezustandes im Südosten der Türkei", Ausnahmezustand: Theoriegeschichte - Anwendungen - Perspektiven, Edited by Matthias Lemke, Wiesbaden 2017, p. 110.

19 Former article 122 of the constitution had regulated emergency decrees to be issued during martial law in a similar manner. Martial law had been arranged as a heavier emergency regime when compared to a state of emergency in Turkish law. In this regard, the transfer of powers from civil authorities to military authorities had differentiated martial law from a state of emergency. Martial law had not been declared in Turkey for more than thirty years. As can be seen below, regulations regarding martial law were completely abolished after the latest constitutional amendments.

20 Also see Christian Rumpf, "Der Not- und Ausnahmezustand im türkischen Verfassungsrecht", Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, Volume: 48, 1988, pp. 683-716.

21 According to the former article 15 of the constitution, "*In times of war, mobilization, martial law, or a state of emergency, the exercise of fundamental rights and freedoms may be partially or entirely suspended, or measures derogating the guarantees embodied in the Constitution may be taken to the extent required by the exigencies of the situation, as long as obligations under international law are not violated. Even under the circumstances indicated in the first paragraph, the individual's right to life, the integrity of his/her corporeal and spiritual existence shall be inviolable except where death occurs through acts in conformity with law of war; no one shall be compelled to reveal his/her religion, conscience, thought or opinion, nor be accused on account of them; offences and penalties shall not be made retroactive; nor shall anyone be held guilty until so proven by a court ruling.*" With the latest amendments, the phrase "*martial law, or*" was removed from this article.

the Constitutional Court for supervision. In connection with this, when parliament approved or amended an emergency decree with a statute then it was possible to apply to the Court for the supervision of such a statute which had the same or revised provisions of an emergency decree.[22] Thus, it was prohibited to supervise emergency decrees before they were handled by the parliament. However, the Court had broken this ban thanks to its wise reasoning beginning from the early 1990s:

"*... Inasmuch as the Constitutional Court cannot be contingent upon the description of a norm which is brought before itself with the plea of constitutionality, it has to describe such norms derived from legislative or executive organ on its own. As a consequence, the Court has to supervise norms which are made under the name of "emergency decrees" whether they constitute valid emergency norms in a way the constitution stipulates or not. If the norms which are named as emergency decrees do not fulfil such constitutional requirements, they have to be reviewed by the Court, since they do not constitute real "emergency decrees". In this regard, article 148 of the Constitution prevents only the supervision of real emergency norms.*"[23] In pursuant of this approach, the Court had determined conditions for emergency decrees which should be fulfilled for the prohibition of supervision: "*In order to meet the constitutional requirements of emergency decrees, a decree should include regulations which should have the possibility to be implemented during the emergency and in the places where state of emergency is declared. Moreover, such regulations must be necessitated by the state of emergency. As emergency decrees are implemented in the places where state of emergency is declared and as they are implemented only during the emergencies, they cannot change statutes. Otherwise such regulations would exceed the limits prescribed for the scope of emergency and they cannot be accepted as emergency decrees.*"[24]

According to the Court, when the aforementioned requirements were not met, the regulations could not be accepted as emergency decrees and they had to be accepted as ordinary ones. Since ordinary decrees required authorization as noted above, the so-called emergency decrees in question lacked this requirement and they were contrary to the constitution. The Court's logic is simple: if an emergency decree, which must be temporary in nature, changes a non-temporal norm like a statute it means that such an emergency measure is not prescribed for a limited time. Thus, it cannot be accepted as an emergency decree.[25] Similarly, if an emergency decree

22 See Merih Öden/Selin Esen, "Fundamental Rights and Freedoms in Turkey and the Turkish Constitutional Court", The Convergence of the Fundamental Rights Protection in Europe, Edited by Rainer Arnold, Dordrecht, 2016, p. 156.

23 Turkish Constitutional Court, Date: 10/01/1991, E: 1990/25, K: 1991/1; Turkish Constitutional Court, Date: 03/07/1991, E: 1991/6, K: 1991/20.

24 Turkish Constitutional Court, Date: 03/07/1991, E: 1991/6, K: 1991/20. In conjunction with this, the Court ruled that emergency decrees cannot make changes on statutes regarding emergencies as well.

25 Turkish Constitutional Court, Date: 10/01/1991, E: 1990/25, K: 1991/1; Turkish Constitutional Court, Date: 03/07/1991, E: 1991/6, K: 1991/20.

has a regulation on territories in which a state of emergency has not been declared or exceeds the limits foreseen in the constitution for emergency decrees, such a regulation cannot be accepted as a measure necessitated by emergency.[26] Thanks to this reasoning, the Court had annulled emergency regulations which prescribed changes on ordinary statutes or regulations which were not related to the necessities created by emergencies. In addition to contributing to the protection of basic rights even in emergencies, the Court also "did not allow an emergency regime to either become an 'extra-legal regime', or to change its extraordinary character and turn into an 'ordinary regime'." As Esen stated.[27]

Nevertheless, the Court reversed its case law regarding the supervision of emergency decrees issued after the coup attempt in July 2016. What is more striking is, the Court's opinion about its former judgments: "*While judging a case on hand, the Court evaluates its former judgments and pays attention to the balance between maintaining its case law and the need for the development or change of its case law. In this regard, when the Court changes its case law it should explain the reasons behind that change and ground its new argument… Taking into account of the wording of article 148 of the Constitution, the purpose of the constituent power and related legislative documents, it is understood that, emergency decrees cannot be subject to judicial review. A judicial review which is contrary to such provision conflicts with the articles 6 and 11 of the Constitution and these articles express superior and binding nature of the Constitution and prohibit the use of power which doesn't originate from the Constitution… For these reasons, requests for the annulment of the rules on hand must be rejected due to lack of jurisdiction*."[28] Obviously, this was an acknowledgement of the Court regarding its former "contrarian judgments". As it is well known, the rule of law requires the judicial review of all acts of the state, especially during emergencies.[29] Such a requirement is also recognized by the Court: "*… Since basic rights and freedoms are more restricted in emergencies, it*

26 Turkish Constitutional Court, Date: 03/07/1991, E: 1991/6, K: 1991/20; Turkish Constitutional Court, Date: 22/05/2003, E: 2003/28, K: 2003/42. Also see Christian Rumpf, Das türkische Verfassungssystem: Einführung mit vollständigem Verfassungstext, Wiesbaden, 1996, pp. 257-258; Necmi Yüzbaşıoğlu, 1982 Anayasası ve Anayasa Mahkemesi Kararlarına Göre Türkiye'de Kanun Hükmünde Kararnameler Rejimi, İstanbul, 1996, pp. 190-200.

27 Selin Esen, "Judicial Control of Decree-Laws in Emergency Regimes - A Self-Destruction Attempt by the Turkish Constitutional Court?", December 19, 2016, Blog of the IACL, AIDC available at https://iacl-aidc-blog.org/2016/12/19/judicial-control-of-the-decree-laws-in-emergency-regimes-a-self-destruction-attempt-by the - turkish-constitutional-court/ (last accessed on 11 January 2018). Also see Öden/Esen, "Fundamental Rights and Freedoms in Turkey and the Turkish Constitutional Court", pp. 156-158; European Commission for Democracy Through Law (Venice Commission), Emergency Powers, Strasbourg, 1995, p. 29. According to Örücü and Özbudun, these judgments also show the Court's distrust of the mechanisms of majoritarian democracy. See Esin Örücü, "The Constitutional Court of Turkey: The Anayasa Mahkemesi as the Protector of the System", Journal of Comparative Law, Volume: 3, 2008, p. 257; Ergun Özbudun, "Political Origins of the Turkish Constitutional Court and the Problem of Democratic Legitimacy", European Public Law, Volume: 12, 2006, pp. 218-219.

28 Turkish Constitutional Court, Date: 12/10/2016, E: 2016/166, K: 2016/159; Turkish Constitutional Court, Date: 12/10/2016, E: 2016/167, K: 2016/160; Turkish Constitutional Court, Date: 02/11/2016, E: 2016/171, K: 2016/164; Turkish Constitutional Court, Date: 02/11/2016, E: 2016/172, K: 2016/165.

29 As emergency regime is not unfamiliar with Turkey's history and lots of grave violations of human rights occurred during the emergencies the importance of judicial review is obvious. See Esen, Judicial Control of Decree-Laws in Emergency Regimes - A Self-Destruction Attempt by the Turkish Constitutional Court?".

might be said that emergency decrees should be subject to judicial supervision in compliance with the rule of law. However, such opinion does not affect the existence and implementation of constitutional norms which prescribe exemption to judicial supervision."[30] In my opinion, such a reversal cannot be justified on the grounds of wording of the constitution.

The text of the 1982 Constitution was finalized by military junta and adopted under extreme undemocratic conditions which shaped the content of the constitution as well.[31] Thanks to successive constitutional amendments, many undemocratic articles in the constitution have been changed or repealed.[32] Even the article which guarantees immunity to coup plotters and sets prohibition on the supervision of the acts issued during military administration was repealed. After this repeal, coup plotters were put on trial more than 30 years after the coup and "untouchable" acts became subject to judicial review. Although the article which prevented supervision of emergency decrees had not been changed, wise reasoning of the Court closed the gap and made the supervision of the emergency decrees possible in order to obstruct the abuse of such decrees. Nonetheless, the Court has upset the apple-cart with its recent reversal and destroyed the gains regarding the protection of basic rights - even in emergencies.

The conditions might differ from the ones in the 1990s or 2000s and another approach towards the conditions and necessities of emergency situations might be inevitable. However, it was also possible to make such an evaluation after making substantial examinations of the emergency decrees: rather than rejecting the supervision of emergency decrees on the basis of wording of the constitution, evaluating the content of the decrees and deciding whether the taken measures are necessitated by the state of emergency or not… If the Court had adopted this approach towards emergency decrees, the evaluation of the content might have been different. A measure which was not seen as a necessity for an emergency 20 years ago would have been found essential under the new conditions. However, the Court didn't choose this way and contented itself with abandoning its well-grounded case law.[33]

30 Turkish Constitutional Court, Date: 12/10/2016, E: 2016/166, K: 2016/159.

31 See Ergun Özbudun/Ömer, F. Gençkaya, Democratization and the Politics of Constitution-Making in Turkey, Budapest, 2009, pp. 19-26; Sibel İnceoğlu, "Constitutional Conflict and the Idea of New Constitution in Turkey", Norms, Interest, and Values, Edited by Henning Glaser, Baden-Baden, 2015, pp. 162-163.

32 See Levent Gönenç, "The 2001 Amendments to the 1982 Constitution of Turkey", Ankara Law Review, Volume: 1, 2004, pp. 89-109; Saadet Yüksel, "Constitutional Changes of Turkey in 2001 under the Framework of the EU Adaptation Process", Annales de la Faculte de Droit d'Istanbul, Volume: 39, 2007, pp. 153-156; Saadet Yüksel, "Turkey's Procedural Challenges to Making a New Constitution", Annales de la Faculte de Droit d'Istanbul, Volume: 41, 2009, p. 120; Saadet Yüksel, "A Comparative Approach on New Turkish Constitutionalism", Annales de la Faculte de Droit d'Istanbul, Volume: 44, 2012, pp. 342-356.

33 According to Gözler, since the constitution prohibits the supervision of emergency decrees, the Court's recent judgments regarding emergency decrees are accurate. See Kemal Gözler, "15 Temmuz Kararnameleri: Olağanüstü Hâl Kanun Hükmünde Kararnamelerinin Hukukî Rejiminin İfsadı Hakkında Bir İnceleme", February 17 2017, available at http://www.anayasa.gen.tr/15-temmuzkararnameleri.pdf, pp. 18-20 (last accessed on January 10 2018). For the criticisms of such judgments see Osman Can/Duygu Şimşek Aktaş, "Olağanüstü Hâl Dönemi Kanun Hükmünde Kararnamelerinin Yargısal

After the coup attempt on 15th of July 2016, a state of emergency was declared[34] throughout Turkey. By the end of this emergency period on 18th of July 2018, 32 emergency decrees were issued.[35] With these decrees, many organizational modifications such as founding a new university on national defense[36] or transferring military hospitals to the ministry of health[37] were made. Also, countless amendments were made to statutes with these decrees[38] including an amendment to the statute regarding unemployment insurance and even an amendment to the highway code regarding an obligation to use winter wheels.[39] There is no doubt that the necessity of these kinds of measures for an emergency is extremely questionable.

Case law of the Court towards emergency decrees was quite progressive and did well to fill the gap regarding supervision of emergency decrees in Turkish law. However, the Court waived this approach and the parliamentary control of emergency decrees proved to be insufficient. Although it was possible to apply to the Constitutional Court after the parliament approves or amends an emergency decree with a statute, the parliament did not act quickly on this matter. Between July 2016 and January 2018, only 5 out of 32 emergency decrees were negotiated and passed by the parliament. The remaining ones were passed afterwards.[40] Despite new applications to the Court being made after the decrees had been transformed into statutes, the Court hasn't announced any judgment regarding them up until today (August 25th 2019). In sum, as parliamentary supervision of emergency decrees was not sufficient and as the Court abandoned its case law regarding the examination of emergency decrees, there was no constitutional mechanism to compel emergency decrees to stay within the boundaries

Denetimi Üzerine", Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi, Volume: 23, 2017, pp. 31-39; Serkan Köybaşı, "Developments in Turkish Constitutional Law", 2016 Global Review of Constitutional Law, Edited by Richard Albert, David Landau, Pietro Faraguna and Simon Drugda, Electronically published by I-CONnect and the Clough Center for the Study of Constitutional Democracy at Boston College, available at http://www.bc.edu/content/dam/files/centers/clough/constitutional-law/ReviewofConLaw-final.pdf, p. 220 (last accessed on January 10 2018).

34 The Council of Ministers under the chairmanship of the President decided to declare state of emergency on July 20, 2016. On the next day the state of emergency went into operation.

35 In this context, 8 of such decrees were issued before the Court reversed its previous case law and 24 of them were issued thereafter.

36 Emergency Decree No: 669, Date: 31. 07. 2016.

37 Emergency Decree No: 669, Date: 31. 07. 2016.

38 Emergency Decree No: 668, Date: 27. 07. 2016; Emergency Decree No: 669, Date: 31. 07. 2016; Emergency Decree No: 671, Date: 17. 08. 2017; Emergency Decree No: 674, Date: 01. 09. 2016; Emergency Decree No: 678, Date: 22. 11. 2016; Emergency Decree No: 680, Date: 06. 01. 2017; Emergency Decree No: 681, Date: 06. 01. 2017; Emergency Decree No: 684, Date: 23. 01. 2017; Emergency Decree No: 690, Date: 29. 04. 2017; Emergency Decree No: 691, Date: 22. 06. 2017; Emergency Decree No: 694, Date: 25. 08. 2017; Emergency Decree No: 696, Date: 24. 12. 2017; Emergency Decree No: 687, Date: 09. 02. 2017.

39 See Emergency Decree No: 687, Date: 09. 02. 2017. For more examples of the measures taken with emergency decrees see European Commission for Democracy Through Law (Venice Commission), Turkey Opinion on Emergency Decree Laws Nos. 667-676 adopted Following the Failed Coup of 15 July 2016, adopted by the Commission at its 109th Plenary Session (Venice, 9-10 December 2016), Opinion No. 865 / 2016, Strasbourg 12 December 2016, pp. 23-39; European Commission for Democracy Through Law (Venice Commission), Turkey Opinion on the Measures Provided in the Recent Emergency Decree Laws with Respect to Freedom of the Media, adopted by the Commission at its 110th Plenary Session (Venice, 10-11 March 2017), Opinion No. 872 / 2016, Strasbourg 13 March 2017.

40 The last statute regarding emergency decrees was accepted in November 2018. In this regard, parliament disregarded its own rules of procedure which stated that emergency decrees shall be negotiated within thirty days after submission. This rule was also changed in late 2018.

set by the constitution.[41] The country was governed under the state of emergency for two years and a lot of issues which were not necessitated by the state of emergency were regulated by emergency decrees. In my opinion, the Court's retreat had great influence on the inflation of such executive dominance in Turkey.[42]

III. What to Expect from the Court After the Constitutional Amendments of 2017

With the latest amendments, article 91 of the constitution was repealed. At the moment, there is no mechanism to authorize an executive organ to issue decree laws. Alternatively, a new version of article 104 of the constitution directly furnishes the President with the authority to issue ordinary decrees without prior authorization from the parliament. Also, there are 5 articles in the constitution which bring special regulations regarding ordinary decrees. In this regard, article 104/9, 106, 108 and 118 of the constitution designate particular areas to be regulated by decrees[43] and article 123 states that, public entities could be established by statutes or decrees. However, these "brand new" ordinary decrees are much more different than previous ones.[44] The new type of ordinary decrees are designed for the areas which are not regulated by statutes and subject to vast limitations. For example, they do not enjoy the same power as statutes and it is not possible to change statutes with them.

For emergency decrees, the latest amendments were less radical. First of all, article 120, 121 and 122 were repealed. The state of emergency was regulated as the single emergency regime in article 119 and regulations regarding martial law were abolished. Emergency decrees are not subject to judicial review after the amendments either. However, the new article regarding emergency decrees prescribes a new condition:

41 According to Köybaşı, by rejecting the supervision of emergency decrees, the Court "created an unstoppable executive organ". See Köybaşı, "Developments in Turkish Constitutional Law".

42 For the changing role of the Court from 1970s up until today see Bertil Emrah Oder, "Populism and the Turkish Constitutional Court: the Game Broker, the Populist and the Popular", Int'l J. Const. L. Blog, May 2 2017, available at: http://www.iconnectblog.com/2017/04/populism-and-the-turkish-constitutional-court-the-game-broker-the-populist-and-the-popular/ (last accessed on January 11 2018). Also see Volkan Aslan, "The Role of Turkish Constitutional Court in the Democratization Process of Turkey: From 2002 to Present", Constitutionalism in a Plural World, Edited by Catarina Santos Botelho/Luis Heleno Terrinha/Pedro Coutinho, Porto, 2018, pp. 139-155.

43 At the moment, there are intensive debates whether these articles create reserved regulatory areas for decrees or not.

44 According to the new version of article 104/17, "*The President of the Republic may issue presidential decrees on the matters regarding executive power. The fundamental rights, individual rights and duties included in the first and second chapters and the political rights and duties listed in the fourth chapter of the second part of the Constitution shall not be regulated by a presidential decree. No presidential decree shall be issued on the matters which are stipulated in the Constitution to be regulated exclusively by law. No presidential decree shall be issued on the matters explicitly regulated by law. In the case of a discrepancy between provisions of the presidential decrees and the laws, the provisions of the laws shall prevail. A presidential decree shall become null and void if the Grand National Assembly of Turkey enacts a law on the same matter*." New version of ordinary decrees is very similar to the Russian President's ordinary decrees. According to the article 90 of the Russian Constitution, "*The President of the Russian Federation shall issue decrees and orders. The decrees and orders of the President of the Russian Federation shall be obligatory for fulfillment in the whole territory of the Russian Federation. Decrees and orders of the President of the Russian Federation shall not run counter to the Constitution of the Russian Federation and the federal laws.*" For the English version of Russian Constitution see http://www.constitution.ru/en/10003000-01.htm (last accessed on January 12 2018). For detailed information see Abdurrahman Eren, Anayasa Hukuku Ders Notları (Genel Esaslar-Türk Anayasa Hukuku), İstanbul, 2018, s. 526; Thomas F. Remington, Presidential Decrees in Russia: A Comparative Perspective, United States, 2014.

if emergency decrees are not debated by the parliament in three months after their promulgation, they cease to have an effect automatically.[45]

Features of new decrees are subject for another study. However, it is possible to say a few words regarding the prospective role the Constitutional Court could play related to the new decree regime. If the Court doesn't change its latest jurisprudence regarding emergency decrees, these decrees will be subject to judicial review only after parliamentary debates, just as before. With regards to ordinary decrees, it is not possible for the Court to adapt the old-fashioned three partite test again, as delegated decree authority is completely abandoned along with the latest amendments. However, new articles regarding decrees create a wide room for maneuver and there are lots of conflicting interpretations which have already whetted stakeholders' appetites. Taking into account all of the debates regarding new articles on decrees, it is fair to say that the Constitutional Court will be the leading actor in the formation of decree authority in the future just as in the past.

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45 According to the new version of article 119, "*In the event of state of emergency, the President of the Republic may issue presidential decrees on matters necessitated by the state of emergency, notwithstanding the limitations set forth in the second sentence of the seventeenth paragraph of the Article 104. Such decrees which have the force of law shall be published in the Official Gazette, and shall be submitted for approval to the Grand National Assembly of Turkey on the same day. Except in the case of inability of the Grand National Assembly of Turkey to convene due to war or force majeure events, presidential decrees issued during the state of emergency shall be debated and decided in the Grand National Assembly of Turkey within three months. Otherwise presidential decrees issued during the state of emergency shall be annulled automatically.*"

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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

How to Understand *non bis in idem*?: The Element of *idem* According to the ECtHR

non bis in idem Nasıl Anlaşılmalı?: *idem* Unsurunun AİHM'e Göre Yorumu

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Abstract
The European Court of Human Rights essentially has three approaches on the issue of the interpretation of *idem* within the context of the *non bis in idem* principle, namely "same conduct test", "essential elements test" and "same act test". These three interpretations are highly open to criticism. In this regard, it is clear that a new concept is necessary to distinguish act in terms of substantive criminal law and act in procedural criminal law practice. In order to determine what constitutes an *idem*, one should consider the concept of "procedural act". Moreover, I contend that providing a concrete and consistent interpretation of *idem* depends on the differentiation of the terms *idem* and *same idem*.

Keywords
Principle of non bis in idem, Concept of idem, Double jeopardy, Procedural act, Article 4 of Protocol No. 7 to the European Convention on Human Rights

Öz
Avrupa İnsan Hakları Mahkemesinin *non bis in idem* ilkesi bağlamında *idem* kavramının yorumlanmasında temel olarak üç yaklaşımı bulunmaktadır. Bunlar "aynı davranış testi", "esaslı unsurlar testi" ve "aynı hareket testi"dir. Bu üç yorum da eleştiriye son derece açıktır. Bu bağlamda maddi ceza hukuku ve ceza muhakemesi hukuklarının uygulanmasında fiil kavramının bu iki hukuk bakımından birbirinden ayrılması gereklidir. Neyin *idem* kavramını oluşturduğuna karar vermek için muhakemesel fiil kavramı göz önünde bulundurulmalıdır. Ayrıca *idem* kavramının somut ve tutarlı uygulanması *idem* ve *aynı idem* kavramlarının farklılaştırılması yoluyla sağlanacaktır.

Anahtar Kelimeler
non bis in idem ilkesi, idem kavramı, İki kere yargılama yasağı, Muhakemesel fiil, Avrupa İnsan Hakları Sözleşmesi Protokol 7 m. 4

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How to understand *non bis in idem*?: The element of *idem* according to the ECtHR

I. Introduction

The *non bis in idem* principle[1] is a fundamental individual right and a guarantee of legal certainty adopted by most legal systems[2]. It basically refers to the prohibition of bringing a case to the judicial bodies on the basis of the same *idem*[3]. Terminology may differ significantly depending on the law systems, which include *non bis in idem*; "double jeopardy" or "not to be tried or punished twice"[4]. As a result, the definition can be narrow or broad. Nevertheless, the core of the principle seems much the same, irrespective of the nomenclature[5]. In this sense, the scope of the application of the principle involves preventing not only multiple convictions but also multiple prosecutions or convictions depending on the same *idem*[6].

The principle has both national and transnational aspects[7], which means that it acts as a tool to prevent multiple prosecutions or convictions for the same *idem* not only within a national jurisdiction, but also allowing tates to approve its' transnational effect between different jurisdictions[8]. The principle is therefore recognized by

1 It is debatable whether the principle belongs to the "rule" or the "principle" category. For example, considering Dworkin's distinction of principles and rules, Bockel proposes the principle should be accepted as a rule. See: Bas Van Bockel, "The European ne bis in idem Principle: Substance, Sources, and Scope", **Ne bis in idem in EU Law**, Ed. by Bas Van Bockel, Cambridge University Press, 2016, p. 14., However, the author also states that traditionally it is convenient to approve it as a principle. See, **Ibid**, s. 14.

2 Christine van den Wyngaert/ Guy Stessens, "The International Non Bis In Idem Principle: Resolving Some of the Unanswered Questions, **The International and Comparative Law Quarterly**, Vol: 48, No: 4, October 1999, p. 780; Maria Fletcher, "Some Developments to the ne bis in idem Principle in the European Union: Criminal Proceedings Against Hüseyn Gözütok and Klaus Brügge", **The Modern Law Review**, Vol: 66, No: 5, September 2003, pp. 778.

3 Beck'scher Online Kommentar Grundgesetz, Ed. by: Epping/Hillgruber, 41. Ed., 2016, § 103, Rn. 44, Çevrimiçi https://beck-online.beck.de/Dokument?vpath=bibdata%2Fkomm%2Fbeckokgg_40%2Fgg%2Fcont%2Fbeckokgg.gg.a103.htm, 29.05.2019

4 Dionysios Spinellis, "Global Report the ne bis in idem Principle in "Global" Instruments", **Revue international de droit pénal**, Vol. 73, 2002/3, , p. 1149; Fletcher, **Ibid**, p. 770.

5 Linda E. Carter, "The Principle of Complementarity and the International Criminal Court: The Role of Ne Bis in Idem", **Santa Clare Law Journal of International Law**, Vol: 8, No: 1, 2010, p. 170.

6 Norel Neagu, "The Ne Bis in Idem Principle in the Interpretation of European Courts: Towards Uniform Interpretation", **Leiden Journal of International Law**, Vol: 25, 2012, p. 955.

7 On a domestic level, the main rationale of the principle has three dimensions. First, it provides protection for the individual. Second is the idea, that the criminal claim, after being considered once, is extinguished. And third, the principle embodies respect for judicial decisions. This is to prevent conflicting judgments. See Wyngaert/Stessens, **Ibid**, p. 780-781; These three rationales are virtually appropriate to be considered also in transnational level. See **Ibid**, p. 781-782. for similar evaluations see Bockel, **Ibid**, pp. 13-14.

8 José Luis de La Cuesta/ Albin Eser, "Concurrent national and international criminal jurisdiction and the principle 'ne bis in idem'", **Revue Internationale de Droit Pénal**, Vol. 72, 2001/3-4, , p. 753; Spinellis, **Ibid**, p. 1150; It should also be noted that there is no generally accepted customary rule of international law or *ius cogens* providing an international protection of the principle in international situations. Therefore, international and transnational application of the principle appears in different forms (Bockel, Ibid, p.14; In this context, the content of the principle may differ in transnational level. For instance, it is accepted as a preventive closure for extradition under the European Convention on Extradition Article 9. In international level, the transnational effect of the principle can be observed under NATO Status of Forces Treaty (SOFA) Article VII (8), Article 54 and 55 Convention Implementing the Schengen Agreement or Article 20 of ICC (Rome) Statute. Besides these, as an individual right in international legal instruments concerning human rights, the principle is regulated under Article 4 of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 14 (7) of the International Covenant on Civil and Political Rights (ICCPR). It should also be stated that these two

national laws[9] and regulated under international conventions[10].

In practice, the principle's primary and salient concern is the interpretation of the *idem* element. For this reason, the element of *idem* is regarded as the most controversial aspect of the principle[11]. Therefore, the terminology used to clarify the principle plays a significant role, and the scope and definition of the *idem* varies among jurisdictions and conventions[12]. The main question that arises here focuses on whether *idem* is relevant to a fact, an act or an offence in the context of the principle[13]. This differentiation in the application of the principle depends essentially on the tendency of European Court of Human Rights' (hereafter ECtHR) to prioritize the facts of the case; to the legal classification of those facts or to the legal interest being protected[14]. Choosing a certain definition of the notion of *idem* may yield different results. For example, when the notion of *idem* is accepted as an offence, the first judgment for a certain fact but under a particular charge, would not prevent the person from being tried under the same facts but for different charges. On the other hand, if the principle is accepted to be applicable on the basis of the facts, the scope of effect would be much wider[15].

conventions accept the effect of the principle only on a domestic level. This means it has a preventive role only for the judgments within the same state. Furthermore, in the context of international criminal law, the principle is considered in the Council of Europe Convention on the International Validity of Judgements and Council of Europe Convention on the Transfer of Proceedings in Criminal Matters; However, these two conventions are considered to be unsuccessful to establish an international *non bis in idem* principle because of the low ratification of these conventions by the members of the Council of Europe. (Fletcher, **Ibid**, p.770, fn. 7); Besides these, the two other instruments on the EU level related to the principle are the 1995 Convention on the Protection of the European Communities' Financial Interest and the 1997 Convention on the Fight against Corruption.

9 Some countries prefer the way to regulate the principle under their constitutions. See the Fifth Amendment to the US Constitution which states *"(no) person (shall) be subject for the same offence to be twice put in jeopardy of life and limb";* Similarly, the German Basic Law (Grundgesetz) Article 103 paragraph. III reads as follows *" No person may be punished for the same act more than once under general criminal law"* (Çevrimiçi https://www.btg-bestellservice.de/pdf/80201000.pdf 17.01.2019)

10 The principle's effect between different states is called the horizontal effect, while the relation in terms of *non bis in idem* effect between national courts and the International Tribunals is named as the "vertical effect" of the principle. See, Spinellis, **Ibid**, p. 1152-1553; However, beside these, de La Cuesta and Eser asserts that there are three kinds of effect of the principle. See: de La Cuesta/ Eser, **Ibid**, p. 756.

11 Bockel, **Ibid**, p. 47.

12 For example Article 4 of Protocol No. 7 to the European Convention on Human Rights, Article 14 paragraph 7 of the United Nations Covenant on Civil and Political Rights, Article 50 of the Charter of Fundamental Rights of the European Union and the Fifth Amendment to the Constitution of the United States of America refer to the term as "same offence"; the American Convention on Human Rights prefers the term "same cause", the Convention Implementing the Schengen Agreement mentions "same act" and the Statute of the International Criminal Court adopts the terms "same conduct". See, Neagu, **Ibid**, p. 957.

13 Wolfgang Schomburg, "Ne bis in idem. Vom Auslieferungshindernis zum internationalen strafrechtlichen Doppelverfolgungsverbot als EU-Grundrecht. Eine Einführung anhand von Texten", **"Ne bis in idem" in Europa**, Ed. by: Gudrun Hochmayr, 1. Ed., Nomos, , 2015, p. 11; Marco Mansdörfer, **Das Prinzip des ne bis in idem im europäischen Strafrecht**, Dencker &Humblot, Berlin, 2004, p. 23; Wyngaert/ Stessens, **Ibid,** p. 788; Neagu, **Ibid**, p. 555.

14 The Principle of Ne Bis in Idem in Criminal Matters in the Case Law of the Court of Justice of the European Union, (Çevrimiçi) http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/caselawanalysis/The%20principle%20of%20Ne%20Bis%20in%20Idem%20in%20criminal%20matters%20in%20the%20case%20law%20of%20the%20Court%20of%20Justice%20of%20the%20EU%20(Sept.%202017)/2017-09_CJEU-CaseLaw-NeBisInIdem_EN.pdf 27.03.2019; For example Court of Justice of the European Union and the Inter-American Court of Human Rights has been interpreted the notion in favor of the perpetrator on the grounds of the terms ("same act" and "same cause") being used under related conventions. This approach strictly rejects the legal classification of the facts of the case and it depends on the material acts. In this way the protective scope of the principle is broadened. See: Neagu, **Ibid**, p. 957.

15 Wyngaert/ Stessens, **Ibid**, p. 789; Also see: Barış Bahçeci, "Vergi Cezalarında Ne Bis In Idem", **Ankara Üniversitesi Hukuk Fakültesi Dergisi**, Vol: 67, No: 2, 2018, p. 258.

This paper aims to explain the interpretation of the ECtHR of *idem* by analyzing the main decisions and judgments of ECtHR on the matter.

II. Interpretation of the ECtHR

The *non bis in idem* principle is enshrined in Protocol No. 7 Article 4 of the European Convention on Human Rights:"*no one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an* ***offence*** *for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State"*[16].

In applying this article, ECtHR faces three challenges[17]. Of the three, the two issues which are fundamental for this study are limiting the scope and qualification of sanctions within the article and deciding whether both proceedings were structurally criminal or penal; or determining whether there was a duplication of proceedings.. The third issue regarding the application of the *non bis in idem* principle which ECtHR dealt with is to interpret the notion of "an offence" in order to decide what constitutes an *idem*. ECtHR applied three different tests in order to determine whether the principle is applicable. These are the "same conduct" test, "essential elements" test and finally the "same act" test[18].

A. Same Conduct Test

ECtHR initially followed the same conduct test that focuses on the material facts of the case and excludes the legal classification of those case-related facts. Thus, in this case the ECtHR placed the emphasis on identity of the facts[19]. In this manner, instead of considering whether the offences of cases considered by domestic courts are the same, the ECtHR evaluated whether the facts are the same and reached a decision according to those facts. It does not matter to the ECtHR if the provisions in question differed with respect to the designation or nature and purpose. Moreover, one provision may be the special version of another. Nevertheless, what is important to the ECtHR is that the two impugned decisions be based on the same conduct. In this sense, the ECtHR considers the overlapping of the facts as a violation[20].

16 To decide whether or not there is a "criminal charge in the scope of the article ECtHR's' case law sets out three criteria. These criteria are commonly known as *"Engel criteria"* which consists of a legal classification of the offence under national law, nature of the offence and degree of the severity of the penalty. See: Engel and Others v. the Netherlands, 8 June 1976; Also see European Court of Human Rights Factsheet-Non bis in idem, November 2018, (Emphasis added) https://www.echr.coe.int/Documents/FS_Non_bis_in_idem_ENG.pdf; In the last ten years there have been 19 violations to the breach of Protocol No 7 Article 4. These countries are: Azerbaijan (1 case), Bosnia and Herzegovina (1 case), Bulgaria (1 case), Finland (6 cases), Greece (2 cases), Iceland (1 case), Italy (1 case), Lithuania (1 case), Romania (1 case), Russia (1 case), Serbia (1 case), Sweden (1 case), Ukraine (1 case),

17 Guide on Article 4 of Protocol No. 7 to the European Convention on Human Rights, (Çevrimiçi) https://www.echr.coe.int/Documents/Guide_Art_4_Protocol_7_ENG.pdf , 27.03.2019.

18 ECtHR has summarized these approaches in the *Zolotukhin* judgment. See Zolotukhin v. Russia, 10 February 2009, Para. 71-73; Also see: Neagu, **Ibid**, p. 969.

19 Guideline, Çevrimiçi https://www.echr.coe.int/Documents/Guide_Art_4_Protocol_7_ENG.pdf (28.03.2019)

20 Gradinger v. Austria, 23 October 1995, Para. 55.

The exemplary application at this point is the *Gradinger* judgment. In this case, the applicant caused an accident that resulted in a cyclist's death. Later at the hospital, it was detected that he/she had an alcohol level of 0.8 grams per liter in his/her blood. The applicant was punished pursuant to Article 81 of the Criminal Code and the Road Traffic Act. The applicant alleged that it was a violation of *non bis in idem* principle by fining him/her under the Road Traffic Act[21]. ECtHR found an infringement of Article 4 of Protocol No. 7 in view of the fact that the both decisions had been based on the same conduct by the applicant[22].

However, as regards cases where "ideal concurrence of offences" is discussed, ECtHR is of the opinion that Article 4 of Protocol 7 prohibits persons being tried for the same offence, but on the legal classification, accepts that the same facts could lead to different offences[23]. In such cases, ECtHR ruled that there was no breach of Article 4 of Protocol 7, as not only the conduct, but also the offences should be identical. For example, in the case of *Oliveira,* ECtHR adopted this approach by taking the legal qualification of the underlying facts as the criterion for establishing the identity of the "offence" without considering the factual elements of the overlapping cases[24]. In the applicant's submission, the fact that he/she was convicted of the same incident first for failing to control his/her vehicle and subsequently for negligently causing physical injury, constituted an infringement of Article 4 of Protocol No. 7[25].

B. Essential Elements Test

Following these controversial judgments, as in the *Franz Fischer* case and myriad subsequent decisions, ECtHR employed an application of the notion by considering whether two or more offences shared the same "essential elements"[26]. In *Fischer*, where ECtHR found a violation of Article 4 of Protocol No. 7, it affirmed that the administrative offence of "drink driving" and the crime of "causing death by negligence while allowing himself to be intoxicated" had the same essential elements[27]. ECtHR stated that:

the wording of Article 4 of Protocol No. 7 does not refer to "the same offence" but rather to trial and punishment "again" for an offence for which the applicant has already been finally acquitted or convicted. Thus, while it is true that the mere

21 Gradinger v. Austria, 23 October 1995, Para. 48.

22 Gradinger v. Austria, 23 October 1995, Para. 55.

23 Oliveira v. Switzerland, 30 July 1998, Para. 26.

24 Franz Fischer v. Austria, 29 August 2001, Para. 21.

25 Oliveira v. Switzerland, 30 July 1998, Para. 22; Subsequently in the case of *Göktan* ECtHR found no violation because the same conduct of the applicant constituted two separate offences. See Göktan v. France, 2 July 2002, Para. 52; For similar cases see: *Gauthier v. France* 24 June 2003,) and Öngün v. Turkey, 10 October 2006.

26 Bockel, **Ibid**, p. 47; Guideline, Çevrimiçi https://www.echr.coe.int/Documents/Guide_Art_4_Protocol_7_ENG.pdf (28.03.2019); Bahçeci, **Ibid,** p. 261;

27 Franz Fischer v. Austria, 29 May 2001, Para. 30.

fact that a single act constitutes more than one offence is not contrary to this Article, the Court must not limit itself to finding that an applicant was, on the basis of one act, tried or punished for nominally different offences. The Court, ... notes that there are cases where one act, at first sight, appears to constitute more than one offence, whereas a closer examination shows that only one offence should be prosecuted because it encompasses all the wrongs contained in the others[28].

However, this approach is criticized for weakening the protection of the principle of Article 4 of Protocol No. 7 and giving rise to legal uncertainty[29]. In particular, this criticism gave rise to the interpretation of the phrase "the same essential elements"[30].

In addition to the above, a different set of "essential elements" featured in ECtHR's analysis in two Austrian cases. In the *Hauser-Sporn* case ECtHR held that the offence of abandoning a victim and the offence of failing to inform the police about an accident differed in their criminal intent and also concerned different acts and omissions[31]. And in the *Schutte* case the "essential element" of one offence was the use of dangerous threat or force as a means of resisting the exercise of official authority, whereas the other concerned a simple omission in the context of road safety, namely the failure to stop at the request of the police[32]. Finally, in a similar application on the subject, ECtHR ruled that the two offences in question had different "essential elements" in that they were distinguishable in terms of their gravity and consequences. These "essential elements" were determined as the social value being protected and the criminal intent[33].

C. Same Act Test

After all these decisions, the ECtHR's interpretation gained stability and shifted interpretation to a more accurate level. As a matter of fact, for almost ten years ECtHR has used this approach for the solution of the problem. In the *Zolotukhin* case ECtHR adopted its current factual approach to the definition of *idem*[34]. In this sense, the terminology used in the interpretation of the concept is not deemed significant[35]. It has also been argued that ECtHR has developed a more harmonized standard test rather than a test for "essential elements"[36].

28 Franz Fischer v. Austria, 29 May 2001, Para. 25; For similar cases see: W.F. v. Austria, 30 May 2002; Sailer v. Austria, 6 June 2002; Manasson v. Sweden, 8 April 2003; Bachmaier v. Austria, 2 September 2004.

29 Bockel, Ibid, s. 48.

30 Bahçeci, Ibid, p. 262.

31 Hauser-Sporn v. Austria, 7 December 2006, Para. 43-46.

32 Schutte v. Austria, 26 July 2007. Para. 42.

33 Garretta v. France, 4 March 2008.

34 Zolotukhin v. Russia, 10 February 2009.

35 Bas Van Bockel, "Introduction and Set-Up of the Study", **Ne bis in idem in EU Law**, Ed. by:Bas Van Bockel, Cambridge University Press, 2016, p. 6.

36 Elisa Ravasi, **Human Rights Protection by te ECtHR and the ECJ: A Comparative Analysis in Light of the Equivalency Doctrine**, Boston Brill, 2017, p. 247.

In this judgment ECtHR first noted that

"the existence of a variety of approaches to ascertain whether the offence for which an applicant has been prosecuted is indeed the same as the one of which he or she was already finally convicted or acquitted engenders legal uncertainty incompatible with a fundamental right, namely the right not to be prosecuted twice for the same offence."[37].

ECtHR thus related the interpretation of the principle before the law to the interests of legal certainty, foreseeability and equality[38]. In this regard, it first analysed the notion in the context of other international instruments incorporating the principle. And then it stated that the use of the word "offence" in Article 4 of Protocol No. 7 cannot justify adhering to a more restrictive approach. According to ECtHR, the Convention must be interpreted and applied in a way that is both "practical and effective"[39]. ECtHR was therefore of the opinion that Article 4 of Protocol No. 7 must be understood as prohibiting the prosecution or trial of a second "offence" in so far as it arises from **identical facts or facts which are substantially the same**[40].

In order to determine whether the facts in both proceedings were identical or substantially the same, the statement of facts should concern both the offence for which the applicant had already been tried and the offence against which he or she is accused[41].

ECtHR also stressed that it was irrelevant in the subsequent proceedings that parts of the new charges were eventually upheld or dismissed. Accordingly, its investigation should focus on those facts that constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space, the existence of which must be demonstrated in order to secure a conviction or institute criminal proceedings[42].

III. Comments and Conclusion

It could be said that three of ECtHR's approaches to the concept of *idem* are open to significant criticism. For example, "same conduct test" basically considers the historical events that constitute the charge and entirely excludes substantive criminal law's concepts. This approach could lead to unjust solutions and could also have

37 Zolotukhin v. Russia, ECtHR 10 February 2009, Para. 78.

38 Zolotukhin v. Russia, ECtHR 10 February 2009 Para.78.

39 Zolotukhin v. Russia, ECtHR 10 February 2009 Para.80.

40 Zolotukhin v. Russia, ECtHR 10 February 2009 Para.82; This interpretation originally belongs to European Court of Justice. For this reason, it is stated that ECtHR has adopted this interpretation from the decisions of the European Court of Justice. See, Neagu, **Ibid,** p. 971.

41 Zolotukhin v. Russia, ECtHR 10 February 2009 Para.83.

42 Zolotukhin v. Russia, ECtHR 10 February 2009 Para.83-84.

the potential to lengthen the criminal procedure in an unpredictable way. Besides, "essential elements test" is also controversial, since it takes into account the elements of crime in the substantive criminal law but lacks certain and determinable criteria to explain which elements of an offence are essential. And finally, the "same act test" can also be considered as a return to a limited "same conduct test", since in the "same conduct test" only the historical events, which are the facts of the case according to ECtHR, should be considered but this time these facts should be identical or substantially the same as each other

In this regard, it is obvious that a new concept is necessary to distinguish act in terms of substantive and procedural criminal law practice. In order to determine what constitutes an *idem,* one should consider the concept of procedural act. This term refers to "*Strafprozessuale Tatbegriff*" in German law and is related to the "procedural subject matter" (*Prozessgegenstand*) of the case[43]. The procedural subject matter of the case has two elements: one is the subjective element which is the defendant person, and the other one is the objective element which is the procedural act[44]. It is important to correctly and concretely detect the objective and subjective elements of one specific case, in order to determine whether these elements are overlapping with those of another case. It should also be noted that the *idem* element of the *non bis in idem* principle refers to the objective element of the procedural subject matter.

The early decisions of ECtHR on the issue were contradictory and inconsistent. In this sense, various approaches can be noted in its case law[45]. I contend that providing a concrete and consistent interpretation of *idem* depends on the differentiation of the terms *idem* and *same idem.*

On the one hand, *idem* is the procedural act and, aside from all the debates and various views on the issue, is accepted as the "historical incident" limited to the indictment[46]. The historical incident should be limited in terms of the conduct, perpetrator, time, space, subject, instrument and victim[47]. Therefore, *idem* should be considered as a purely factual concept which has no relation to the substantive criminal law's regulations[48].On the other hand, in addition to the limitations in the determination of *idem*, detecting the *same idem* also requires an evaluation of the

43 Roxin/ Schünemannn, **Strafverfahrensrecht,** 29. Bs. München, Beck, 2017, § 20, Rn. 2; Urs Kindhäuser, Strafprozessrecht, 3. Ed., 2013, § 25, Rn. 1.

44 Roxin/ Schünemannn, **Ibid** , § 20, Rn. 3; Kindhäuser, **Ibid**, § 25, Rn. 2.

45 Bockel, The European ne bis bin idem principle, p. 47; Xavier Groussot/ Angelica Ericsson, "Ne bis in Idem in the EU and ECHR Legal Orders A Matter of Uniform Interpretation", **Ne bis in idem in EU Law**, Ed. by: Bas Van Bockel, Cambridge University Press, 2016, pp. 56.; Neagu, **Ibid**, p. 969.

46 For detailed debates and views on the issue see Luis Greco, **Strafprozesstheorie und materielle Rechtskraft: Grundlagen und Dogmatik des Tatbegriffs, des Strafklage, verbrauchs und derWiederaufnahme im Strafverfahrensrecht**, Berlin, Duncker & Humblot, 2015 s. 440 vd.

47 Kyung-Lyul Lee, **Die Präzisierung der "Tateinheit" und Reichweite des Strafklage, verbrauchs nach der Entscheidung BGHSt 40, 138 zum "Fortsetzungszusammenhang"**, Berlin, Logos, , 2002, s. 197.

48 **Ibid**, p. 198 ff.

substantive criminal law. The decisive and limiting factor taken from substantive criminal law should be the legally protected value element. The legally protected value will result in a fairer application of the *non bis in idem* principle as it determines the legal issue defined by an offence[49]. Otherwise, the effect of *non bis in idem* would prevent justice from being manifested. In this respect the legal value of an offence which is under protection of a certain offence, should be the same or similar. If the legal values are the same or similar, *idem* of two certain cases are considered "the same" and *non bis in idem* effect of the latter case can be observed.

It must be noted that, unlike the ECtHR, being practical should not be a concern in terms of human rights protections. Thus, one should consider whether the result is fair or not in applying the *non bis in idem* principle. Although the principle of *Zolotukhin* is said to need a practical interpretation, it is more important to implement the principle fairly. For this reason, *legally protected values* should be taken as a basis, which are relatively less practical and give a fairer result. It would not be wrong to accept that ECtHR's approach in *Zolotukhin* as a more practical one. However, the approach in the "essential elements" test is much more suitable to ensure justice for the parties.

In summary, when applying the essential element test, the *essential element* does not have to be an element of a crime, but it should be considered as the *legally protected value* of an offense. Therefore, it is understandable for ECtHR to use the same act test to determine the concept of *idem*, while limiting it. However, it must return to the application of the essential element test, taking into account the legally protected value which is an essential element in terms of the same application. For this reason, ECtHR's interpretation in *Zolotukhin* should be applied as the definition of the *idem* in the broader sense, but in order to decide whether there is *same idem* in a case, ECtHR should return to the essential elements test and investigate whether the legally protected values are the same as the essential elements.

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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

The Principle of "Ultima Ratio" in Termination of Employment Contract in Turkish Labour Law

Türk İş Hukukunda İş Sözleşmesinin Feshinde Son Çare -Ultima Ratio- İlkesi

Ayse Kome Akpulat[1]

Abstract
The risk of the employee losing his job against the employer's right of termination is considered in this study, which found this right of termination to be limited in contemporary labour law systems. One aspect of this limitation is job security. In the job security system, the existence of a valid reason is examined during the judicial review of the termination. However, in some instances, the valid reason is not sufficient per se. Termination based on a valid reason should be proportional. Pursuant to the principle of proportionality, termination should be applied as a last resort. The principle of ultima ratio is examined not only in terms of termination based on business requirements, but also in terms of termination-based employee's incapacity or behaviour. This study aims to explain the status of the principle of ultima ratio in Turkish Labour Law which means that termination should be applied as a last resort. Furthermore, focus is laid on the precedents by also examining the decisions of the Supreme Court on the matter.

Keywords
Ultima Ratio, Job security, Termination of employment contract, Valid termination, Valid reason

Öz
Modern iş hukuku sistemlerinde, işverenlerin fesih hakkı karşısında işçinin işini kaybetmesi tehlikesi dikkate alınmış ve fesih hakkı sınırlandırılmıştır. Bu sınırlandırmanın bir boyutu da iş güvencesidir. İş güvencesi sisteminde, yapılan feshin yargı denetimine tabi tutulması sırasında geçerli bir nedenin var olup olmadığı incelenir. Ancak kimi durumlarda tek başına geçerli bir nedenin olması yetmez. Geçerli nedene dayanılarak yapılan feshin ölçülü olması gerekir. Ölçülülük ilkesi gereğince de feshe son çare olarak başvurulması gerekir. Başlangıçta yalnızca işletme gerekleri için geçerli olduğu kabul edilen son çare ilkesi giderek diğer geçerli fesih sebeplerinde de uygulanır olmuştur. Bugün için işletme gereklerinden kaynaklanan fesihlerde değil, işçinin yetersizliği veya davranışları nedeniyle yapılacak fesihlerde de son çare ilkesine uyulup uyulmadığı araştırılmaktadır. Bu çalışmada, feshe son bir çare olarak başvurulması anlamına gelen ultima ratio ilkesinin Türk İş Hukukundaki yeri açıklanmıştır. Ayrıca Yargıtay'ın konu hakkında verdiği kararlar da incelenerek uygulama örnekleri üzerinde durulmuştur.

Anahtar Kelimeler
Son çare, İş güvencesi, İş sözleşmesinin feshi, Geçerli fesih, Geçerli neden

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The Principle of "Ultima Ratio" in Termination of Employment Contract in Turkish Labour Law

I. Introduction

By very nature, an employment contract is one which causes perpetual obligation and which urges one party to undertake to perform work dependently and the other party to pay remuneration. Termination of this contract is considered within the boundaries of principles such as the protection of personal rights, free will, and the freedom of the employer to make decisions about his/her business, and it is recognized as a right for both parties. However, termination with notice particularly poses certain risks for the employee who works dependently of the employer. Therefore, in today's labour law approach, the employee's use of termination with notice is not subjected to any limitation. However, there are several limitations imposed on the employer for the use of this right.

The fact that the employee works dependently of the employer is an important factor that distinguishes the employment contract from other private law contracts. This dependency on the employment contract also demonstrates that the parties are not equal. The employee who is a non-equal party should be protected in particular. One of the aspects that this protection gives rise to is the termination of the employment contract. A balance between the managerial power of the employer and the employees' job loss should be established in an employment contract. This balance gave rise to the concept of "job security". Job security protects employees from arbitrary dismissals. This protection is achieved by termination only by following certain procedures, providing a valid reason and subjecting this reason to a judicial review.

The principle of ultima ratio has been one of the principles required for termination to qualify as valid. In principle, applying the rule of termination by the employer as a last resort means taking all measures for ensuring the continuity of the employment contract. As a consequence of this, if it is not possible to keep the employee in a workplace despite the employer taking all expected measures, the termination will happen as long as the termination procedure is complied with and a valid reason is provided. Thus, an important legal meaning and the legal consequence are attributed to the principle of ultima ratio.

II. The Concept of Ultima Ratio in Termination

A. Definition and Importance

One of the principles in the termination of an employment contract with a valid reason, which limits the right of termination of the employer and allows the judge

to conduct a review of arbitrariness over the valid reason, is the principle of ultima ratio. Ultima ratio is a Latin phrase and has the meaning of the last resort or the last measure to be considered or applied[1]. This principle, in particular in German law, is an important principle applied to termination of contract arising from the employee or the workplace[2].

The principle of ultima ratio, which is not explicitly included in the legal regulations in Turkish law, is set forth in the decisions of high court and doctrine as explained below. This principle means being able to terminate when the reason for the termination cannot be eliminated by any measures other than termination[3]. In other words, the employer should resort to the termination of the contract only if he/she does not have the possibility of achieving his/her purpose with less severe measures. Therefore, with respect to the principle of ultima ratio, it should first be determined whether the result desired to be attained could be reached with less severe measures[4]. Thus, the employer will be able to apply the termination process provided it is based on a valid reason if he/she cannot prevent the employee from losing his/her job in the workplace despite taking all the available measures[5].

The idea of terminating the employment contract only as a last resort first arose from the decisions of the German Federal Court. The Federal Court proposed some alternatives to the termination of a particular contract and invalidated the employer's application to terminate the agreement while such alternatives were available. Later, these alternatives were added into the law with the amendments made to the German Law on Protection against Termination in 1969 and 1972. It is stipulated in German Law that termination notices will be invalid while it is possible to implement the alternatives mentioned[6]. Pursuant to this principle, which is also covered under the principle of proportionality in German Law, termination should be applied when it is appropriate and necessary to prevent damages that could occur in the operation of the business and it is proportional with respect to the purpose sought in this sense[7].

1 **Ali Güzel**, "İş Sözleşmesinin Geçerli Nedenle Feshinde Ultima Ratio (Son Çare) İlkesi ve Uygulama Esasları", A. Can Tuncay'a Armağan, İstanbul, Legal, 2005, p. 61.

2 **E. Murat Engin**, İş Sözleşmesinin İşletme Gerekleri ile Feshi, İstanbul, Beta, 2003, p. 91; **Nuri Çelik/Nurşen Caniklioğlu/Talat Canbolat**, İş Hukuku Dersleri, 31. edi., İstanbul, Beta, 2018, p. 518.

3 **Gülsevil Alpagut**, "İş Sözleşmesinin Feshi ve İş Güvencesi", 3.Yılında İş Yasası: Seminer Notları, Bodrum, Toprak İşveren Yayını, 2005, p. 26.

4 **Polat Soyer**, "Feshe Karşı Korumanın Genel Çerçevesi ve Yargıtay Kararları Işığında Uygulama Sorunları", Legal İş Hukuku ve Sosyal Güvenlik Hukuku 2005 Yılı Toplantısı: İş Güvencesi Kurumu ve İşe İade Davaları, İstanbul, Legal, 2005, p. 51.

5 **Ali Güzel**, "İşletmesel Kararların Keyfilik Denetimine Tabi Olması ve Geçerli Nedenle Fesihte Son Çare (Ultima Ratio) İlkesinin Gözetilmesi", Çalışma ve Toplum Dergisi, Vol.4, 2005, p. 172.

6 **Mustafa Alp**, **"**Hizmet Akitlerinin Sona Ermesi Ve İşçilik Alacaklarının Güvencesi", İstanbul Barosu, Galatasaray Üniversitesi İş Hukukuna ve Sosyal Güvenlik Hukukuna İlişkin Sorunlar ve Çözüm Önerileri 2002 Yılı Toplantısı, İstanbul, İstanbul Barosu Yayınları, 2002, p. 104.

7 **Engin**, İşletme Gerekleri, p.91; **Alpagut**, İş Sözleşmesinin Feshi ve İş Güvencesi, p. 226.

Termination is the biggest risk that the employee could face in the job security system. Therefore, taking measures to maintain the employment contract instead of termination will prevent this risk from occurring. The job security system primarily looks out for the interests of the employee. Protecting the job of the employee, which is a means of livelihood, is of great importance. On the other hand, job security is also important as far as the employer's economic interests are concerned. It is possible for an employer who does not terminate the contract in accordance with the provisions in the law to face compensation. Moreover, this system also has a social aspect with regards to unemployment[8]. Therefore, not complying with the principle of ultima ratio that is acknowledged in the job security system causes the employee to lose his job and for the employer to incur an additional cost. On the other hand, in a work system where this principle is applied consistently, the employee will not have the fear that he/she might lose his/her job at any time. Thus, work harmony between the employee and the employer will not get disrupted and this will increase productivity. In summary, generally, the things that could be said about the importance of the job security system could also be repeated for the principle of ultima ratio.

B. Limits

The legal basis for the principle of ultima ratio arises from the principles of good faith, not abusing rights, contract commitment and trust. According to this, each party makes every effort to ensure the continuity of the contract and the other party's fulfilment of its obligations in particular. When the relevant principle is adapted to the employment contract, it is concluded that the employer should make all efforts to ensure the continuity of the contract and the employee should make all efforts to fulfil his/her obligation to work[9]. Indeed, maintaining the contract is fundamental in the job security system and termination of the agreement is an exception[10]. Moreover, the principle of ultima ratio is also closely related to the principle of good faith. The principle of good faith has a regulating character and can be directly applied to every legal relation[11]. Everybody is obliged to comply with this principle when exercising their rights and fulfilling their obligations. The principle requires a fair and reasonable employer to make necessary efforts to maintain the employment contract before the termination of the contract. Thus, the right of termination of the employment contract is a right that should be exercised within the frame of the principle of good faith.

8 **Gülsevil Alpagut,** "Yargıtay Kararları Işığında İş Güvencesi ve Çalışma Koşullarında Esaslı Değişiklik", Bankacılar Dergisi, Vol.65, 2008, p. 89.

9 **Ali Güzel**, "İş Güvencesine İlişkin Yasal Esasların Değerlendirilmesi", İstanbul Barosu, Galatasaray Üniversitesi İş Hukuku ve Sosyal Güvenlik Hukukuna İlişkin Sorunlar ve Çözüm Önerileri 2004 Yılı Toplantısı, İstanbul, İstanbul Barosu Yayınları, 2004, p. 76; **Mustafa Kılıçoğlu**, "4857 sayılı İş Kanunu'nun 18. Maddesinin Yorumu", A. Can Tuncay'a Armağan, İstanbul, Legal, 2005, p. 474; **Polat Soyer**, "Küresel Kriz Sürecinde İşletme Gereklerine Dayanan Fesihler ve İstihdam Sorunu", Sicil İş Hukuku Dergisi, Vol.12, 2008, p. 71.

10 **Sarper Süzek**, İş Hukuku, 16. edi., İstanbul, Beta, 2018, p. 593.

11 **Halil Akkanat**, Türk Medeni Hukukunda İyiniyetin Korunması, İstanbul, Filiz Kitabevi, 2010, p. 11.

Fundamentally, the source of the principle of ultima ratio also shows the limits of it. Indeed, it should not be overlooked that even the implementation of the principle of ultima ratio has limits. In other words, it is wrong to think that the principle of ultima ratio imposes an unlimited obligation on the employer to choose less severe measures. Expecting the employer to take less severe measures instead of termination can be accepted when it is both legally and practically possible[12]. The alternatives of termination should not intensely interfere with the freedom of operational decision.[13] Similarly, the employer should not be forced into a structure in the workplace that he/she would not be willing to accept. On the other hand, the alternatives that can be used instead of termination should be suitable for the employer to achieve his/her purpose. For instance, it should not be expected from the employer to resort to a very expensive resolution[14]. Likewise, the employer does not have the obligation to choose any other alternative if he/she cannot achieve the envisaged purpose with other measures[15]. The employer should not be forced to make such a choice even though these measures are more favourable to the employee but do not fit the employer's purpose. As can be seen, implementation of the principle of ultima ratio is not a rule which is absolute and should be accepted in every case. This rule occurs in the cases where the employer has abused his/her right of termination and it is one of the principles that is considered when determining that the termination is legally invalid.

The review of valid termination should be distinguished from the review of the employer's making a decision about his/her business. The operational decision is a reflection of the employer's right to manage. The right to manage is one of the sources of labour law. However, it is inferior to other sources. Therefore, the right to manage is restricted by other labour law sources that are superior to it[16]. It is not possible to use the right to manage contrary to law both in regards to the continuity and the expiration of the employment contract. A decision of termination that is based on an operational decision is also subject to a judicial review. Undoubtedly, the employer has the freedom to make a decision on his/her business to protect its economic future. Besides, economic consequences of these decisions will occur over the employer[17]. Therefore, operational decision and the purpose of this decision are not directly evaluated in the review of the termination. In the first place, the valid

12 **Soyer**, Feshe Karşı Koruma, p. 52.

13 For detailed information about operational decision, see **Engin**, İşletme Gerekleri**,** p.51 ff**; Bektaş Kar**, "İşletme, İşyeri Ve İşin Gereklerinden Kaynaklanan Nedenlere Dayalı Fesihlerde Yargısal Denetim", Çalışma ve Toplum Dergisi, Vol.17, 2008, p. 107 ff.

14 **Süzek**, İş Hukuku, p. 594; **Engin**, İşletme Gerekleri, p. 92; **Hamdi Mollamahmutoğlu/Muhittin Astarlı/Ulaş Baysal**, İş Hukuku, 6.edi., Ankara, Turhan Kitabevi, 2014, p. 1013; **Alp**, Hizmet Akitlerinin Sona Ermesi, p. 105.

15 **Muhittin Astarlı**, "Genel Ekonomik Kriz Dönemlerinde İşletme Gerekleri Nedeniyle Fesih ve Kısa Çalışma İlişkisi", Sicil İş Hukuku Dergisi, Vol.17, 2010, p.81.

16 **Gaye Burcu Yıldız**, "Türk İş Hukukunda Orantılılık İlkesi", Prof. Dr. M. Polat Soyer'e Armağan I, DEÜHFD, Özel Sayı, 2013, p. 686.

17 **Ömer Ekmekçi**, "Değerlendirme", Legal İş Hukuku ve Sosyal Güvenlik Hukuku 2005 Yılı Toplantısı: İş Güvencesi Kurumu ve İşe İade Davaları, İstanbul, Legal, 2005, p. 173.

reasons that are put forward by the employer are reviewed. As a second step, even if a valid reason exists, the proportionality of the termination is examined. Namely, when the termination of the employment contract is reviewed, termination as an operational measure can only be made as a result of an operational decision. Therefore, reviewing whether the termination is applied as a last resort does not interfere with the freedom of operational decision[18]. Evaluations which would intervene in the operational decisions should not be conducted while reviewing whether the principle of ultima ratio is followed or not. Indeed, in the Supreme Court decisions, it is emphasised that the judicial review with regards to the termination based on the business requirements is not about the operational decision. As per the Court's decision, a review on whether or not the operational decision is beneficial or fit for the purpose is not conducted. The employer can freely determine the purpose and the content of the operational decision. However, the employer should prove that the measure he/she has taken to enforce the operational decision has necessitated the termination and that the termination is based on a valid reason[19].

It should be noted that examining whether the principle of ultima ratio is applied only becomes an issue when a valid reason for the termination exists. Namely, examining whether termination is being applied as a last resort is only carried out if the reason that the employer gives is based on a valid reason. It is not necessary to examine the principle of ultima ratio when the given reason is not valid. In this case, termination will be deemed invalid since it is not based on a valid reason[20].

III. The Implementation of The Principle of Ultima Ratio in Turkish Labour Law

A. In General

The principle of ultima ratio is not explicitly regulated under Labour Law No. 4857. However, it is stated in the reasoning of Article 18 that termination should be applied as a last resort as follows; "It is expected from the employer to consider the termination as a last resort when implementing this practice. Therefore, it should be consistently examined whether there is a possibility to avoid the termination when making a comment in accordance with the concept of the valid reason." Even though the reasoning has such a provision, it is not possible to achieve a conclusion regarding the principle of ultima ratio from the wording of the law. However, as indicated above, the principle of ultima ratio should be acknowledged when the general principles of law and the principles specific to labour law are considered. The dominant opinion in the

18 **Astarlı**, Genel Ekonomik Kriz, p. 84.

19 Y. 9.HD, 15.6.2015, 9946/12122; 9.HD. 24.9.2008, 30742/24595, (Online), www.kazanci.com, 25.03.2019.

20 **Süzek**, İş Hukuku, p. 594.

doctrine also acknowledges the existence of the principle of ultima ratio[21]. However, as a counter-opinion, it is stated that the employer does not have the obligation to apply to termination as a last resort since the reasoning of the article is not of binding nature and the principle of ultima ratio is not regulated under the law. Pursuant to this opinion, for instance, the employer is not required to take other measures such as offering a new job or providing training when a part of a workplace is closed down. This would be an excessive intervention in the employer's decisions[22].

The Supreme Court sought compliance with the principle of ultima ratio in its decisions as regards to the review of termination[23]. Pursuant to the High Court, a valid reason cannot exist if it is possible to achieve the desired purpose with the operational decision by any means other than termination. Termination should not be resorted to when there is the possibility of achieving the purpose by removing overtime, bringing in flexible working arrangements with the employee's consent, extending the time of the work, placing the employee in another job or providing on-the-job training[24]. The measures that will be taken within the scope of ultima ratio and the practice of the Supreme Court are provided below.

In our law, the principle of ultima ratio first came to the fore with regards to termination based on business requirements. Indeed, in the reasoning of the relevant article of Law No. 4773 under which the job security system first came into force, it is explained that the employer is expected to consider termination as a last resort when making a termination arising from the business. Again, in the reasoning of the relevant article, cancelling overtime, shortening the working period with the employee's consent, introducing flexible working arrangements and providing on-the-job training are listed as the measures within the scope of ultima ratio. The Supreme Court has started to search for termination criteria based on the business requirements for reasons based on employees. As for today, the principle of ultima ratio is also applied to termination of employee's due to incapacity or behaviours[25].

It is emphasized in the doctrine that the measures which the Supreme Court introduced when reviewing the termination sometimes exceed the purpose of

21 **Nuri Çelik**, İş Güvencesi, İstanbul, Beta, 2003, p. 8; **Tankut Centel**, İş Güvencesi, İstanbul, Legal, 2013, p. 113; **A.Can Tuncay**, "Geçerli Nedenle İş Sözleşmesinin Feshi ve İşe İade Davaları", TÜSİAD İş Kanunu Toplantı Dizisi IV. İstanbul, 2007, p. 24; **Münir Ekonomi**, "Yeni İş Kanunu Çerçevesinde İş Sözleşmesinin Feshi ve İş Güvencesi", TÜSİAD İş Kanunu Toplantı Dizisi I, İstanbul, 2005. p. 50; **Çelik/Caniklioğlu/ Canbolat**, İş Hukuku, p. 518; **Süzek,** İş Hukuku, p. 593; **Güzel,** Son Çare İlkesi, p. 70; **Soyer**, Feshe Karşı Koruma, p. 51; **Alpagut,** İş Sözleşmesinin Feshi ve İş Güvencesi, p. 227; Engin, **İşletme Gerekleri**, p. 91.

22 **Ömer Ekmekçi**, "Yargıtay'ın İşe İade Davalarına İlişkin Kararlarının Değerlendirilmesi", Legal İHSGHD., Vol.1. 2004, p. 168.

23 Y. 9.HD, 28.4.2008, 2007-33518/10645, Legal İHSGHD., Vol.19, 2008, p.1123; Y. 9.HD, 16.12.2004, 27003/279998, **Güzel**, Keyfilik Denetimi, p.159; Y. 9.HD. 22.3.2007, 36997/8174, (Online), www.calismatoplum.org, 20.03.2019.

24 Y. 9.HD, 3.4.2014, 761/11250, 9.HD. 5.12.2005, 35749/38673 (Online), www.calismatoplum.org, 20.03.2019.

25 **Süzek**, İş Hukuku, p. 594; **Tuncay**, Geçerli Nedenle İş Sözleşmesinin Feshi, p. 24; **Alpagut**, İş Sözleşmesinin Feshi ve İş Güvencesi, p. 227;

the principle of ultima ratio[26]. The High Court ruled in one of its decisions that termination cannot be valid since measures such as reducing representation and marketing expenses, and making savings in the fees for telephones provided to the representatives were not taken. This decision was criticized in the doctrine on the basis that the above-mentioned measures were not alternatives to termination, and that the relevant measures were not less severe for the employer and did not fit the employer's benefits[27].

The principle of proportionality is also the main principle used as a base in the implementation and content of the principle of ultima ratio in Turkish law. The principle of proportionality arises from the implementation of righteousness and trust rules. This principle, which first arose in public law, is also acknowledged in private law. Whether or not there is a reasonable relationship between the means and the purpose is examined in the course of the review of proportionality. The review of proportionality in private law is the comparison of two values which run counter to each other and which the law protects[28]. The principle of proportionality should be considered when exercising constitutive rights because these are the rights which are being granted by the law and which provide the power to intervene in the third party's rights protected by law in private law. Specifically in terminations based on business requirements, the principle of proportionality is frequently resorted to when deciding between eliminating the need for labour and maintaining the employment relation.

It could be said that the principle of ultima ratio should be applied in the Turkish law both within the meaning of Article 2 of the Civil Code and in accordance with the existence purpose of the job security system. However, the implementation of this principle should not be of an absolute character and it should be evaluated by the judge in regards to the facts of each termination. In our country, due to the impact of economic crises, there has been an increase in the number of employees who request termination of the employment contract or urge the employer to do so by not accepting the alternatives asserted by the employer with a view to getting notice pay and severance pay. Accordingly, the purpose of the principle of ultima ratio should not be perceived as the absolute continuity of the employment relation. It should not be forgotten that one of the required criteria for the principle of ultima ratio is that the use of the alternatives asserted prior to the termination should be equally convenient for the employer, and that the employer should also be achieving the result desired to be attained with termination by means of relevant alternative measures. On the other

26 **Fevzi Şahlanan**, "Bireysel İş İlişkisinin Sona Ermesi ve Kıdem Tazminatı Açısından Yargıtay'ın 2003 Yılı Kararlarının Değerlendirilmesi" Yargıtay'ın İş ve Sosyal Güvenlik Hukukuna İlişkin 2003 Yılı Kararlarının Değerlendirilmesi, Ankara, 2005, p. 98; **Soyer,** Feshe Karşı Koruma, p. 54; **Tuncay,** Geçerli Nedenle İş Sözleşmesinin Feshi, p. 24.

27 **Şahlanan,** 2003 Yılı Kararları, p. 98; **Soyer**, Feshe Karşı Koruma, p. 54.

28 **Yıldız**, Orantılılık İlkesi, p. 682.

hand, when reviewing the compliance with the principle of ultima ratio; an appropriate review for the case at hand should be conducted and the concrete measures that could be resorted to instead of the termination should be examined and explained[29].

B. The Measures Taken within the Principle of Ultima Ratio and the Practice

Valid reasons for termination should primarily exist in order to consider termination as valid. These reasons can be related to the employee or to the business. If the employer can achieve the desired purpose of the termination in any other way, then this way should first be utilized despite the existence of a valid reason for termination. Accordingly, the principle of ultima ratio means that termination is inevitable despite the employer doing his/her best to keep the employee in the workplace[30]. The employer should resort to measures other than termination before termination. These measures are explained in the doctrine and in the judicial decisions. It should be noted that these measures vary as to whether the reason for termination relates to the employee or to the business. Particularly, in the reasons arising from the business, the measures that could be taken as a last resort are more diverse than the reasons arising from the employee.

In the first place, measures that could be taken in cases of termination arising from the behaviour and incapacity of the employee are those that avoid the implementations that could have an adverse effect on the employment[31]. In this regard, the employer should examine the conditions for the employee to keep working in the workplace. The employer is obliged to transfer the employer to a vacant position if the workplace has such a vacancy. Hiring another employee from outside and dismissing the employee cannot be accepted if there is a job that is suitable for the employee[32]. However, such an obligation does not exist if the relevant employee is not qualified for the position in a professional and personal sense[33]. A decision of the Supreme Court can be given here as an example. In the case in point, an employee who had fallen short of the standards required for being a flight attendant due to being overweight had his contract of employment terminated. However, the High Court decided that it should be examined whether it was possible to assign this person a position in ground handling services[34]. This decision was criticized on the grounds that it is necessary to preserve the delicate balance between protecting the employee from termination and

29 **Çelik/Caniklioğlu/Canbolat**, İş Hukuku, p. 518; **Engin**, İşletme Gerekleri**,** p. 92; **Kar**, Yargısal Denetim, p. 125.

30 **Centel**, İş Güvencesi, p. 113.

31 **Güzel**, Son Çare İlkesi, p. 73.

32 **Süzek**, İş Hukuku, p. 595.

33 **Alpagut**, İş Sözleşmesinin Feshi ve İş Güvencesi, p. 227.

34 Y.22.HD. 18.6.2012, 11598/23353, **Fevzi Şahlanan**, "İşçinin Fiziki Yetersizliği Nedeniyle İş Akdinin Feshi", Tekstil İşveren Dergisi, Ocak 2014, p. 2.

the employer's right to manage while operating the job security system[35]. In another case, an employer who was working as a regional manager in the workplace, had his/her contract terminated upon closure of certain departments including the department in which he/she was working. The Court of Appeal found that eighty persons were hired as medical promotion officers following the termination and decided to examine whether this job was offered to the employee under the principle that termination is the last resort[36].

Another decision of the Supreme Court on termination due to the employer's competence is highly interesting. In the relevant case, the plaintiff employee was working as a driver of a local public transport vehicle. The employee was admitted to psycho technical evaluation after having frequent accidents and it was determined that he/she was incompetent in visual continuity, visual perception, speed distance prediction and vision on traffic tests. After all evaluations had been completed, it was indicated in the report given by the experts that the driver was lacking the basic skills and abilities to use a vehicle and thus it was risky for the employee to work. The contract of the employee, who had been involved in eleven accidents in five years, was terminated for this reason. The High Court, after indicating that it was not appropriate to employ the employee as a driver, decided that as the defendant employer was a large public body with a large number of employees, the possibility of the plaintiff working in another unit should be examined upon consideration of his education and experience[37]. However, in doctrine, this decision of the Supreme Court was referred to as the intervention of the judiciary in the employer's right to manage. Pursuant to this opinion, this assessment of the court will also neutralize the law. Therefore, pursuant to the existing job security system, not only the incapacity of the employee but also the unavailability of another job in the workplace in which the employee can be employed will be necessary for terminating the employment contract. Such a ruling does not comply with the legal regulation on the job security system[38]. However, there are also opinions which consider the decision accurate within the principle of ultima ratio and stress the importance of the continuity of the employment contract in the job security system[39].

In cases of termination arising from reasons given by the employee or the business, if the employer has more than one workplace, it should also be examined whether it is possible to employ the employee in the other workplace as a last resort[40].

35 **Şahlanan**, İşçinin Fiziki Yetersizliği, p. 4.

36 Y. 9.HD. 31.3.2014, 791/10660, (Online) www.legalbank.net, 20.03.2019.

37 Y. 9. HD, 12.6.2007, 8740/18743, (Online) www.legalbank.net, 20.03.2019.

38 **Fevzi Şahlanan**, "İşçinin Mesleki Yetersizliği Sabit Olmasına Rağmen Çalıştırılabileceği Başka Bir İşe İadesi" , Tekstil İşveren Dergisi, Haziran 2008, p. 3.

39 **Talat Canbolat**, "Psiko Teknik Muayenede Yetersiz Görülen İşçinin Şoför Olarak Çalıştırılması Doğru Olmayacağından Önceki İşyerine, Çalıştırılması Mümkün Olan İşe İadesine Karar Verilmesi Gerekir", Sicil İş Hukuku Dergisi, Vol.9, 2008, p. 75.

40 Y. 9.HD. 12.7.2010, 26822/22726; 9.HD, .4.6.2007, 7926/17965, (Online) www.kazanci.com, 20.03.2019.

It goes without saying that the job in the other workplace should be appropriate to the employee's qualifications. The employer would not be expected to apply the principle of ultima ratio if there is no work appropriate to the employee's qualification in the other workplace. On the other hand, these workplaces should belong to the same natural or legal persons. The employer does not have the obligation to explore employment possibilities in another workplace that is a legal entity which is under the same group of companies[41]. It is also not required for the other workplace under question to be in the same line of business or the same city. Particularly in the case of closing down of a workplace, which is a reason arising from the business, it should also be explored whether the employee has the possibility of working in another workplace if the employer has such a place. However, contrary to this opinion, it could be stated that it is the decision of the employer to fulfil the need for the personnel in the workplace by either hiring a new employee or transferring an employee within the business. Pursuant to this opinion, it is the employer who can decide which choice is more appropriate and economic rather than the judiciary. Because it is the employer who completely bears the economic risk that this decision would create[42].

The High Court explained in one of its decisions regarding the matter that the companies affiliated with the same holding should be considered as different employers and thus the employer does not have the obligation of taking on the employee in these places. It was concluded in the same decision that, considering the employee was working in a department where production had almost completely come to a halt, it would be impossible to employ the employee in the sales and marketing department since sales and marketing is a job that requires training, knowledge and experience[43]. As can be seen, employing the employee in a new workplace should only come to fore when jobs that are appropriate to the employee's qualifications are available. Termination should be deemed valid when the employee's experience or training is not proper to perform the job.

In another case in the Supreme Court decision, after the holding decided to downsize, the companies affiliated with the holding were affected by this decision and resorted to dismissal after applying austerity measures. The Supreme Court in its decision on the matter stated that first, the purpose of the operational decision cannot be reviewed by the judiciary. It was explained in the decision that the inevitability of the termination would be reviewed within the technical frame rather than by an economic review, namely whether or not it terminated the possibility for the employee to work. In conclusion, the court decision emphasised that the inevitability of the

41 **Süzek**, İş Hukuku, p. 596; **Tuncay**, Geçerli Nedenle İş Sözleşmesinin Feshi, p. 24; **Centel**, İş Güvencesi, p. 114.

42 **Ekmekçi**, İş Güvencesi Kurumu, p. 173.

43 Y. 9.HD, 24.3.2008, 7977/6091**,** (Online) www.legalbank.net, 20.03.2019**.**

termination should be examined in the light of whether or not the decision made by the company had been applied consistently[44].

With regards to reasons for termination arising from the business, another measure that should be taken within the principle of termination being a last resort is subjecting the employee to on-the-job training[45]. The employer should resort to this measure if the employee can keep working in the workplace after having been trained[46]. For instance, if a product system that is based on new technology is adopted in the workplace, then the continuation of the employment relationship can be ensured by training that would ensure the adaptation to the new technology rather than resorting to termination. However, the relevant training should be reasonable as could be expected from the employer. It cannot be expected from the employer to provide training that would provide a new profession to the employee. This training should be completed in a reasonable period and it should place only a reasonable burden on all concerned. The employment contract of the employee can be terminated on grounds of incapacity if the employee cannot adapt to the job despite the training provided. However, it should be noted that the training provided should be proportional and reasonable for the employer. Training which is a long-term and very expensive is not proportional and reasonable. Again, it should not be expected that the training should be such a training that would bring a new skill or a new profession to the employee.

In the Supreme Court decisions, it is indicated that the employer can resort to measures such as adopting part-time working basis, introducing short-time employment, cancelling overtime, reducing the working hours in the workplace, giving the employee leave without pay[47], implementing flexible working arrangements in order to ensure the continuity of employment[48]. For instance, if the workplace has a labour force surplus and the termination is made for this reason, then overtime should be terminated[49]. Indeed, in the case of an employer who claims that there is a labour force surplus yet still applies overtime and terminates the employee's employment contract due to the labour force surplus, such a termination can be deemed invalid. However, it should be noted that it is not necessary for the employer to terminate overtime in the entire workplace. In particular, in large workplaces, it is possible to maintain overtime in the departments other than the department where the employees that will be dismissed work.

44 Y. 9.HD. 12.2.2015, 1199/6314, (Online) www.legalbank.net, 20.03.2019.

45 **Engin**, İşletme Gerekleri, p. 93.

46 Y. 9. HD, 10.4.2006, 7088/8976, (Online) www.legalbank.net, 20.03.2019.

47 For detailed information see **E**. **Murat Engin**, "İşletme Gerekleri ile Fesih ve Ücretsiz İzin", Legal İHSGHD, Vol.2, 2004, p. 540.

48 Y. 9.HD. 24.2.2016,26193/3803, (Online) www.calismatoplum.org, 20.03.2019.

49 Y. 9.HD, 8.7.2003, 12442/13123, **Tankut Centel**, "Ekonomik Nedenle İşten Çıkarma" Tekstil İşveren Dergisi, Vol.286, 2003, p. 32; 9.HD. 8.11.2004, 12698/25058, Legal İHSGHD, Vol.5, 2005, p. 278.

As in the case of employing the employee in another workplace of the employer, if there is the possibility to place the employee in another job in the same workplace, then this should be chosen first before termination. However, it cannot be expected from the employer to employ the employee in this workplace if there is no available job[50]. On the other hand, the invalidity of the termination should be accepted if the employer does not place the employee in another job fit for him/her yet hires another employee to work there. Not examining whether there is a possibility of employing the employee in another job does not cause the invalidity of the termination per se. What is important for the validity of the termination is whether it is actually and really possible to employ the employee in another job in the workplace[51].

The measures that could be taken as a last resort usually mean making changes in the employee's working conditions. Basically, changing the job or workplace of the employer, giving leave without pay, moving to a flexible working arrangement mean material alterations in the working conditions. It cannot be said that a valid reason for termination exists if the employee can work with the changed conditions. In this sense, measures such as changing the working conditions, reducing premiums and bonuses or even the salary could be resorted to. The consent of the employee is required pursuant to Article 22 of Labour Law if the relevant change introduces a material change against the employee. The measure that was taken as a last resort can be applied if the employee gives consent, yet termination of change could come to the fore when the employee does not give consent[52].

IV. Conclusion

The general rule within job security is to maintain the employment contract as long as possible and prevent the employee from losing his/her job. Therefore, valid reasons for termination are listed and termination is subjected to a certain form. However, despite the existence of these valid reasons, the employer's termination based on this reason is limited by also introducing certain principles. The principle of ultima ratio, which is also covered under the principle of proportionality and essentially based on the principle of good faith, is one of these principles.

The principle of ultima ratio means that all possible means to avoid termination before terminating the contract should be used and the employment contract could be terminated if it cannot be maintained. It should be also consistently examined whether there is a possibility to avoid the termination. Therefore, certain principles should be resorted to in the course of reviewing termination although this is not regulated under Labour Law. The principle of ultima ratio is a principle that is set

50 **Alpagut**, İş Sözleşmesinin Feshi ve İş Güvencesi, p. 228.

51 **Kar**, Yargısal Denetim, p. 124.

52 **Süzek**, İş Hukuku, p. 597.

forth in the decisions of the Supreme Court and the doctrine although it was not introduced by the Labour Law. This principle, which was first acknowledged for the termination based on the business requirements, has also been applied later to the reasons arising from the employee.

It should also be carefully examined whether the measures that should be taken are expedient when implementing the principle of ultima ratio. The measures which are excessively expensive for the employer should not be considered as a last resort. On the other hand, the employer is not obliged to implement the measures that were taken if the relevant measures do not comply with the purpose desired to be achieved with the termination. The expediency of the measures taken should be evaluated specific to each case.

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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

Overview of the Definitons of Data Controller and Data Processor within the Scope of The Turkish Code of Personal Data Protection (TCDP)

Kişisel Verilerin Korunması Kanunu Kapsamında Veri İşleyen ve Veri Sorumlusu Kavramı Üzerine Değerlendirme

Cuneyt Pekmez[1]

Abstract

The definition of data controller based on TCDP Art. 3: (ı). The definition of controller within the TCDP requires four main elements; 1) the data processing, 2) determining the purposes and means of the processing of personal data, 3) the natural or legal person, 4) alone or jointly with others. For secondary elements, the provision TCDP Art. 3(ı) seemingly entails two elements within the determination of data controller. The first element is to determine the purpose and means of processing personal data, the second is to establish and manage the data registry system. The first and second elements should not exist cumulatively. In fact, the first element contains all the constitutents of the second element that were implied in TCDP Art. 3 (ı), since the establishment of a personal data registry system requires a determination of the means of collecting and recording personal data. The management of the data registry system requires the performance of one of the operation listed within the scope of the processing of personal data and can therefore be evaluated within the scope of processing personal data. Considering the definitions of data controller and processor in the TCDP, even though the data controller and the data processor are likely to be identified separately in the TCDP, a natural or legal person may have both the title of data controller and data processor. When a processor deviates from the instructions of a controller, the processor becomes the "de facto" controller. This embraces those cases where the processor doesn't act on behalf of the controller, rather acts on his/her own behalf. In this context, there will be two separate data controllers. Although the TCDP does not explicitly refer to it, the "de facto" data controller should also be allocated the responsibilities and obligations of the "legal" data controller in the TCDP.

Keywords

Personal data, The data controller, The data processor, Data processing, The data registry system

Öz

Kişisel Verilerin Korunması Kanunu (KVKK) m.3 (ı) de tanımlanan veri sorumlusu kavramı 4 ana unsurun mevcudiyetinin incelenmesini gerektirmektedir. 1) veri işleme 2) veri işleme araç ve amacının belirlenmesi 3) gerçek veya tüzel kişi 4) birlikte veya yalnız veri sorumlusu. İkinci unsur bakımından KVKK m. 3 (ı) görünürde iki unsurun varlığını gerektirmektedir. İlk unsur kişisel verinin işlenmesinin amaç ve aracının belirlenmesi, ikinci unsur ise veri kayıt sisteminin kurulması ve yönetilmesidir. Bu ikinci unsur, ilk unsurdan farklı, onunla birlikte aranması gereken bir unsur olarak değerlendirilmemelidir. Bu ikinci unsur ilk unsurun içerisinde değerlendirilmelidir. Çünkü veri kayıt sisteminin kurulması kişisel verilerin toplanması ve kaydedilmesi aracının belirlenmesini gerektirir. Veri kayıt sisteminin yönetilmesi ise kişisel verilerin işlenmesi çatısı altında belirtilen işlemlerden en az birinin varlığını gerektirir. Dolayısıyla bu ikinci unsura veri sorumlusu tanımı bakımından gerek yoktur. KVKK' da yer alan veri sorumlusu ve veri işleyen tanımları göz önüne alındığında veri sorumlusu ve veri işleyen ayrı iki kişi olarak görülebilse dahi, bir gerçek veya tüzel kişi hem veri sorumlusu hem de veri işleyen sıfatına sahip olabilir. Veri

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işleyen veri sorumlusunun talimatlarından ayrıldığı ve kendi adına veri işleme araç ve amacını belirlediği andan itibaren artık fiili veri sorumlusu niteliğini haiz olacaktır. Bu kapsamda iki ayrı veri sorumlusu ortaya çıkacaktır. KVKK açıkça bu duruma işaret etmemiş olsa dahi, fiili veri sorumlusunun varlığını kabul etmek ve KVKK'da öngörülen veri sorumlusunun yükümlülüklerine tabi olduğunu belirtmek gerekir.

Anahtar Kelimeler
Veri, Veri sorumlusu, Veri işleyen, Veri işleme, Veri kayıt sistemi

Overview of the Definitons of Data Controller and Data Processor within the Scope of The Turkish Code of Personal Data Protection (TCDP)

I. Introduction

The need for data and its processing processes has increased significantly in today's technology and information focused society. This situation creates different challenges in terms of the protection of personal data. To provide this protection, law makers have a tendency within their legal systems to adopt specific provisions or codes. Thus, by adopting the Turkish Code of Personal Data Protection (TCDP) under No. 6698, Turkish lawmakers tend to meet this need. The TCDP regulates the data controller's and data processor's obligations and responsibilities seperately. Thus, the definition of "data controller" and "data processor" in the TCDP are especially crucial. The application of provisions related to obligations and responsibilities in the TCDP depend on the identification of the data controller and the data processor and seems to pose different challenges. In our study, in order to achieve a better understanding of the terms of the data controller and the data processor, the definition of data controller and data processor will be examined only within the scope of the TCDP. In this context, we will be able to put forward suggestions to minimize any problems that might arise. By doing this, it should be noted that we do not intend to compare European Law and Turkish Law as to the definition of data controller, but we will use the case law of main European countries in order to give a better understanding about the data controller and data processor.

II. Analysing the Definiton of the Data Controller within TCDP Art. 3 (ı)

According to TCDP Art. 3 (ı), data controller is the natural or legal person who determines the purposes and means of processing personal data, and is responsible for establishing and managing the data registry system. We will try to analyze the definition of controller under four primary elements which must be analyzed separately. They are as follows:

- the data processing,
- determining the purposes and means of the processing personal data,

- the natural or legal person,
- alone or jointly with others[1].

A. Data Proccessing

Firstly, it is necessary to analyze the element of data processing in order to achieve a better understanding of determining the purpose and means of processing and to identify the data controller. According to TCDP Art. 3 (e), the processing of personal data is any operation performed upon personal data such as the collection, recording, storage, retention, alteration, re-organization, disclosure, transferring, taking over, making retrievable, classification or preventing the use thereof, fully or partially through automatic means or provided that the process is a part of any data registry system through non-automatic means. Each of these processes is considered within the scope of processing personal data[2]. The determination of purposes and means of each of these operations is therefore crucial criteria for the nomination of data controller.

B. Determining the Purposes and Means of Processing Personal Data

TCDP Art. 3 (ı) appears to involve two elements within the scope of the determination of data controller. The first element is the determination of purpose and means of processing personal data, the second is the establishment and management of the data registry system[3].

The data controller determines the purposes and means of the operation listed in TCDP Art. 3 (e). The determination of purposes and means of processing personal

1 These main elements are linked with each other separately and closely. See: Article 29 Data Protection Working Party, **"Opinion 1/2010 on the concepts of "controller" and "processor"**, 2010, p. 7. (http://ec.europa.eu/justice_home/fsj/privacy/index_en.htm00264/10/EN WP 169 Opinion 1/2010 on the concepts of "controller" and "processor")

2 Hüseyin Murat Develioğlu, **6698 sayılı Kişisel Verilerin Korunması Kanunu ile Karşılaştırmalı Olarak Avrupa Birliği Genel Veri Koruma Tüzüğü uyarınca Kişisel Verilerin Korunması Hukuku**, On İki Levha, İstanbul, 2017, p. 40; Elif Küzeci**, Kişisel Verilerin Korunması**, 3. Baskı, Turhan, Ankara, 2019, p. 323; Christopher Modschein/ Cosimo Monda, **"EU's General Data Protection Regulation (GDPR) in a Research Context"**, Fundemantals of Clinical Data Science, Springer, 2019, p. 61. (pp. 55-74); IT Governance Privacy Team, **Eu General Data Protection Regulation –An Implementation and Compliance Guide**, 2. Ed., 2017. p. 19; İbrahim Korkmaz, " **Kişisel Verilerin Korunması Kanunu Hakkında Bir Değerlendirme**", TBB 2016/214, p. 95 (pp. 82-152); Stefan Brick/ Heinrich Amadeus Wolff, **BeckOK Datenschutzrecht**, 27. Ed. München, 2019, Art. 4, N. 35 vd; Jürgen Kühling/ Benedikt Bunchner, **Datenschutz-Grundverodnung/ BDSG**, 2. Aufl, München, 2018, Art.4, Nr. 2/ 20-37.
The data processing is not, however, restricted to operation listed in the relevant provision. See. W. Gregory Vois, "**European Union Data Privacy Law Reform: General Data Protection Reguation, Privacy Shield, and the Right to Delisting**", The Business Lawyer, 2016-2017/ 72, p. 222 (pp. 221-233); **Küzeci**, p. 323; İlke Gürsel, "**Protection of Personal Data in International Law and The General Aspects of Turkish Data Protection Law**", DEUHD, 2016/1, p. 47 (pp. 33-61).

3 According to Art.4 VII of General Data Protection Regulation (GDPR), 'controller' means the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data. In order to identify data controller, it is necessary to determine who decides on the purpose and means of processing personal data. See. Jürgen Hartung/ Lisa Büttgen, **"Die Auftragsverarbeitung nach der DS-GVO**", DuD 2017/9, pp. 550-551; Stefan Seiter, "**Auftragsverarbeitung nach der Datenschutz-Grundverordnung**" DuD 2019/3, p. 128 (pp. 127-133). However, GDPR Art. 4 VII regulates only the first element of TCDP Art. 3 (ı) with regard to data controller.

data amounts to the determination of why and how personal data is processed. In this context, the main issue is who determines the purpose and means of processing personal data. This issue especially gains importance when multiple actors are involved in processing personal data. In these cases it is necessary to clarify which of those actors is considered as the data controller. First of all, determining the purposes and means of the operation depends on the specific circumstances of the concrete case where processing personal data takes place. In these cases, it is crucial to determine the role of any possible related actors in processing personal data. For instance, If one of them (A) gives clear instructions to others (B,C) in order to process personal data, the others (B,C) have to rely on the legal basis of instructor (A). But only one legal entity (A) is entitled to use and benefit from the processed personal data. In this context, the instructor (A) is the data controller when the third parties are involved in processing as data processors [4]. Under the legal basis of the data controller, the data processor is likely to determine the means of processing personal data. In this case, due to the reasons we have mentioned above, the data processor may not also be considered as data controller.

It is also debatable in terms of the definition of data controller in TCDP Art. 3 (ı): Should one, who determines the purpose and means of processing personal data (the first element), also be responsible for managing and establishing the data registry system (the secondary element) ? Should the first and second factors be dealt with cumulatively? Doctrine has generally excluded the secondary element and has only dealt with the first element in TCDP Art. 3 (ı) to identify the data controller[5].

In our opinion, the secondary element should not be considered cumulatively with the first element in TCDP Art. 3 (ı). In this context, the first element contains the constituents of the second element. This is because, the establishment of a data registry system amounts to the determination of the means by which personal data are collected and recorded. TCDP Art. 3 (e) listed the operations of the collection and recording under the exemplary operations of processing personal data.

In this context, the means of collecting and recording personal data may include the means of establishing a data registry system. The means of collecting and recording personal data is a broader means than the previous one. Thus, one who establishes a data registry system is also the one who determines the means of collecting and recording personal data and the data controller who decides on the purposes and the means of the processing personal data as regards the first element.

In terms of the management of a data registry system, the manager of the system

4 For the example of mail marketing. See. **Art. 29 Data Protection Working Party**, p. 13.

5 **Develioğlu**, pp. 41-42; Tekin Memiş, **"Veri Sorumlusu ve Veri İşleyen Arasındaki İlişkiler ve Sorumluluk Düzeni"**, BÜHFD, 2017/ 6, pp. 10-11; Damla Gürpınar, **"Kişisel Verilerin Korunamamasından Doğan Hukuki Sorumluluk"**, DEÜHFD, 2017/ Special Issue, p. 685 (pp. 679-694); **Korkmaz**, p. 98.

is the one who decides whether or not the personal data will be processed or how the personal data will be processed. The management of the data registry system requires one of the operations listed within the scope of the processing of personal data and can therefore be evaluated within the scope of processing of the personal data. For instance, X company, which is active on social media and known as web 2.0[6], establishes an online platform to collect and store personal data, and manage the platform and is also a legal entity that establishes and manages the data registry system. It decides which personal data will be processed and why or how this personal data will be processed. Therefore X company is the data controller as a legal entity determining the means of collecting and storing personal data, i.e. processing personal data[7].

As a preliminary result, the secondary element is not a mandatory factor in terms of determining who the data controller is. However it is a descriptive factor[8]. When a legal entity decides how and why the personal data are processed, the legal entity is data controller[9]. This determination(the first element) is necessary and sufficient to identify the data controller, but it is also unnecessary to determine whether or not the data controller establishes and/or manages the data registry system (the secondary element).

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6 It is difficult to determine who the data controller is, where data processing is performed by artificial intelligence (AI), known as web 3.0, which is capable of processing personal data more extensively and faster through automatic means. According to one view, it is important to find out who benefits from processing personal data Bkz. **Memiş**, p. 12; in terms of the definition, the answer to the following questions will help to identify the data controller on Web 3.0. Is there any possibility of accessing the data obtained and processed by artificial intelligence? If the answer is no, we can ask who benefits from processing the personal data taken place by Artificial İntelligent (AI). However, it should be answered that if these data are accessible, who determines the means and purpose of obtaining and processing the data?

7 However, it can hardly be said that X company is a data controller if it does not have access to the data obtained through the platform X built. The same applies to web page managers without data access , see. Paul Voight/ Stefan Alich, "**Facebook-Like-Button und Co. – Datenschutzrechtliche Verantwortlichkeit der Webseiten-betreiber"**, NJW 2011/ 49, p. 3543; **Memiş**, p. 11; where both X and third parties are able to obtain these data, they are both data controllers as they have jointly determined purpose and means of processing personal data. Same for this see: According to the decision of the European Court of Justice, Facebook and Wirtschaftsakademie Schleswig-Holstein company, managing a fun web page via Facebook, are both data controllers. For this decision see. **Court of Justice of the European Union, No 81/ 18, Case - 210/16, 5 June 2018;** for view that decision is right see. Thorsten Heermann, **EUGH: Gemeinsame Verantwortung für den Datenschutz bei Facebook-Fanpages"** ZD-Aktuell 2018/11, 06176.
According to another decision by the European Court of Justice on 29 July 2019, the Court ruled that Fashion ID, who embeds a social plugin on that website causing the browser of a visitor to that website to request content from the provider of that plugin and, to that end, to transmit to that provider personal data of the visitor, is data controller. According to the Court, because the operations involving the processing of personal data in respect of which Fashion ID is capable of determining, jointly with Facebook Ireland, the purposes and means are the collection and disclosure by transmission of the personal data of visitors to its website. However, Fashion ID do not determine the purposes and means of subsequent operations involving the processing of personal data carried out by Facebook Ireland after their transmission to the latter, so that Fashion ID cannot be considered to be a controller in respect of those operations. See **Court of Justice of the European Union, Case- 40/17, 29 July 2019;** for the same decision of Court of European Union. According to the Court, a religious community is a controller, jointly with its members who engage in preaching, for the processing of personal data carried out by the latter in the context of door-to-door preaching organised, coordinated and encouraged by that community, without it being necessary that the community has access to those data. **Court of Justice of the European Union, Case- 25/17, 10 July 2018.**

8 GDPR regulates on Art. 4 VII that the purposes and means of such processing may be determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law. In our opinion, this second factor may not be specific criteria for the controller's nomination in this context. See. **Modschein/ Monda,** p. 61.

9 There are three categories used to identify data controller; control stemming from explicit legal competence, from implict competence and from factual influence, the first two may cover more than 80% of relevant situations in practice. See **Art 29 Data Protection Working Party**, pp. 10-12; the TCDP includes the latter under these categories on itself.

C. Data Controller As A Natural or Legal Person

Under TCDP Art. 3 (1), the data controller may be a natural or a legal person. First, the data controller can be a natural person. For instance, a lawyer is a data controller, when the lawyer decides when and how the clients' personal data will be obtained or for which purpose the clients'data are processed or the length of storing their data. This is also valid even though the official assistants of the lawyer or the law office staff take part in data processing[10]. However, as we will discuss in detail below, the one, who processes the personal data on the legal basis of the lawyer or on behalf of the lawyer, becomes the data processor. Second, the data controller may be a legal person. For instance X company, as we have already discussed above, can be a data controller under certain circumstances. In terms of the legal persons, the bodies and employees, natural person who constitute the legal person will be able to carry out work and operations that will have legal consequences for the legal person. Therefore, even if these natural persons determine the purpose and means of data processing within the scope of the legal person's activity, as a rule, the legal person will be the data controller[11] and have the rights and obligations of the data controller. For example, in a car rental company, although the customers' personal data are obtained and stored by the companies' employees, the data controller will not be the companies' employees but will be the car rental company itself.

Finally in this section, the TCDP has made no distinction between private or public law in terms of legal persons who have the title of data controller,[12]. Thus, the cooperations, companies, associations, foundations, state institutions and organizations may be the data controller. In this sense, it can clearly be observed that the scope of application of the concept of"data controller" has been expanded in the TCDP.

D. Joint or Alone Controller ?

Although it states that the data controller is the natural or legal person deciding "why" and "how" processing the data takes place, the TCDP has not explicitly stated that the data controller can be more than one person. It can be concluded from TCDP Art. 3 (1) that the data controller must be *a natural or legal person*. However this does not lead to the conclusion that the data controller may not be more than one legal person who decides the purposes and means of processing personal data, especially considering the definition of data controller under GDPR Art. 4 (7).

10 According to GDPR Art. 4 (10), third party means a natural or legal person, public authority, agency or body other than the data subject, controller, processor and persons authorized to process personal data under the direct authority of the controller or processor; consequently, the lawyer's aide and/or staff is third party pursuant to GDPR Art. 4 (10). Even though the TCDP includes no determinaton of third party, it doesn't effect the title of data controller and data processor.

11 **Memiş**, pp. 20-21; same for Directive 95/46 EC, see. **Art 29 Data Protection Working Party,** p. 15

12 **Memiş**, pp. 10-11; **Develioğlu**, p. 42; KVKK, **Data Protection in Turkey**, Ankara, p. 8.

According to GDPR Art. 4, the data controller is the natural or legal person alone or jointly with others, determines the purposes and means of the processing of personal data. Moreover, GDPR Art. 26 states that where two or more controllers jointly determine the purposes and means of processing, they shall be joint controllers[13]. The TCDP does not include such a provision,but in our view, this provision of the GDPR can also be applied under the TCDP. If two or more natural or legal persons have jointly decided to determine the purposes and means of processing personal data, then there is no hesitation that they are jointly data controllers. For instance, when two lawyers working together have determined the purposes and means of processing the personal data of their clients, both are the data controllers.

The main question arising is: Would it be possible to designate the data controllers as the joint data controllers in terms of people who seperately but not jointly, determine the means and purpose of processing personal data? In this case, these data controllers are not the joint controller on the basis of GDPR Art. 26. Because this provision explicitly states that the purpose and means of processing personal data shall be determined by joint decision. Therefore, if the joint decision has not been made, they are the separate data controllers. This conclusion also applies within the scope of the TCDP.

III. Definition of "Data Processor" within the TCDP

The TCDP defined the limit between the data processor and the data controller and regulated a stricter level of responsibility and liability attached to data controller than to processor. So the setup and due diligence in identifying the roles between these notions is crucial. The question of who is the processor should be answered.

According to TCDP Art. 3 (ğ), the processor is the natural or legal person who processes the personal data on behalf of the controller upon his authorization[14]. The data processor is the legal or natural person who has performed one of the operations listed in TCDP Art. 3 (e) on behalf of the controller.

Generally, the data processor is the person authorized to process data and the data proccessor contracts with the data controller. Within the application of the provisions of the contract, the data processor does not act on his/her own behalf, but he/she acts on behalf of the data controller. The data controller gives the data processor the instructions about the data processing, the data processor acts on behalf of the controller and processes the personal data in accordance with instructions after the

13 The data subject may raise his or her rights against each of the joint controllers under GDPR. See. **Vois**, pp. 227-228; generally same for it, see. **Art 29 Data Protection Working Party,** p. 24.

14 GDPR Art 4 (8) regulates that 'processor' means a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller. In this context, the GDPR and theTCDP have a paralel provision. For processor, TCDP Art. 3 (ğ) has not distinguished between private and public agencies. See. **Küzeci**, p. 319.

data controller determines the purposes and means of processing data. Therefore, as a rule, the responsibilities, liabilities, rights and obligations stemming from the processing of the personal data belong to the data controller, and not to the data processor[15]. For instance, according to TCDP Art. 11, each person has the right to apply to the data controller for the purpose of fulfilling request and obtaining certain information listed under same provision.

The fact that the data processor is the natural or legal person in this context does not make any difference in terms of the title of data processor. The data processor may be the legal or natural person. If the data processor is the natural person, the data processor's aides and/or staff involved in processing may not have the title of data processor. The natural person, to whom the relavent instructions are directed and who is the party of the data processing contract, has the title of data processor.

As far as the legal person is concerned, the legal person has the title of data processor even though the employees of thed legal person are involved in data processing. For instance, bank (A) wants to create projects through taking advantage of its customers' personal data. In order to do this, (A) forms a contract with digital service provider (D) which is a legal person. Even though (D)'s employees process the personal data of (A)'s clients, the title of data processor belongs to (D).

IV. The Distinction Between Data Controller and Processor in Terms of Relevant Definitions

A. Acceptability of "De Facto" Data Controller

Considering the definitions of data controller and processor in the TCDP, even though the data controller and data processor are likely to be identified separately, a natural or legal person may have the titles of both data controller and data processor.

There may be several different combinations of data controller and processor relationships. The data controller and processor can be one legal entity or organization or be separate legal entities or organizations. In these cases, it is necessary to investigate and check the roles of the legal entities within the process. For instance, when a consumer product company hires a marketing agency to profile their consumer, the consumer product company will be the data controller, the marketing agency will also be the data processor. However, in the same case, if the marketing agency will decide how and why the data is used, it could be the data controller[16].

15 Same For GDPR. See. **Seiter**, p. 128; W. Gregory Vois, "**European Union Data Privacy Law Reform: General Data Protection Reguation, Privacy Shield, and the Right to Delisting**", The Business Lawyer, 2016-2017/ 72, p. 226 (pp. 221-233).

16 See for instance: IT Governance Privacy Team, **Eu General Data Protection Regulation –An Implementation and Compliance Guide**, 2. Ed., 2017. p. 19; see. **Küzeci,** p. 320.

The distinctive criteria on this issue is whether or not the data processor acts on behalf of the controller. Where the data processor deviates from the instructions of the data controller, the data processor becomes the "de facto" data controller[17]. In this case he/ she doesn't act on behalf of controller, rather acts on his/her own behalf. This does not effect the title of instructor as data controller. In this context, there can be two seperate data controllers[18].On the one hand, the instructor is the "legal" data controller, and on the other hand the data processor is the "de facto" data controller. The TCDP-based definition of the data controller does not distinguish between the data controller by law or contract and one by de facto. TCDP Art. 3(ı) also supports this factual approach by regulating that the data controller is not the one who is "legally" supposed to determine the purpose and means, but the one who actually determines the purpose and means[19].

B. The Conclusions of Accepting the "De Facto" Data Controller

Considering the definition of the data controller in the TCDP, the acceptance of two separate data controllers will result in an outcome. The TCDP regulates the various obligations and responsibilities of the data controller. For instance, TCDP Art. 10 requires the data controller to inform the data subject about the issues listed in TCDP Art. 10[20]. In this perspective, the TCDP allocates the obligations and responsibilities only to the data controller and the person authorized by the data controller. As well as the data, the subject has the right to apply only to the data controller stated in TCDP Art. 11. The title of data controller and data processor seems to be dealt with separately in these provisions. However, the TCDP regulates responsibility for processing the personal data jointly under TCDP Art. 12. According to TCDP Art. 12 I;

"…the controllers are obliged to take all necessary technical and administrative measures to provide asufficient level of security in order to prevent unlawful processing of personal data and unlawful access to personal data, to ensure the retention of personal data…"

17 **Modschein/ Monda,** p. 61; **Art 29 Data Protection Working Party,** p. 17

18 The designation of data controller by contract or law is not decisive in determining its actual status, which must be based on concrete, specific circumstances from which factual influence can be inferred. See. **Art. 29 Data Protection Working Party**, p. 9**; Hartung/ Büttgen**, p. 551.

19 However this conclusion does not exclude the data controller from being identified explicitly by national law establishing a task or imposing a duty on a legal entity to process personal data. In some countries, we can see that the national law provides that public or private legal entities are responsible for the processing of personal data within their duties. See **Art. 29 Data Protection Working Party**, p. 10; we can see an example of this issue in the German Traffic Road Code §63a. See. Klink-Straub/ Straub," **Nachste Ausfahrt DS-GVO-Datenschutzrechtliche Heraus-forderungen beim automatisierten Fahren"**, NJW 2018, pp. 3202-3203.

20 For this provision and other responsibility of tha data controller. See. Nafiye Yücedağ, "**Medeni Hukuk Açısından Kişisel Verilerin Korunması Kanunu'nun Uygulama Alanı ve Genel Hukuka Uygunluk Sebepleri**", İÜHFM, 2017/2, p. 778; A. Çiğdem Ayözger, **Kişisel Verilerin Korunması**, Beta, İstanbul, 2016, p. 141; Nafiye Yücedağ, "**Kişisel Verilerin Korunması Kanunu Kapsamında Genel İlkeler**", Kişisel Verileri Koruma Dergisi 2019/1, pp. 48 vd.

According to Art. 12 II,

"In case of the processing of personal data by a natural or legal person on behalf of the controller, the controller shall jointly be responsible with these persons for taking the measures laid down in the first paragraph."

These two provisions relating to personal data security explictly regulate the joint responsibility of the data controller and the data processor, even though they are not explictly identified as "joint data controller" [21].

In our opinion, it is not in accordance with GDPR in terms of the definition of the data controller that the TCDP took into account a single data controller whilst establishing the provisions. Although the TCDP does not explicitly accept the term of "the joint data controller", it is not concluded that the TCDP explicitly rejected "the joint data controller". Within the scope of the TCDP, more than one legal entity may also have the title of data controller by jointly deciding on determining the purposes and the means of processing the personal data. In this perspective, the "joint data controller" is accepted within the scope of the TCDP in a similar way to the GDPR. Moreover, we have to mention the "de facto" data controller when there are more than one legal entities deciding on it not jointly, but having the title of data controller pursuant to TCDP Art. 3.

The legal entities other than those identified as the data controller pursuant to TCDP Art. 3 (ı) may also be the "de facto" data controller when these decide on determining the purpose and the means of processing the personal data. The data processor among these legal entities is more likely to be a "de facto" data controller. Is the data processor, determining the purpose and the means of processing personal data actually, liable for responsibilities and obligations in the TCDP which the title of data controller is intended to allocate? Based on the definition of the data processor in TCDP Art. 3 (ğ), the data processor upon the data controller's authorization is not the data controller, thus he/she is not liable for responsibilities and obligations in the TCDP which the title of data controller is intended to allocate. When the data processor de facto deviates from the data controller's authorizations and has de facto the title of data controller based on TCDP Art. 3 (ı), the "de facto" data controller is subject to responsibilities and obligations of the "legal" data controller based on TCDP[22].

In our opinion, although the TCDP does not explicitly refer to it, the de facto data controller should also be allocated the responsibilities and obligations of the data

21 For this provision. See. **Memiş**, p. 17; **Küzeci**, pp. 357-358.

22 To some extent, one may give the data processor authority to decide on determination of special means of processing personal data, the determination of person deciding on determination of the purpose and the means of processing personal data depends on actual circumstances. See. **Hartung/Büttgen,** p. 551.

controller in the TCDP. With regard to TCDP Art. 11 regulating the rights of the data subject, the data subject should be able to apply to the legal entity which is the de facto data controller[23]. For instance, according to TCDP Art. 11 (d), the data subject has the right to request the rectification of the incomplete or inaccurate data if any, by applying to data controller. In our opinion, the data subject should also claim his rights against the data processor or legal entity having the title of the "de facto" data controller.

The TCDP enables the data processor to act as the data controller's representative upon the data controller's authorization in terms of task and operation related to processing data. However, the liability and obligations arising from processing personal data are not on the data processor, rather, they are on the data controller. The data processor also depends on the data controller's instruction to perform the obligations of the data controller. Where the data processor becomes the "de facto" data controller, he/she is also responsible for the data controller's obligations laid out in the TCDP.

V. Conclusion

The definition of data controller is based on TCDP Art. 3 (ı). According to TCDP Art. 3 (ı), a data controller is the natural or legal person who determines the purpose and means of processing personal data, is responsible for establishing and managing the data registry system. The definition of controller within the TCDP requires four main elements; 1) the data processing, 2) determining the purposes and means of the processing of personal data, 3) the natural or legal person, 4) alone or jointly with others. These four main elements are related with each other. Of these elements, the second and fourth elements are especially debatable. For second elements, the provision TCDP Art. 3(ı) seemingly entails the two elements within determination of the data controller. The first element is to determine the purposes and means of processing the personal data, the second is to establish and manage the data registry system. This second factor should not be jointly considered as an element with the first element. Elements for the second factor stated in TCDP Art. 3 (ı) fall even under the first factor and may be assessed in this context because the establishment of a personal data registry system requires determination of the means of collecting and recording personal data. Given the management of data registry systems, the one who manages the data registry is the one who decides on whether or not the data will be processed or how the data will be processed. The management of the data registry system requires that the one of the operation listed within the scope of the

23 According to TCDP Art. 11 (ğ), the data subject has the right to request compensation for the damage arising from the unlawful processing of his personal data by applying to data controller. In our opinion, the data subject has this right also by applying to the data processor ("de facto" data controller). This provision is more likely to occur in circumstances in which the data processor is identified as "de facto" data controller.

processing of the personal data takes place and therefore may be evaluated within the scope of processing of the personal data. The TCDP has defined the limit between the data processor and the data controller and has regulated that a higher level of responsibilities and liability should be attached to the data controller than to the processor. The setup and due diligence in identifying the roles betweeen these notions is crucial. According to TCDP Art. 3 (ğ), the processor is the natural or legal person who processes the personal data on behalf of the controller upon his authorization. Considering the definitions of the data controller and the processor in the TCDP, even though the data controller and data processor are likely to be identified separately, a natural or legal person may have both the title of data controller and data processor. When the processor deviates from the instructions of the controller, or, to put it another way, when he/she doesn't act on behalf of the controller but rather acts on his/her own behalf, the processor becomes the de facto controller. In this context, the instructor as the "legal" data controller, and the data processor as the "de facto" data controller are two separate data controllers. Although the TCDP does not explicitly refer to it, the de facto data controller should also be allocated the responsibilities and obligations of the legal data controller in the TCDP.

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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

Provisions of the Industrial Property Law Regarding Representative (Agent) Trademarks and Claims Based on Such Provisions

Sınai Mülkiyet Kanununun Temsilci Markasına İlişkin Hükümleri ve Bu Hükümlere Dayalı Talepler

Ismail Cem Soykan[1]

Abstract
This article has been written to review the provisions of Industrial Property Law Nr. 6769 regarding representative trademarks as well as the claims based on such provisions. The article first describes the common subjects of the provisions on representative trademarks, followed by the exceptional characteristics of the provisions. Afterwards, the common conditions required for implementation of provisions on representative trademarks are reviewed. Following the review of the common conditions, the claims based on provisions regarding representative trademarks are described. Finally, the issues regarding time-dependency of such claims and registration in bad faith are discussed.

Keywords
Mark, Trademark, Agent Trademark, Representative Trademark, Industrial Property Law, Trademark Law, Paris Convention for the Protection of Industrial Property

Öz
Bu makale, 6769 sayılı Sınai Mülkiyet Kanunu'nda yer alan temsilci markası hükümlerini ve anılan hükümlere dayalı talepleri incelemek amacıyla kaleme alınmıştır. Makalede öncelikle temsilci markası hükümlerinin ortak özneleri açıklanmış, takiben bu hükümlerin istisnai özelliklerine değinilmiştir. Bunlardan sonra, temsilci markası hükümlerinin uygulanması için varlığı gereken ortak şartlar incelenmiştir. Ortak şartlara ilişkin incelemenin ardından, temsilci markası hükümlerine dayalı talepler açıklanmıştır. Son olarak, bu taleplerin süreye bağlılıkları ve kötüniyetli tescil konuları ele alınmıştır.

Anahtar Kelimeler
Marka, Temsilci Markası, Vekil Markası, Sınai Mülkiyet Kanunu, Marka Hukuku, Sınai Mülkiyetin Himayesine İlişkin Paris İttihadı Mukavelenamesi, Paris Konvansiyonu

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Provisions of the Industrial Property Law Regarding Representative (Agent) Trademarks and Claims Based on Such Provisions

I. Introduction

Registration of an identical (or indistinguishably similar) trademark in the name of the agent or representative without the consent of the proprietor or without any justifiable ground as well as the rights of the proprietor in case of an application of such registration are regulated by IPL Art. 6/2, 10 and 25/1. The abovementioned IPL provisions are based on PC Art. 6^{septies} regulations[1].

If the common conditions are fulfilled, the provisions regarding representative trademarks grants the following rights to the legal proprietor in parallel with the PC Art. 6^{septies} regulation[2]:

1. to ensure rejection of the application and prevention of the registration by opposing the application – which is made without the consent of the legal proprietor and without justifiable ground – for the registration of the trademark in the name of the representative (IPL Art. 6/2),
2. to request invalidation of the trademark if it has been registered in the name of the representative (IPL Art. 25/1, 6/2),
3. to request transfer of the registration (trademark) to himself, also on the assumption that the trademarks has been registered in the name of the representative (IPL Art. 10) and
4. to request prohibition of the use of the trademark registered in the name of the representative (despite the registration) (IPL Art. 10)

This article aims to review and assess IPL provisions regarding the representative trademarks and the rights granted to the proprietor by these provisions. The outline of our article is as follows:

1 While expressed in DLPT period see **Sabih Arkan**, Marka Hukuku, Vol. I, Ankara 1997, p. 110-111; **Sabih Arkan**, "Yabancı Markaların Türkiye'de Korunması", Banka ve Ticaret Hukuku Dergisi, Vol. XX, Nr. 1, 1999, p. 9; **Ünal Tekinalp**, Fikrî Mülkiyet Hukuku, 5. Edition, İstanbul 2012, p. 421; **Sami Karahan**, Marka Hukukunda Hükümsüzlük Davaları, Konya n.d., p. 108; **Hamdi Yasaman (Sıtkı Anlam Altay/Tolga Ayoğlu/Fülürya Yusufoğlu/Sinan Yüksel)**, Marka Hukuku 556 Sayılı KHK Şerhi, Vol. I, İstanbul 2004, p. 403; **Hakan Karan/Mehmet Kılıç**, Markaların Korunması 556 Sayılı KHK Şerhi ve İlgili Mevzuat, Ankara 2004, p. 204; **Arslan Kaya**, Marka Hukuku, İstanbul 2006, p. 150, fn. 173; **Alper Tunga Ünal**, Marka Hukukunda Tescil Engelleri, Unpublished Master's Thesis, Gazi University Instıtute of Social Sciences Department of Private Law, Ankara 2007, p. 63; **Fatma Karaman**, Marka Hukukunda Markanın Ülkeselliği İlkesi, Unpublished Master's Thesis, Marmara University Instıtute of Social Sciences Department of Law Sub Department of Private Law, İstanbul 2008, p. 118; **Ali Paslı**, Uluslararası Antlaşmaların Türk Marka Hukukunun Esasına İlişkin Etkileri, İstanbul 2014, p. 357-359; **Orhan Sekmen**, Markanın Hükümsüzlüğü ve Hukuki Sonuçları, 2. Edition, Ankara 2016, p. 175. On the other hand, we would like to note that *Paslı*, who dedicated a thirty page section to the subject in his study –finding the source of the provisions regarding the representative trademarks in an international treaty must have been helpful–, is the author who analyzes representative trademarks in most detail as far as we have been able to identify (see **Paslı**, Etkiler, p. 357-387). For emergence of representative trademarks as an international issue of law and historical development of regulation in PC see **Florian Bauer**, Die Agentenmarke Rechtsfragen des internationalen Vertriebs von Markenwaren, Schriftenreihe zum gewerblichen Rechtsschutz Vol. 27, Köln Berlin Bonn München 1972, p. 8 ff.

2 See and cf. **Paslı**, Etkiler, p. 359.

The subjects of the provisions on representative trademarks are common. Thus, for a reliable assessment, the meaning of the aforementioned "common subjects" must be specified in the first place.

The claims relating to the representative trademark, on the other hand, have some exceptional characteristics which are different from the general system of IPL. Indeed, the provisions regarding representative trademarks not only constitute an exception to the principle of territoriality and registration which are predominant in IPL, they also grant a right which is not included in the general system of IPL by granting the legal proprietor an authorization to request from the court to transfer the trademark registered in the name of the representative to himself (IPL Art. 10).

Finally, while each provision on representative trademarks grants the proprietor different opportunities, the conditions to be able to use the advantage of these provisions and make the abovementioned claims are the same. This means that there are "common conditions" to exercise the provisions on representative trademarks that apply for all the provisions and claims.

This requires an assessment of the abovementioned common subjects and common conditions as well as exceptional characteristics of the provisions on representative trademarks before reviewing the claims based on these provisions. Hence, we are going to identify and assess the common subjects, exceptional characteristics and common conditions for their exercise respectively and review the requests based on the abovementioned provisions afterwards.

II. Common Subjects of Provisions on Representative Trademarks

A. Overview

IPL Art. 6/2 specifies *"A trademark application for the registration of an identical or indistinguishably similar trademark filed by a commercial agent or representative in his own name without the trademark proprietor's consent and without any justifiable ground shall be refused upon the trademark proprietor's opposition"*. Based on the reference thereof in IPL Art. 25/1, the existence of the conditions in this provision are also reasons for invalidation of a registered trademark.

IPL Art. 10 states *"If an identical or indistinguishably similar trademark is registered in the name of the agent or representative without the consent of the trademark proprietor, unless the commercial agent or representative has a justifiable reason, the trademark proprietor may request from the court the prohibition of the use of his trademark and may also request the transfer of the said registration to himself."*.

It appears that the common subjects of IPL Art. 6/2 and 10 are "the trademark proprietor" and "the commercial agent or representative".

B. Trademark Proprietor (Legal/Real Right Owner)

"The trademark proprietor" referred to in IPL Art. 6/2 and 10 is the legal right owner of the sign (trademark) which the representative has registered or has applied for registration before TPTO[3]. The proprietor of a trademark is the person who originally formed and used it, meaning that he is the person that imagined and created (selected) the trademark and used it in connection with a good or service[4].

It is highly important to state that the proprietorship (legal right ownership) of a trademark as in the meaning of IPL Art. 6/2 and 10 is not required to be based on an earlier domestic or foreign registration or registrations[5]. However the right owned in this sense has to be a "trademark right". Whether registered or not, the exercise of the provisions of representative trademarks cannot be requested based on any right other than a trademark right[6].

It is not obligatory for the proprietorship of the trademark to be granted abroad for application of the provisions regarding representative trademarks[7]. This right might have also been obtained in Turkey[8]. While the states which are members of Paris Union will be encountered in the majority of incidents, it must be specified that foreign right ownership is not required to be obtained in a state which is a member of Paris Union to exercise the provisions of representative trademarks of IPL[9]. Similarly, the proprietorship of the trademark is not required to be obtained in the origin country of the goods[10].

3 Indeed see **Yasaman/Ayoğlu**, Vol. I, p. 519, 520; **Hamdi Yasaman/Sıtkı Anlam Altay (Tolga Ayoğlu/Fülürya Yusufoğlu/Sinan Yüksel)**, Marka Hukuku 556 Sayılı KHK Şerhi, Vol. II, İstanbul 2004, p. 696; **Uğur Çolak**, Türk Marka Hukuku, 4. Edition, İstanbul 2018, p. 330; **Paslı**, Etkiler, p. 361, 362, 367, 373, 374, 378, 380, 381, 382, 383, 384, 385 and p. 379, fn. 352, p. 383, fn. 365; **Hayrettin Çağlar**, Marka Hukuku Temel Esaslar, 2. Edition, Ankara 2015, p. 72, 143.

4 See **Tekinalp**, p. 382; **Yasaman**, Vol. I, p. 183; **Kaya**, p. 186-187; for legal/real right ownership also see **Çolak**, p. 419-424.

5 **Paslı**, Etkiler, p. 361-362; **Detlef von Schultz** (and others), Kommentar zum Markenrecht, 2. Edition, Frankfurt am Main 2007, p. 241; in this regard see and cf. **Tekinalp**, p. 485; **Sekmen**, p. 176, 178; also see **Arkan**, Marka Vol. I, p. 111, fn. 180 where it is mentioned that registration or application for registration of the trademark in Turkey is not required to be able to oppose to the application of registration by the proprietor pursuant to IPL Art. 6/2, in fact, PC Art. 6^{septies}/1 mentions a trademark owned in another country that is a member of Paris Union; finally see and cf. **Bauer**, p. 246.

6 **von Schultz**, p. 241; **Georg Fuchs-Wissemann** (and others), Markenrecht Vol. I Markengesetz und Markenrecht ausgewählter ausländischer Staaten, 2. Edition, Heidelberg 2009, p. 210; **Çağlar**, p. 72.

7 **Paslı**, Etkiler, p. 363-364, fn. 318; in terms of German law, in the same regard see **Franz Hacker (Paul Ströbele/Irmgard Kirschneck)**, Markengesetz Kommentar, 8. Edition, Köln Berlin München 2006, p. 609, 612; **von Schultz**, p. 241; **von Zumbusch**, p. 426; **Paul Lange**, Marken- und Kennzeichenrecht, München 2006, p. 647; **Fuchs-Wissemann**, p. 207, 378; **Astrid Meckel**, "Agentenmarke", https://wirtschaftslexikon.gabler.de/definition/agentenmarke-31838/version-255389 (accessed on 17 July 2019), p. 1.

8 Indeed see **Arkan**, Yabancı Marka, p. 11, fn. 22 regarding that the provisions on representative trademark may be exercised when a non-registered trademark used in Turkey [DLPT Art. 8/3; IPL Art. 6/3] is requested to be registered (or is registered) in the name of the representative who also operates in Turkey without authorization, for example, the proprietor might request transfer of the registration in the name of the representative to himself based on 17 (IPL Art. 10); in terms of German Law in the same regard see for example **von Schultz**, p. 241.

9 In terms of German law in this regard see **Hacker**, p. 612; **von Schultz**, p. 241.

10 Indeed see **Bauer**, p. 246; **Hacker**, p. 612.

Whether or not the person who makes a request based on the provisions regarding representative trademarks (IPL Art. 6/2, 10, 25/1) is the proprietor of the trademark is to be determined by the applicable legislation of the state where the trademark right is claimed to be obtained[11]. However it is convenient to say that, in the majority of incidents, the proprietorship of the trademark will be based on an earlier registration obtained abroad[12].

Within the scope of the abovementioned principles, the "proprietor of a trademark" is defined in doctrine as *"a person who has acquired a property right on the trademark subject to application in a country which is a member of Paris Union other than Turkey before the application for registration in Turkey"* in terms of application of provisions of PC and DLPT (IPL) regarding representative trademarks[13]. To emphasize again: while it is also possible that the proprietorship of the trademark to be obtained in Turkey, the provisions regarding representative trademarks of the referred PC and the IPL are based on a proprietorship obtained in a country other than Turkey (an in a Paris Union country as a principle even if not obligatory) and aim to protect such trademark proprietors[14]. This is because, those who obtain their proprietorship in Turkey are already protected by the provisions of IPL Art. 6/1, 6/3 and 25/1 against subsequent applications for registration and registrations of trademarks[15].

Therefore, if the representative has registered the trademark in his name before TPTO, the proprietor (legal right owner) and the formal right owner of the trademark become different[16]. This is because although the trademark in question has been selected earlier by the proprietor (generally abroad) and has been used as a trademark and has even been registered in the name of the proprietor abroad, it is registered in the name of the "commercial agent or representative" before TPTO. Thus the agent or the representative is an "apparent" or a "formal" right owner in Turkey.

C. The Concept of "Commercial Agent or Representative" in terms of Practice of Representative Trademarks

After defining the meaning of the concept of "trademark proprietor" used in the provisions on representative trademark, it is now time to explain the concept of "commercial agent or representative" which is another subject of the abovementioned provisions.

11 **Paslı**, Etkiler, p. 362; **Bauer**, p. 246; **Hacker**, p. 612; **von Schultz**, p. 241.

12 **Paslı**, Etkiler, p. 361, fn. 313 and p. 363, fn. 318.

13 **Paslı**, Etkiler, p. 363.

14 **Paslı**, Etkiler, p. 362, 363, 364. The author states that DLPT Art. 8/2 (IPL Art. 6/2) is a special and exceptional regulation that provides protection to foreign trademarks (**Paslı**, Etkiler, p. 364-366) and that such interpretation of the provision is caused by the structure of the referred PC Art. 6^{septies} which emphasizes its exceptional characteristic, method and purpose of regulation of PC Art. 6^{septies} rather than the wording of DLPT (IPL) (**Paslı**, Etkiler, p. 366).

15 **Paslı**, Etkiler, p. 362; also see **Sekmen**, p. 178 and **Yasaman/Ayoğlu**, Vol. I, p. 518 who mention "the trademark proprietor whose trademark is not registered in Turkey".

16 **Yasaman/Ayoğlu**, Vol. I, p. 519; **Karaman**, p. 121-122; **Paslı**, Etkiler, p. 381; **Bauer**, p. 179.

Firstly, it must be noted that to exercise the provisions of IPL regarding representative trademarks (IPL Art. 6/2, 10, 25/1), the trademark proprietor and the person who has registered or applied for registration of the trademark in his name before TPTO must have a relationship which concerns the use of the trademark, distribution of the goods branded with the trademark or delivery of service or services under such trademark[17]. The relationship between the proprietor and the person who wants to register or has registered the trademark in his name is defined as "commercial agency" or "commercial representation" in IPL – as in DLPT[18].

Today it is unanimously accepted in Turkish doctrine that the expressions "commercial agent or representative" used in the provisions on representative trademarks shall not be limited to the commercial agent or (commercial) representative in the technical legal meaning specified in TCO Art. 547 ff. but shall be interpreted in a broad sense and any person who is authorized to use the trademark in Turkey (for example to sell the goods branded with the trademark or provide service or services under the trademark on behalf of the proprietor or himself) pursuant to any relationship such as attorney contract, exclusive distributorship agreement, labor contract, license agreement, franchise agreement, agency contract, brokerage contract, distributorship or dealership agreement shall be deemed as "representative" in terms of exercise of IPL Art. 6/2 and 10, whether or not granted the power to represent the proprietor in technical legal meaning[19,20]. The same applies for the practice by TPTO[21]. Thus, we use the term "representative" to imply the abovementioned meaning in this study.

17 We have adapted this assessment made by *Arkan* in terms of DLPT Art. 8/2 to IPL (see and cf. **Arkan**, Marka Vol. I, p. 111; **Kaya**, p. 150; **Paslı**, Etkiler, p. 367).

18 **Kaya**, p. 150.

19 **Arkan**, Marka Vol. I, p. 111; **Arkan**, Yabancı Marka, p. 11; **Tekinalp**, p. 421, 485; **Yasaman**, Vol. I, p. 403; **Yasaman/Ayoğlu**, Vol. I, p. 519, 520; **Yasaman/Altay**, Vol. II, p. 696; **Karahan**, p. 108-109; **Kaya**, p. 150; **Karan/Kılıç**, p. 205; **Ünal**, p. 64; **Karaman**, p. 120, 122, 123; **Paslı**, Etkiler, p. 366-368; **Çağlar**, p. 71-72; **Çolak**, p. 330-331; **Erdal Noyan/İlhami Güneş**, Marka Hukuku, 5. Edition, Ankara 2015, p. 158; **Sekmen**, p. 176-177; also see the decisions of Court of Cassation referred to in **Sekmen**, p. 177, fn. 556; finally see **Karan/Kılıç**, p. 205; **Kaya**, p. 150 regarding that this relationship may be based on a unilaterally granted power of representation.

20 For a similar example in German doctrine see **Bauer**, p. 241-246; **Wolfgang Berlit**, Markenrecht, 11. Auflage, München 2019, p. 142; **Hacker**, p. 610; **von Schultz**, p. 241-242; **Lange**, p. 647-648; **Fuchs-Wissemann**, p. 207-208. Also see **Bauer**, p. 246 regarding that the term "representative" must be construed in economic terms and that all the exporters integrated on the basis of rights and liabilities beyond an ordinary purchase-sale relationship as an "economic representative" of the proprietor in his distribution system shall be considered "representative" in German law; see **von Schultz**, p. 242 who (with reference to a decision of Hamburg OLG) emphasizes the relationship between the parties shall exceed an ordinary exchange of goods, imposing them to protect the interests of one another and the bond of interest between the parties shall be understood from the contractual relation; in this regard also see **Hacker**, p. 610; **Lange**, p. 647-648; **Fuchs-Wissemann**, p. 207-208.

21 The following statement on p. 126 of TPI's (TPTO's) 2015 Trademark Examination Guideline clearly shows TPTO's practice in such regard [for full text of the manual see https://www.turkpatent.gov.tr/TURKPATENT/resources/temp/F9E4CFAF-A7AE-4FEA-8BCC-DA8B5C7DAB00.pdf (accessed on 5 July 2019)] *"...the proprietor and the person applying for trademark must have a business relation which grants the power to use the trademark in Turkey on behalf of the legal right owner, to put the trademark in the market and to distribute. Such business relation and the concept of agent and representative mentioned in the provision must be construed in a broad sense to include any economic relation which is legal-commercial or only commercial. The business relations between the parties are generally based on a contract that authorizes the representative to use the trademark and in this case the provisions of the contract become crucial. The primary types of contracts that may be considered as a relation of an agent or representative are contracts of agency, exclusive distributorship, franchising, licensing, partnership, attorney, labor, dealership and import."*.

Nevertheless the relationship between the proprietor and the representative must be subject to a certain consistency and commitment[22]. A simple/ordinary sales engagement based on a discrete sales contract does not qualify the purchaser as a "representative"[23]. Hence for example, a person who purchases a good branded with the trademark from abroad to deliver into Turkey via direct or parallel import and sell the goods cannot be deemed a "representative" within the scope of IPL Art. 6/2 and 10, thus provisions of IPL on representative trademarks (IPL Art. 6/2, 10, 25/1) cannot be applied under such assumptions[24].

Therefore if a person cannot be qualified as a representative in the context of IPL Art. 6/2 and 10, meaning that if they do not have a relationship with the proprietor that grants the authority to use the trademark as exemplified above, the registration application of such a person cannot be opposed based on IPL Art. 6/2[25]. If the trademark has been registered in his name, the trademark proprietor cannot ensure invalidity of the registration based on IPL Art. 25/1 and 6/2 or cannot request assignment of the trademark in his favor pursuant to IPL Art. 10 and cannot prohibit the use of the trademark by the registration holder within the scope of IPL Art. 10. In such a case, the proprietor, provided that the conditions are met, can apply to means other than the provisions on representative trademarks (IPL Art. 6/2, 10, 25/1). Thus, if the required conditions are fulfilled, the proprietor can demand the rejection of a registration application or the invalidity of the trademark based on other regulations of IPL (such as IPL Art. 6/1, 6/3, 6/4 or 6/9)[26].

Arkan claims that interpreting the requirement of being a party to the contract that authorizes the use of the trademark, as exemplified above, in a strict sense would cause IPL Art. 6/2 (DPLT Art. 8/2) to be easily bypassed; thus it is required to consider that a trademark subject to application not only in the name of the agent or exclusive distributor that is a party to the contract but also in the name of their commercial representatives or employees within the scope of IPL Art. 6/2 (DPLT Art. 8/2)[27]. In parallel, *Paslı* discusses that any person who uses the trademark by a written, verbal or de facto application within the scope of a mutual definite relation based on the authorization by the proprietor shall be considered a "representative" through a broad

22 **Arkan**, Yabancı Marka, p. 11; **Paslı**, Etkiler, p. 368.

23 **Arkan**, Yabancı Marka, p. 11; **Paslı**, Etkiler, p. 368, fn. 330; in this regard particularly see **Bauer**, p. 242-243; **Hacker**, p. 610; **von Schultz**, p. 241-242.

24 **Paslı**, Etkiler, p. 368.

25 **Arkan**, Marka Vol. I, p. 111-112; **Karahan**, p. 109; **Kaya**, p. 150-151, fn. 174; **Paslı**, Etkiler, p. 368; also see **Arkan**, Yabancı Marka, p. 10-11.

26 **Arkan**, Marka Vol. I, p. 112, fn. 181; **Arkan**, Yabancı Marka, p. 14 ff.; **Kaya**, p. 150-151, fn. 174; **Ünal**, p. 64; **Paslı**, Etkiler, p. 368-370 also and in particular see **Paslı**, Etkiler, p. 368-370, fn. 331 and TEG, p. 124.

27 **Arkan**, Marka Vol. I, p. 112; **Arkan**, Yabancı Marka, p. 11; in the same regard see **Sekmen**, p. 177; also see **von Schultz**, p. 242; **von Zumbusch**, p. 427; **Hacker**, p. 610-611, 835; **Lange**, p. 649; **Fuchs-Wissemann**, p. 208-209, 380 regarding that the "straw men" behind the representative who act on orders and instructions of the representative shall also be included in the extent of the provisions of representative trademarks.

interpretation that will prevent an unfair advantage of the principle of territoriality; he claims that any application of registration by this person in his name as well as by the persons who are directly connected in their own names had better be included within the scope of IPL Art. 6/2 (DPLT Art. 8/2) by lifting the veil of incorporation[28].

TPTO appears to adopt an interpretation in a broad sense, considering the statements in the TEG regarding DLPT Art. 8/2 (IPL Art. 6/2) which are as follows; *"...it is not required for the application to be made in the name of the agent or representative for enforcement of the article, but when there is sufficient proof that any application made upon the request or instructions of the agent or the representative and made by the spouse, children of the agent or representative or the executives of a company owned by the agent or the representative who shares the same financial interest, these applications shall be evaluated within this scope."*[29], *"The parties of the contract shall be interpreted in a broad sense when the business relation is based on a contract. ... it shall be considered that there is a business relation not only between the parties of the contract, but also between their partners, representatives and employees."*[30].

However it must be noted that another view in the doctrine is that an interpretation IPL Art. 6/2 (DPLT Art. 8/2) in such a broad sense would not serve to prevent a bypassing of the provision since a representative who wants to avoid the prohibition would apply for registration of the trademark in the name of a person who is not related; therefore, this view discusses the idea that the provision should not be expanded as much to include the bad faith of the representative and that the "party" should be considered as any person who is a party to the contract with the proprietor[31].

A relationship as per above between the proprietor and the "representative" is required and sufficient for exercise of the provisions regarding representative trademarks[32]. The provisions of representative trademarks shall apply even if such relations have not been exercised or have been terminated afterwards[33]. Therefore,

28 **Paslı**, Etkiler, p. 367. The author states that if a person related to the representative (such as the spouse, children or any other person who shares the same economic interests with the representative) applies for the registration of the trademark in his name and the concerned authorities (TPTO) identify such a relation, the provisions on representative trademarks shall apply, as a rule. In order for the provisions on representative trademarks not to be applied in such a case, the applicants must prove that they are not under the influence of the representative and not related or connected to the representative or the proprietor (**Paslı**, Etkiler, p. 367, fn. 328).

29 TEG, p. 125.

30 TEG, p. 126.

31 **Karahan**, p. 108-109, fn. 2.

32 **Paslı**, Etkiler, p. 372.

33 **Paslı**, Etkiler, p. 372, 358; also see **Yasaman/Ayoğlu**, Vol. I, p. 520; **Bauer**, p. 247-248; **Berlit**, p. 160; **Fuchs-Wissemann**, p. 209; for a different view see **Arkan**, Yabancı Marka, p. 10 who claims that the wording of PC Art. 6^{septies} is not broad enough to be concluded to cover a representative whose authority has expired and that it is not possible to mention a "representative" after termination of the relation between the parties [it should be added that the study also includes the following statements, referring to the foreign doctrine *"However it is stated that accepting this formal interpretation would not serve to the requirements of the practice and the registration of the trademark by the former representative who is still interested in the trademark even after expiration of the representation relation in his name and use of the trademark*

what matters for application of the provisions on representative trademarks is for the "representative" to hold such position for once[34]. Hence, the relations between the proprietor and the representative are not required to be maintained when the application for registration of the trademark is opposed (IPL Art. 6/2) or prohibition of the use of the registered trademark (IPL Art. 10) or invalidity (IPL Art. 25/1, 6/2) or transfer (IPL Art. 10) of the trademark is claimed[35]. In fact, the doctrine highlights that the necessity for protection of the proprietor arises when the contractual relation between the proprietor and the representative ends[36].

III. Exceptional Characteristics of the Provisions Regarding Representative Trademarks

There are three exceptional characteristics of the provisions on representative trademarks. These are: *(i)* precedence of the legal/real right owner (proprietor) over formal right owner which is an exception to the principle of registration (IPL Art. 10; DLPT Art. 11), *(ii)* ability to transfer the trademark though a court decision (IPL Art. 10; DLPT Art. 17) and *(iii)* being provided for as an exception to the principle of territoriality (IPL Art. 6/2; DLPT Art. 8/2)[37].

An exception to the principle of registration is introduced in IPL Art. 10. In case common conditions[38] exist, this provision enables the proprietor to apply to the court and have the use of the trademark by the formal right owner prohibited[39]. Therefore if the court finds such application justified, the representative cannot use the trademark even if it is registered in his name before TPTO.

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by the former representative for goods that are not produced by the foreign trademark proprietor is included in the scope of prohibition." (**Arkan**, Yabancı Marka, p. 10)]; also see **Çağlar**, p. 72 who states that the provision on application/registration in bad faith [DLPT Art. 35/1; IPL Art. 6/9, 25/1] instead of provisions on representative trademarks shall apply after the termination of the relation between the proprietor and the representative; see **von Schultz**, p. 244 regarding that the ground for invalidity in MarkenG § 11 in German law shall apply only if the registration application is made while the relation between the parties continues; but for the applications made after the termination of the contract the proprietor shall request invalidity on the ground of registration in bad faith and on other grounds; in similar regard see **Hacker**, p. 611; **Lange**, p. 648.

34 **Paslı**, Etkiler, p. 372.

35 In particular see **Paslı**, Etkiler, p. 372-373, fn. 335. Therefore, it is not possible to agree with the following statements in (TEG, p. 126) *"The commencement date of the contract must be earlier than the date of application of trademark registration made by the agent or representative to Turkish Patent Institute. Negotiations made between the applicant and the trademark proprietor who opposes to the application on a date after the application regarding representation of the trademark and unilateral initiatives by the applicant to be the representative of the trademark in question shall not have any importance in terms of examination of the opposition and shall not affect the decision. If the former representative applies for registration of the trademark after termination of the relation of representation, the opposition of the privileged trademark proprietor shall not be assessed within the scope of article 8/2 since the business relation is terminated. (Excluding the reasonable time period after termination in which the effects of the contract remain)"* (**Paslı**, Etkiler, p. 372, fn. 335).

36 **Yasaman/Ayoğlu**, Vol. I, p. 520; **Karaman**, p. 122; also see **von Schultz**, p. 240 regarding that the representative trademarks registered during the relation between the parties allow "disloyal" representatives to put pressure on the proprietor for continuation of the relation in case of termination of the contractual relation and the provisions regarding the representative trademarks are regulations against such cases; similarly see **Hacker**, p. 608.

37 **Paslı**, Etkiler, p. 381, fn. 359.

38 For remarks on common conditions see IV.

39 For detailed explanation about the subject see V, C.

Also subject to the existence of the common conditions, another exception introduced by IPL Art. 10 is that it allows the proprietor to have the registration in the name of the representative (trademark) transferred in his favor through court decision[40]. Indeed, it is impossible as a rule in Turkish trademark law for a person who claims to be the proprietor of a registered trademark to have the registration transferred to himself through filing a case[41]. IPL Art. 10 is an exception to this rule.

The third and a highly important exceptional characteristic of the provisions on representative trademarks is that these provisions (IPL Art. 6/2 and 10) are exceptions to the principle of territoriality of protection of trademarks which is predominant in IPL. The principle of territoriality in terms of trademark law is that each state allows trademark protection within its country, provided that the meritorious and formal requirements in its law are fulfilled, which in such regard means that each state grants the authority to take legal actions in its country to the persons who are right owners within the scope of its own law whose rights are violated by infringements in its own country[42]. Pursuant to such a principle, the trademark right is limited to the territory of the country where it is registered and the rights and protection provided by registration of a trademark is limited to the country where the trademark is registered[43].

However the provisions on representative trademarks (IPL Art. 6/2, 10, 25/1) grant those who have not acquired their proprietorship in Turkey and who are not considered as right owners under Turkish legislation the rights to prevent a registration through opposing the registration application of a trademark before TPTO in Turkey (IPL Art. 6/2), to have the use of the trademark rights arising from a completed registration prohibited and have the registration (trademark) transferred in his name (IPL Art. 10) or claim invalidity of a registered trademark (IPL Art. 6/2, 25/1). This becomes an exception to the principle of territoriality in terms of "each state grants the authority to take legal actions in its country to the persons who are rightful owners within the scope of its own law whose rights are violated by infringements in its own country"[44]. There is no uncertainty in the doctrine that the protection and the opportunities provided by the provisions on representative trademarks to the proprietor are exceptions to the principle of territoriality[45].

40 For detailed explanation about the subject see V, D.

41 **Paslı**, Etkiler, p. 378.

42 **Tekinalp**, p. 431. For principle of territoriality also see **Arkan**, Yabancı Marka, p. 5; **Tekinalp**, p. 431-432; **Karaman**, p. 61-65; **Paslı**, Etkiler, p. 177 ff. and as a whole **Karaman**, passim.

43 **Tekinalp**, p. 432.

44 **Tekinalp**, p. 432; from this aspect see again **Karaman**, p. 61-65.

45 Indeed see **Arkan**, Yabancı Marka, p. 9; **Yasaman/Ayoğlu**, Vol. I, p. 10, 520; **Karaman**, p. 119, 121; **Paslı**, Etkiler, p. 357, 358, 360-361, 363, 364, 366, 367, 382 and p. 362, fn. 316; also see **Bauer**, p. 255; **Hacker**, p. 608.

IV. Common Conditions for Application of Provisions on Representative Trademarks

A. Overview

The provisions on representative trademarks protect a common interest. As can be understood from the remarks such as *"The representative trademark, ... is a trademark which a person who has the authority to use such trademark within the framework of a business relation engaged with the trademark proprietor in compliance with the law tries to acquire through an application in his own name after termination of*[46] *or during such relation, in the country where he holds the authority to use the trademark or in another one or several countries within Paris Union by abusing his position and knowledge obtained in parallel with the authority to use the trademark"* in the doctrine[47], such interest is prevention of seizure and use of a trademark created and used by the proprietor which has been extended via "representatives" in time by these "representatives" in bad faith[48]. From this aspect, the provisions on representative trademarks, as will be mentioned below[49], aim to prevent any problem that may be caused by the proprietor and formal right owner being different parties[50].

It is indeed a fact that the foreigners consent to registration of their trademarks before TPTO in the name of and/or use hereof by their "representatives" as well as their exclusive distributors and agents in order to protect their trademarks against third parties efficiently in Turkey[51].

Hence, in parallel with the same interest they share, the conditions of application of the provisions on representative trademarks are common. In this context, the following conditions are required to exist at the same time in order for application of provisions on representative trademarks (IPL Art. 6/2, 10, 25/1),

1. The trademark registered or applied for registration in the name of the representative must be identical or indistinguishably similar to the trademark of the proprietor,
2. Such registration or application must be made without authorization of the trademark proprietor and
3. The representative must not have any justifiable grounds.

46 On this subject, see II, C.

47 **Paslı**, Etkiler, p. 366.

48 **Paslı**, Etkiler, p. 361.

49 See V, C.

50 **Paslı**, Etkiler, p. 381.

51 **Yasaman/Ayoğlu**, Vol. I, p. 520; cf. **Karan/Kılıç**, p. 205. An opinion in the doctrine expresses that the parties are engaged in a "fiducia" in such cases and emphasizes that the necessity for protection of the proprietor arises upon the termination of the contractual relation between the proprietor and the representative, as we mentioned earlier (**Yasaman/Ayoğlu**, Vol. I, p. 520; **Karaman**, p. 122; also see **Paslı**, Etkiler, p. 360-361).

However before analyzing these three common conditions, we would like to point out the following:

First of all, the provisions on representative trademarks apply to both the service marks and the trade marks[52]. Therefore whether the mark in question is a service mark or a trademark is not important in terms of exercise of the rights granted to the proprietor by IPL.

Secondly, it is not required for the trademark to be well-known for the proprietor to exercise the protection granted by the provisions on representative trademarks. The provisions on representative trademarks enables the proprietor to bypass the principle of territoriality even if his trademark is not well-known[53].

Thirdly, even if the conditions of application of the provisions on representative trademarks are common, the authority to exercise such provisions is not always the same[54]. If there is a registered trademark, the requests for prohibition and transfer of this trademark (IPL Art. 10) or its invalidity (IPL Art. 25/1, 6/2) shall be sent to the court. However if there is an application for registration (IPL Art. 6/2), the proprietor opposes to the application before TPTO and TPTO shall be the authority to make a decision on the opposition in question.

Following this overview, we may now start reviewing the common conditions for application of the provisions of representative trademarks.

B. The Trademark Registered or Subject to Application for Registration Being Identical or Undistinguishably Similar to the Trademark of the Proprietor

The provisions of IPL regarding representative trademarks only mention the trademark registered or subject to application for registration before TPTO as "identical or undistinguishably similar to the trademark of the proprietor" (IPL Art. 6/2, 10). However despite the strict sense in the wording of these provisions it must be accepted that the protection granted by the provisions regarding representative trademarks is to the extent specified in IPL Art. 6/1. That is to say:

TEG uses the following statements regarding DLPT Art. 8/2 (IPL Art. 6/2) *"The trademark for which the agent or the representative applies for registration regarding the identical or the same type of goods or services can be either identical or undistinguishably similar to the trademark owned by the trademark proprietor. Moreover the proprietor can oppose to the applications for registration for trademarks*

52 **Paslı**, Etkiler, p. 374. For detailed explanation about trade and service marks see **Kaya**, p. 50-52.

53 Indeed see **Paslı**, Etkiler, p. 364.

54 **Paslı**, Etkiler, p. 380, fn. 356.

of goods and services that are identical or undistinguishably similar to the goods and services of his trademark"[55]. Therefore, in practice, TPTO considers the scope of the protection granted by IPL Art. 6/2 as identical to that of IPL Art. 6/1.

Similar to the broad approach adopted by TPTO, the doctrine also specifies that it would be accurate to consider the scope of the protection granted to the abroad obtained trademark right – which enables the proprietor to oppose the application of registration submitted to TPTO – as parallel to DLPT Art. 8/1 and 9/1 (IPL Art. 6/1 and 7/2), thus DLPT Art. 8/2 (IPL Art. 6/2) can apply when the trademark subject to the application of registration by the representative is identical or similar in terms of both the sign and the goods or services of the trademark of the proprietor[56].

We believe such statement to be accurate. Therefore the terms "identical or undistinguishably similar" in IPL Art. 6/2 and 10 should be interpreted as in IPL Art. 6/1. Considering their purpose, interpretation of IPL Art. 6/2 and 10 in a strict sense would deprive the proprietor of a functional protection and would enable representatives to avoid application of the said provisions[57].

However – while opposite opinions also exist in the doctrine[58]– it would not be correct to expand the protection granted to the proprietor by provisions on representative trademarks (IPL Art. 6/2, 10, 25/1) to include "different goods and services"[59]. Accepting otherwise would mean protection of non-well-known trademarks as if they were well-known against representatives and expansion of the protection exclusively granted to the well-known trademarks by IPL Art. 6/5 to all representative trademarks[60].

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55 TEG, p. 126.

56 **Paslı**, Etkiler, p. 373; **Çağlar**, p. 72; in terms of DLPT period also see and cf. **Çolak**, p. 909; **Ünal**, p. 64. We must add that while *Arkan* states in a study that within DLPT Art. 8/2 (IPL Art. 6/2) an application for registration for an "identical" trademark owned by somebody else for the same type of good or service is in question (**Arkan**, Marka Vol. I, p. 111, fn. 179), he also states in another one of his studies that the proprietor should be able to oppose the registration of an "identical or undistinguishably similar" trademark in the name of the representative, on the condition of regarding the same type of goods (**Arkan**, Yabancı Marka, p. 12; in this regard also see **Paslı**, Etkiler, p. 373, fn. 337). Also see **Kaya**, p. 152; **Sekmen**, p. 178 regarding the types of the trademarks which the proprietor can object to the registration based on IPL Art. 6/2 (DLPT Art. 8/2).

57 **Paslı**, Etkiler, p. 373. For the view in German law regarding the concept of representative trademarks not being limited to the trademarks that are "identical" to the trademark of the proprietor but also include the trademarks that are undistinguishably similar as in the meaning of MarkenG § 9/1-Nr. 2 see **von Schultz**, p. 241, 243; **Hacker**, p. 611-612; also see **von Schultz**, p. 240; **Lange**, p. 648; **Fuchs-Wissemann**, p. 210.

58 With the following statements, *Yasaman* accepts that under certain conditions a protection which is at the same degree with the protection granted for a well-known trademark may be granted to the proprietor *"The registration of the trademark by the agent or the representative for different goods and services may not be justified under certain circumstances. This may contradict with the rules of unfair competition. Taking unfair advantage of business products of another person may not be justified. In this context, if the registration by the commercial agent or representative of the trademark of the person whom they represent for different goods and services aims taking unfair advantage of the trademark or taking advantage of its distinguishing power and reputation, it should be possible to oppose to the application of registration for the trademark."* (**Yasaman**, Vol. I, p. 404; following *Yasaman* see **Ünal**, p. 64; **Karaman**, p. 120 in the same regard).

59 Indeed see **Paslı**, Etkiler, p. 373-374; particularly see **Paslı**, Etkiler, p. 374, fn. 339; also see and cf. **Arkan**, Marka Vol. I, p. 111, fn. 179 and **Karan/Kılıç**, p. 204.

60 **Paslı**, Etkiler, p. 374.

Hence if a trademark applied for registration or already registered in the name of the representative before TPTO is identical or similar to the trademark of the proprietor in terms of both the sign and the goods or services[61] and if this situation causes a likelihood of confusion –including the relation possibility by the public– between them (IPL Art. 6/1), the provisions of the representative trademarks (IPL Art. 6/2, 10, 25/1) may apply. This is the first common condition required for application of the provisions on representative trademarks.

Therefore if the following conditions to be analyzed below also exist, the proprietor has the opportunities to oppose the registration application before TPTO (IPL Art. 6/2), to request the prohibition of use or assignment in his favor of the trademark registered by such means (IPL Art. 10) or to claim invalidity of the trademark (IPL Art. 25/1, 6/2) if it causes a likelihood of confusion – including the relation possibility by the public – with his trademark because of the identity or similarity of the signs and identity or similarity of the goods or services that it covers.

C. Registration or Application for Registration Being Made Without Authorization of the Proprietor

The second common condition required for application of the provisions on representative trademarks is making application of registration or registration of the trademark without the consent of the proprietor.

It must be noted in the first place that the "authorization" mentioned hereby is not the authorization granted to the representative within the framework of the relation between the representative and the proprietor, but the authorization "for registration of the trademark in the name of the representative before TPTO", meaning the authorization "for registration"[62].

On the other hand although the term "authorization" is used in IPL Art. 6/2 and 10, in fact the real intention here is to mention the "consent of the proprietor to registration of the trademark in the name of the representative"[63]. Thus if the proprietor approves the registration in the name of the representative later, even if permission had not been requested from him in the first place, the registration now becomes subject to consent and "authorized" within the meaning in IPL Art. 6/2 and 10[64].

61 Regarding similarity of goods and services see **Arkan**, Marka Vol. I, p. 102-103; **Tekinalp**, p. 442; **Yasaman**, Vol. I, p. 397-399; **Karan/Kılıç**, p. 200-201; **Kaya**, p. 148-149; **Çağlar**, p. 66-71; **Çolak**, p. 210-225; **Sevilay Uzunallı**, "Marka Hukukunda Malların ve/veya Hizmetlerin Benzerliğinin Tespiti Sorunu", Prof. Dr. Hamdi Yasaman'a Armağan, İstanbul 2017, passim; regarding good (product) similarity in particular see **Ali Paslı**, Marka Hukukunda Ürün Benzerliği, İstanbul 2018, passim.

62 **Paslı**, Etkiler, p. 375; also see **Yasaman/Ayoğlu**, Vol. I, p. 518.

63 See **Bauer**, p. 247; **Arkan**, Yabancı Marka, p. 12, fn. 23; **Hacker**, p. 613; **Fuchs-Wissemann**, p. 211.

64 TEG, p. 127.

The authorization or consent specified in IPL Art. 6/2 and 10 is not subject to any form requirement[65]. Therefore, such authorization or consent does not have to be based on a written contract[66]. Likewise, such authorization or consent does not necessarily have to be "explicit". The authorization or consent to be granted by the proprietor to the representative for registration of the trademark in his name can also be "implied (implicit)"[67]. Thus, any oral agreement between the proprietor and the representative, non-objection by the proprietor even if he is aware of the circumstances and maintaining of the relation between the parties over the formal right ownership of the representative indicate authorization or consent of the proprietor[68]. This means that the authorization and consent may be concluded from the actual incidents[69].

As a result of the authorization or consent requirement being aimed at "registration", it cannot be construed from the proprietor's acquiescence to the use of the trademark by the representative or the image portrayed by the representative as the "proprietor of the trademark" in the market that the proprietor permitted or approved the registration of the trademark in the name of the representative[70].

On the other hand such authorization or consent, which is based on a more thorough market knowledge that the representative possesses and his ability to take faster and more efficient precautions for protection of the trademark, can be revoked at any time by the proprietor, even if the relations between the parties are still effective[71]. If the proprietor revokes such authorization on justified legal grounds, now he cannot only request prohibition of the use of the registered trademark and transfer of the trademark in his name (IPL Art. 10) but also have the trademark invalidated if he wants (IPL Art. 25/1, 6/2)[72].

For oppositions based on IPL Art. 6/2 in trademark registration, it is assumed as a rule that the proprietor does not have consent for the registration and the burden

65 See **Fuchs-Wissemann**, p. 211.

66 **Kaya**, p. 151; **Paslı**, Etkiler, p. 375-376, fn. 343.

67 TEG, p. 127; **Arkan**, Yabancı Marka, p. 12, fn. 23; **Karan/Kılıç**, p. 205; **Karahan**, p. 109; **Kaya**, p. 151; **Karaman**, p. 124; **Paslı**, Etkiler, p. 375; **Noyan/Güneş**, p. 663; **Sekmen**, p. 177; **Bauer**, p. 247; **von Schultz**, p. 242; **Fuchs-Wissemann**, p. 211.

68 **Paslı**, Etkiler, p. 375-376, fn. 343; also see **Bauer**, p. 247.

69 **Karan/Kılıç**, p. 205; **Kaya**, p. 151. See **Bauer**, p. 246-247; **Hacker**, p. 613 regarding that the authorization may be concluded based on actual incidents if the proprietor demands the representative to take measures for protecting the trademark; also see **von Schultz**, p. 242.

70 **Paslı**, Etkiler, p. 375.

71 **Arkan**, Yabancı Marka, p. 10, fn. 16; **Karaman**, p. 119; **Paslı**, Etkiler, p. 375-376, fn. 343; **von Schultz**, p. 242; **Lange**, p. 649; **Meckel**, p. 1; cf. **Hacker**, p. 613. See **Arkan**, Yabancı Marka, p. 10 regarding the termination of the relation between the parties shall also mean nullification of the authorization granted for the registration of the trademark in the name of the representative; see **von Schultz**, p. 242-243 regarding that the authorization or consent may have been implicitly revoked depending on the conditions of the actual incident; for example, termination of the relation between the parties or request of the proprietor on assignment of the trademark in his favor may be considered within this scope; similarly see **Lange**, p. 649.

72 **Paslı**, Etkiler, p. 375-376, fn. 343; **Arkan**, Yabancı Marka, p. 10; **Karaman**, p. 119.

to prove contrary is laid on the applicant[73]. Hence, the representative who requests registration of the trademark in his name must prove that the proprietor has expressly or implicitly granted authorization to such registration[74].

D. Representative's Failure to Justify His Actions

The final common condition required for application of the representative trademark is the representative's failure to justify his action (IPL Art. 10), his inability to base his request for registration of the trademark in his name on a justifiable reason (IPL Art. 6/2).

First of all, it must be pointed out that the "justifiable reason" mentioned hereby is another and a different concept from the "authorization" analyzed above[75]. This means that the "authorization" and "justifiable reason" specified in the provisions regarding the representative trademarks are different terms. Thus for application of the provisions on representative trademarks, it is required both for the proprietor not to grant authorization and for the representative to fail justification of his action to request registration of the trademark in his name[76].

In the doctrine, there are two opposing views on whether such "justifiable reason" should be "contractual" or not.

From the point of view of *Tekinalp*, who claims that any justifiable reason in the meaning specified in DLPT Art. 8/2, 11 and 17 (IPL Art. 6/2 and 10) can only be contractual, the representative's need to protect his investment does not justify his action[77]. In this context, the author discusses that the representative's action can be justified if the contract between the proprietor and the representative grants the representative to have the trademark registered in his name[78].

73 TEG, p. 127.

74 **Paslı**, Etkiler, p. 375; **Fuchs-Wissemann**, p. 211. Acting hereon, *Paslı* states that the authorization must be granted in the beginning during the application for registration and that it should be directly aimed at registration, thus it may always be granted at a contractual platform and in this context, even if there is not an explicit provision in the contract regarding the authorization, if it can be concluded via overall assessment of the contract that registration is required for the representative to use his authorities, exercise his rights and/or fulfill his obligations, it would be accurate to deem that there is an implicit authorization (**Paslı**, Etkiler, p. 375). Regarding acceptance of the contract provisions other than explicit authorization provisions as implicit authorization provisions also see **Paslı**, Etkiler, p. 376.

75 **Paslı**, Etkiler, p. 375, 376.

76 **Paslı**, Etkiler, p. 375; in this regard also see and cf. **Karan/Kılıç**, p. 205; **Kaya**, p. 151; **Sekmen**, p. 176, fn. 552, p. 177 and **Paslı**, Etkiler, p. 375.

77 **Tekinalp**, p. 421; also see **Tekinalp**, p. 486; for the same view see **Çolak**, p. 331. In parallel to this view *Çolak* states that, depending on the relation between the parties, it can be accepted as an example of justifiable reason if the contract regulates that the trademark can be registered by the representative after a certain period of time (**Çolak**, p. 331). However *Tekinalp*, following the abovementioned statements, referring to *Arkan* (**Arkan**, Marka Vol. I, p. 112), states that acknowledgment that the trademark has not been or will not be extended shall be accepted as justifiable reason and on such assumptions the opposition of the proprietor shall not be justified. Thus the author gives a non-contractual example for justifiable reason (see and cf. **Tekinalp**, p. 421; in this regard also see **Paslı**, Etkiler, p. 344).

78 **Tekinalp**, p. 486; in the same opinion see **Çolak**, p. 331.

The second view which is led by *Arkan* as far as we have observed and constitutes the majority of the doctrine interprets justifiable reason in a broad sense. *Arkan* discusses that if the representative introduces the trademark into the market as a result of a long and hard work and gains it reputation, the necessity of effectively protecting such a representative's rights may "justify his action"[79]. This becomes particularly important when the proprietor has explicitly or through his actions indicated that he is no longer interested in the market that the representative carries out his activities[80]. For example this applies when the proprietor does not take any action for extension of the protection period of the trademark he uses for the goods sold in the market that the representative conducts business or waives his trademark right in question and under such assumptions, the proprietor should not be able to oppose the registration of the trademark in the name of the representative[81]. *Arkan*'s abovementioned remarks are also adopted by other authors in the doctrine[82].

We are also of the opinion that the justifiable reason should not be limited to contractual matters[83]. As accurately identified and expressed in the doctrine, an authorization granted on a contractual degree shall mean that the abovementioned condition of "registration or application for registration being made without authorization of the proprietor" has not been fulfilled. In such case, the provisions of representative trademarks do not apply, because the proprietor has granted

79 **Arkan**, Marka Vol. I, p. 112; in the same opinion see **Noyan/Güneş**, p. 158; also see **Bauer**, p. 250-252 for statements regarding justifiable reason in the meaning of PC Art. 6^{septies} and assessments on comparative law regarding the concept of justifiable reason.

80 **Arkan**, Marka Vol. I, p. 112; also see **Arkan**, Yabancı Marka, p. 12-13.

81 **Arkan**, Marka Vol. I, p. 112; **Arkan**, Yabancı Marka, p. 12-13; in terms of waiver also see TEG, p. 127.

82 **Karahan**, p. 109; **Karan/Kılıç**, p. 205; **Kaya**, p. 151; **Paslı**, Etkiler, p. 376-377; **Sekmen**, p. 177; also see **Ünal**, p. 64-65 and **Karaman**, p. 120-121 who only point out the opposing views in the doctrine. *Yasaman* points out the opposing views and states that the authorization of the proprietor would not be required on the assumption that he does not take any action to renew the trademark and waives his trademark right, any trademark that is not renewed or is waived can be used by everybody, however the applications for registration of the trademark within two years after the expiration of renewal period shall be rejected upon opposition if the trademark is used by the proprietor within this period (DLPT Art. 8/7, 35/2; IPL Art. 6/8) and it is possible in such case that the opposition of the trademark proprietor that exceeds the application period may not be justified (**Yasaman**, Vol. I, p. 404; in the same regard see **Ünal**, p. 65; also see **Yasaman/Altay**, Vol. II, p. 696; **Karaman**, p. 123 regarding that it is possible to discuss that the actions are justified when the proprietor waives registration of the trademark in favor of the representative).
However the following must be added regarding the renewal of the trademark: As *Paslı* righteously emphasizes, non-renewal of a trademark only and solely must not be acknowledged as intention of the trademark proprietor to waive his trademark right unless supported by additional facts (**Paslı**, Etkiler, p. 377, fn. 347). This is because expiration of a trademark requires that the protection period to expire and the trademark not to be renewed in due time [IPL Art. 28/1-(a)]. The application for renewal must be made by the trademark proprietor within six months before expiration of the protection period and TPTO must be submitted the notification regarding the payment of the renewal fee within the same period. In case the application is not made within such a period and TPTO is not submitted the notification regarding the payment of the renewal fee, the request for renewal can be made through payment of an additional fee within six months following the date of expiration of the protection period (IPL Art. 23/2). Thus the trademark proprietor still has the opportunity to request renewal within a period of six months starting from the expiration of the protection period.
On the other hand, as indicated in the abovementioned statements of *Yasaman* (again see **Yasaman**, Vol. I, p. 404), as required by explicit statement of IPL Art. 6/8, an application for registration of a trademark identical or similar to a registered trademark which covers identical or similar goods or services with the registered trademark and is filed within two years following the expiration of the protection of the registered trademark due to non-renewal shall be refused upon opposition of previous trademark proprietor provided that the trademark has been used during this period.
Under such circumstances it is clear that even if in the case of non-renewal, the proprietor still has authority over the trademark; thus only and solely non-renewal of the trademark does not grant the representative the right to apply for registration of the trademark (**Paslı**, Etkiler, p. 377, fn. 347).

83 **Paslı**, Etkiler, p. 376.

authorization to the representative for registration[84]. Therefore, a justifiable reason cannot be sought. Thus, the terms "justifiable reason" referred in provisions on representative trademarks correspond to the matters which fall outside the contract and arise from the actual status of the relation between the parties and from the approach of the proprietor to the business activities in Turkey[85].

From this point of view, *Paslı* states that it may be deemed as an example of justifiable reason if the proprietor explicitly stated that he will not apply for registration in Turkey and in the meantime the representative who made an important investment for the trademark started to be acknowledged as the trademark proprietor in Turkey[86]. The author also discusses that it is also among those examples of justifiable reasons if the proprietor ceases production operations, he explicitly or implicitly waives the trademark due to loss of his interest and profit with the related market and does not concern with the trademark anymore[87].

Finally it should be pointed out due to their significance, as *Paslı* accurately identifies and states, those registrations which are made by the representative in order to protect the trademark against any violation by third parties with the aim to transfer the trademark to the proprietor upon his request can be accepted to be based on a justified reason only if the representative duly warns the proprietor about the registration of the trademark but the proprietor does not apply for registration[88]. Thus, in this assumption any registration or application of registration made without fulfillment of the abovementioned conditions shall not be deemed to be based on a justifiable reason.

Likewise, the fact that the representative introduced the trademark to the market and granted it a reputation cannot be deemed as "justifiable reason" alone[89]. A "compensation for clientele" that may be discussed under such assumption is not a matter of trademark law but a matter of contractual law[90].

V. Claims Based on the Provisions of Representative Trademarks

A. Overview

Following the analysis of the common subjects and exceptional characteristics of the provisions on representative trademarks and the common conditions for

84 See **Kaya**, p. 151 and **Paslı**, Etkiler, p. 376.

85 **Paslı**, Etkiler, p. 376. Thus, it is not possible to agree with the following statements in TEG (TEG, p. 127) *"The justifiable reason can either arise from the contract (for example, the contract may grant the representative the right to register the trademark in Turkey) ..."*. Since the proprietor has already granted "authorization" to the representative in such case, the representative does not need to prove justification of his action (**Paslı**, Etkiler, p. 376, fn. 345).

86 **Paslı**, Etkiler, p. 376.

87 **Paslı**, Etkiler, p. 377; in the same regard see **von Schultz**, p. 243.

88 **Paslı**, Etkiler, p. 377, fn. 349; cf. **Yasaman/Ayoğlu**, Vol. I, p. 518-519; **Karaman**, p. 121.

89 **Hacker**, p. 614; cf. **Arkan**, Marka Vol. I, p. 112.

90 **Hacker**, p. 614. On this regard see TCC Art. 122 and particularly TCC Art. 122/5.

application of such provisions, it is now time to analyze the claims based on the provisions on representative trademarks.

We deem it useful to point out once more, as explained above[91] and to be repeated again in the following section, that for the proprietor to be able to make claims based on provisions on representative trademarks, it is required for the abovementioned common conditions to be fulfilled, regardless of the claim. Even if only one of the abovementioned conditions are not fulfilled, the proprietor cannot make any claims based on provisions regarding the representative trademarks.

After this short reminder, we may now analyze the claims based on provisions regarding representative trademarks.

B. Being a Relative Ground for Refusal of Application of Registration and a Ground of Invalidity of the Registered Trademark

The first opportunity granted to the proprietor by the provisions on representative trademarks is to be able to prevent the registration by opposing the application for registration of the trademark in the name of the representative and (IPL Art. 6/2) to demand invalidity of the trademark in case the trademark has already been registered in the name of the representative (IPL Art. 25/1, 6/2). The importance of granting the proprietor the rights to oppose the application during the registration process and to demand invalidity after registration can be explained as follows:

As stated on the title of IPL Art. 6, the grounds regulated by this provision for refusal are "relative". Therefore while it is possible that the registration may be granted if the trademark proprietor does not oppose, the registration may also be granted unlawfully even though the common conditions are fulfilled and the trademark proprietor has opposed the application[92].

IPL enables the proprietor, who did not or could not prevent the registration before TPTO during registration application, to claim invalidity of the trademark (IPL Art. 25/1, 6/2)[93]. Thus, the proprietor is protected even if he did not oppose the registration during application process or his opposition is found unjustified and refused despite fulfillment of the common conditions[94].

91 See IV, A.

92 **Paslı**, Etkiler, p. 377; also see **Karahan**, p. 108.

93 Indeed see **Arkan**, Yabancı Marka, p. 12, 13; also see **Arkan**, Yabancı Marka, p. 13 regarding that the legal actions for invalidity which are based on the provisions on representative trademarks (IPL Art. 25/1 ve 6/2) cannot be prevented even if the trademark registered in the name of the representative has been transferred to another person; see **von Schultz**, p. 242; **Hacker**, p. 611 who state that MarkenG § 11 regarding invalidity of the representative trademarks shall also apply for the representative's legal successors; see **von Zumbusch**, p. 427; **Fuchs-Wissemann**, p. 208-209, 380 for the same opinion regarding the claim for transfer regulated by MarkenG § 17/1; for an opposing opinion in terms of a transfer claim see **Hacker**, p. 835-836. It must be pointed out that *von Zumbusch* and *Fuchs-Wissemann* discuss that the claim for prohibition based on MarkenG § 17/2 cannot be brought forward against the representative's legal successors and his licensees (**von Zumbusch**, p. 428; **Fuchs-Wissemann**, p. 381).

94 In this assumption the proprietor may also request from the court to transfer the registered trademark in his name (IPL Art. 10; also see **Karahan**, p. 108). For a detailed explanation about transfer claims of the registered trademark see V, D.

IPL Art. 6/2 which originates from international trademark law and aims to prevent the representative from taking unfair advantage of the "representative trademark" institution is an exclusive restraint on registration and an exclusive ground for invalidity of a registered trademark (IPL Art. 25/1)[95]. In this context, it is not required that the application of registration or the registration be made in the country where the representative is authorized for application of the provision[96]. The proprietor can oppose the application of registration made in Turkey by the representative[97] and have the trademark invalidated if the registration has been granted[98] even if the representative's scope of authority does not cover Turkey or the relation between the proprietor and the representative is established in a country out of Paris Union. From the point of view of the example provided in the doctrine: If the Bulgarian representative of the proprietor in France applies for registration of the trademark before TPTO in his own name in Turkey, the proprietor can oppose the application based on Art. 6/2[99]. In such a case the proprietor can either claim invalidity of the trademark if the registration has been granted (IPL Art. 25/1, 6/2) or use any of the rights granted to him by IPL Art. 10.

To add a final remark, it is not required that the trademark has been used in Turkey by the proprietor or the representative for opposing the application of registration based on IPL Art. 6/2[100]. The proprietor can also oppose an application for registration of a trademark which had never been used in Turkey until the application within the framework of IPL Art. 6/2[101].

C. Prohibition of Use of the Trademark Registered in the Name of the Representative

Provided that the common conditions are fulfilled[102], IPL Art. 10 grants the trademark proprietor the right to demand from the court to prohibit the use of the trademark by the representative despite the registration of the trademark is in the name of the representative[103]. The importance of such right can be explained as follows:

95 **Paslı**, Etkiler, p. 372.

96 **Paslı**, Etkiler, p. 371; **Bauer**, p. 248-249; cf. **Paslı**, Etkiler, p. 371, fn. 332 and **Arkan**, Yabancı Marka, p. 9-10.

97 **Paslı**, Etkiler, p. 371; also see **Paslı**, Etkiler, p. 362 and particularly see **Paslı**, Etkiler, p. 371, fn. 333.

98 This rule also applies for the claims of the proprietor based on IPL Art. 10.

99 **Paslı**, Etkiler, p. 371.

100 **Paslı**, Etkiler, p. 371.

101 **Paslı**, Etkiler, p. 371.

102 See IV.

103 In DLPT period, this right was regulated at DLPT Art. 11 which was titled *"Prohibition on the Use of Trademark Registered in the Name of an Agent or a Representative"* as follows *"If a trademark is registered in the name of the agent or representative of the proprietor of the trademark without the proprietor's consent, the proprietor shall be entitled to oppose the use of the trademark unless the agent or representative has a justifiable reason."*. IPL uses the terms "prohibition of the use" instead of "oppose the use". Moreover dissimilarly from DLPT Art. 11, IPL Art. 10 does not mention "without the proprietor's consent" (in this regard see and cf. **Tekinalp**, p. 486; **Paslı**, Etkiler, p. 381).

Pursuant to the IPL Art. 7/1, the trademark protection provided by IPL is acquired by registration (principle of registration) and the rights arising from a trademark registration shall be granted exclusively to the trademark proprietor (IPL Art. 7/2). The "trademark proprietor" referred hereby and entitled to utilize the protection provided by IPL is "the person in the name of whom the trademark is registered". But as mentioned above[104], in the assumption which IPL Art. 10 regulates, the proprietor and the formal right owner of a trademark are different persons[105]. This is because the trademark is registered in the name of the representative even though he is not the legal proprietor of the trademark. In order to prevent any problems that may arise in such a case, IPL Art. 10 surrenders the principle of precedence of the formal right owner in appearance to protect the legal proprietor and allows prohibition of use of the registered trademark by the person for whom it has been registered (formal right owner)[106]. However such surrender shall not mean that the proprietor abroad may use any opportunity provided by IPL as if he were the registration holder[107]. IPL Art. 10 is qualified as an exception to the principle of registration and the main rule in acquisition of trademark protection provided by IPL is still IPL Art. 7/1[108].

The proprietor shall use his right to prohibition granted by IPL Art. 10 by filing a suit. Such right to prohibition is not limited to the requests of the formal right owner (representative) against the proprietor[109]. Through the lawsuit, the proprietor may prevent the representative from any action concerning the trademark and from using the trademark, despite the registration of the trademark is in the name of the representative[110]. The representative cannot use the registration he holds as a justification for defense and cannot claim requirement of invalidity of the trademark for prohibition of its use[111].

On the other hand, the proprietor may demand that the court prevents the representative from using his rights arising from the registration of the trademark against himself[112] and may defend himself based on his actual proprietorship in lawsuits for violation based on misusing or unfair competition filed against himself by the representative[113]. Under such assumption, the case will be dismissed through

104 See II, B.

105 **Yasaman/Ayoğlu**, Vol. I, p. 519; **Karaman**, p. 121-122; **Paslı**, Etkiler, p. 381; **Bauer**, p. 179.

106 **Paslı**, Etkiler, p. 381; **Yasaman/Ayoğlu**, Vol. I, p. 519 (also and particularly see and cf. **Paslı**, Etkiler, p. 381, fn. 359; **Yasaman/Ayoğlu**, Vol. I, p. 519-520 and **Sekmen**, p. 178). Therefore on the condition of fulfillment of common conditions and through the application to court by the proprietor, the right of use which is exclusive for formal (registration) owner of the trademark in IPL Art. 7/2 is limited against the proprietor (**Paslı**, Etkiler, p. 382, 384-385).

107 **Paslı**, Etkiler, p. 381.

108 **Paslı**, Etkiler, p. 381, fn. 359.

109 **Paslı**, Etkiler, p. 382.

110 **Paslı**, Etkiler, p. 382.

111 **Paslı**, Etkiler, p. 385; also see and cf. IPL Article 155.

112 **Çolak**, p. 331-332.

113 **Paslı**, Etkiler, p. 382, fn. 363; also and particularly see **von Schultz**, p. 243; **Fuchs-Wissemann**, p. 379.

precedence of the proprietor despite the formal right ownership granted by the registration to the representative[114].

Tekinalp states that it qualifies as a form of interim injunction for the person who is the trademark proprietor by a registration or registrations outside Turkey (legal/real right owner) to prevent the representative who becomes the formal right owner of the said trademark in Turkey by the registration in Turkey (formal right owner) from using the trademark and that such a lawsuit can be followed by lawsuits for compensation and invalidation and even that the assumption regulated by DLPT Art. 11 (IPL Art. 10) requires opposition right to use of trademark (prohibition right to use of the trademark) to be completed with an invalidation suit and it proves that the invalidation suit is the extension to the opposition (prohibition) right[115].

The proprietor, indeed, will almost always request from the court not only to prohibit the use but also to transfer the registered trademark to himself (IPL Art. 10) or to invalidate it (IPL Art. 25/1, 6/2). This is so because the claim for prohibition of use applies cumulatively with the claim for transfer (IPL Art. 10) or invalidation (IPL Art. 25/1, 6/2)[116]. However this does not change the fact that the right of prohibition is independent from the right of invalidation and transfer and those rights can be claimed independently[117].

We would finally like to point out that while it is indisputable that the right to prohibition regulated by IPL Art. 10 will be used by the "proprietor" through "lawsuits", there is not a consensus in the doctrine regarding the nature of the said lawsuits. While one opinion accepts that the right to prohibition based on IPL Art. 10 (DLPT Art. 11) shall be used through "a claim to prevent and stop the infringement" [DLPT Art. 62/1-(a); IPL Art. 149/1-(b), (c)][118], another opinion claims that there is not an exception to the principle of registration here [DLPT Art. 6; IPL Art. 7/1] and the formal right owner holds an exclusive right on action on infringement and the proprietor does not possess a right to be protected by proceedings for infringement and thus he would not be able to file its proceedings for prohibition as a lawsuit for infringement and that he would be able to use the right to protection granted by IPL Art. 10 within the scope of general protection rules based on unfair competition within the framework of the TCC Art. 54 ff. provisions[119]. The second opinion also

114 **Paslı**, Etkiler, p. 382, fn. 363.

115 **Tekinalp**, p. 485; in the same opinion see **Çağlar**, p. 143.

116 **Paslı**, Etkiler, p. 382, fn. 362. However a cumulative application is not possible in terms of claims for "invalidation" (IPL Art. 25/1, 6/2) and "transfer" (IPL Art. 10) (see and cf. V, D).

117 See **Paslı**, Etkiler, p. 382 regarding independency of the right of prohibition from the claim for invalidation; also see **Berlit**, p. 221-222.

118 In this opinion see **Arkan**, Yabancı Marka, p. 14 and particularly **Arkan**, Yabancı Marka, p. 14, fn. 31; **Tekinalp**, p. 421, 449, 485; **Karan/Kılıç**, p. 282; **Sekmen**, p. 178.

119 **Paslı**, Etkiler, p. 383-385. The author states that TCC Art. 56/1-(b) and (c) provides the proprietor with the opportunity to prevent the formal right owner from using the trademark and to eliminate the factual circumstances incurred and

mentions that there must be an explicit provision of law which provides for a person who is not a registration holder to be qualified as a plaintiff in terms of claiming requests granted to the holders of registered trademarks[120].

However regardless of whichever point of view is adopted, there is no dispute that the proprietor can prevent the representative who becomes the formal right owner of the trademark from performing the following based on IPL Art. 10: From affixing the sign to the goods or to the packaging thereof [IPL Art. 7/3-(a)], putting the goods on the market, offering them as deliverable or stocking them for these purposes under the trademark or offering or supplying services under the trademark [IPL Art. 7/3-(b)], importing or exporting the goods under the trademark [IPL Art. 7/3-(c)], using the trademark on business papers and advertisements [IPL Art. 7/3-(ç)], using the trademark on internet as domain name, router code, keyword or in similar manner with a commercial impression [IPL Art. 7/3-(d)] and using the sign as a business name or a trade name [IPL Art. 7/3-(e)]. Therefore whether based on IPL Art. 149/1-(b), (c) or TCC Art. 54 ff. (and TCC Art. 56 in particular) provisions, the proprietor can without a doubt prevent the representative from carrying out any of the actions specified in IPL Art. 7/3-(a), (b), (c), (ç), (d) and (e). We are of the opinion that the fact that IPL is not regulated to contain a similar reference in MarkenG § 17/2 to MarkenG § 14 in German law, meaning that IPL Art. 10 does not include a reference to IPL Art. 7, does not prevent such conclusion. The scope of provisions of TCC Art. 56/1-(b), (c) and TCC Art. 61 already prevent the representative from carrying out the actions specified in IPL Art. 7/3-(a), (b), (c), (ç), (d) and (e)[121].

D. Claim the Transfer of the Registered Trademark

Upon fulfillment of the common conditions[122], another opportunity granted by IPL to the proprietor of the trademark is to request that the court transfers the registration to himself[123] (IPL Art. 10). This grants the trademark proprietor who has not or could not prevent the registration based on IPL Art. 6/2 the right to be registered as the trademark proprietor instead of "his representative" through a lawsuit based on IPL Art. 10 while the record of the trademark in the registration remains the same, instead of claiming invalidation of the registered trademark[124]. This provides

furthermore discusses that it is possible for the proprietor of the trademark to claim compensation (pecuniary and non-pecuniary) specified in TCC Art. 56/1-(d) and (e) and even though it may be considered that the provisions of PC and IPL (PC Art. 6[septies]; IPL Art. 10) provides the proprietor with only the opportunity of protection, there is categorically not a reason that requires refusal of the claim of compensation on the ground that the protection granted by the registration will not be available (**Paslı**, Etkiler, p. 385-386, fn. 372).

120 **Paslı**, Etkiler, p. 385, fn. 369.

121 On this subject also see and cf. **Paslı**, Etkiler, p. 382 and **Paslı**, Etkiler, p. 383, fn. 365.

122 See IV.

123 While "transfer of the registration" is mentioned hereby, the subject of the transfer is in fact "the trademark right granted by the registration" (indeed see **Sabih Arkan**, Marka Hukuku, Vol. II, Ankara 1998, p. 160).

124 **Paslı**, Etkiler, p. 378-379.

the trademark proprietor with an alternative to the invalidation claim[125]. The most important advantage of the possibility of transfer is that the proprietor will acquire the trademark right in Turkey with the precedence granted by the registration in the name of the representative[126].

The conditions for application of invalidation of the representative trademark based on IPL Art. 25/1 and 6/2 and claiming its transfer pursuant to IPL Art. 10 are common[127]. In this context, the terms "justifiable reason" mentioned in IPL Art. 6/2 and IPL Art. 10 are also not different[128]. Thus we would like to repeat once more that the abovementioned common conditions shall be sought for transfer of the trademark registered in the name of the representative, as well.

Contrary to DLPT Art. 17, IPL Art. 10 expressly specifies that the transfer of the trademark may be requested from "the court"[129]. It is undisputable that the trademark proprietor may request that the representative transfers the trademark in his favor before filing a suit. If the representative accepts such a request and transfers the trademark to its proprietor, the problem will be solved. However if the representative avoids the transfer, the proprietor is required to file a lawsuit based on IPL Art. 10 in order to take over the trademark. The proprietor cannot have the trademark transferred to himself by submitting his request of transfer to TPTO and TPTO is not authorized to order such a transfer.

Only the proprietor of the trademark may file a lawsuit for transfer of the trademark based on IPL Art. 10[130]. Pursuant to the explicit provision of IPL Art. 10, the plaintiff may request transfer of the trademark solely "to himself". The trademark cannot be requested to be transferred to a third party appointed by the plaintiff[131]. The doctrine also accepts requests for transfer in part for the goods and/or services covered by the trademark based on the permissibility that registration is possible for different goods and/or services of the same trademark[132].

125 **Paslı**, Etkiler, p. 378; **Hacker**, p. 835; **Fuchs-Wissemann**, p. 207.

126 **von Zumbusch**, p. 426; also see **Hacker**, p. 608, 835, 836; **Fuchs-Wissemann**, p. 379. See **Arkan**, Yabancı Marka, p. 13; **Karaman**, p. 123 regarding that the opportunity for the transfer is accepted considering that the invalidation may not always suffice to protect the interests of the proprietor and that the proprietor may deem it more advantageous in terms of his interests to acquire the trademark right in Turkey with the precedence granted by the registration in the name of the representative.

127 **Paslı**, Etkiler, p. 379; also see **Arkan**, Yabancı Marka, p. 13; **Paslı**, Etkiler, p. 379, fn. 353; **Hacker**, p. 835.

128 The doctrine explicitly stated during DLPT period that although different in expression, "valid justification" in DLPT Art. 8/2 and "justified reason" DLPT Art. 17 are the same in context (see **Paslı**, Etkiler, p. 379).

129 DLPT Art. 17 was not clear on request of transfer to be made through a lawsuit. However the doctrine accepted also during DLPT period that the request was to be made through filing a lawsuit since TPI (TPTO) is not authorized to make judgements on justifiability. Indeed see **Tekinalp**, p. 465; **Yasaman/Altay**, Vol. II, p. 696; **Karaman**, p. 123; **Karan/Kılıç**, p. 338; **Paslı**, Etkiler, p. 379-380.

130 **Paslı**, Etkiler, p. 380.

131 **Paslı**, Etkiler, p. 380. However the proprietor who has the trademark transferred to himself after succeeding in the lawsuit could initiate legal transactions within the scope of IPL Art. 148 regarding his registered trademark (such as transferring it to a third party of choice) (**Paslı**, Etkiler, p. 380).

132 **Arkan**, Yabancı Marka, p. 13; **Karaman**, p. 123; **Paslı**, Etkiler, p. 380; also see **Hacker**, p. 835; **von Zumbusch**, p. 426;

The transfer regulated by IPL Art. 10 is a "compulsory" transfer for which the consent of the transferor (the "representative" who is the formal rightful owner of the registered trademark) is not sought[133]. It is also not required for the representative to have acted negligently regarding trademark registration for the proprietor to use IPL Art. 10 as a basis for transfer[134]. Therefore if the common conditions are fulfilled and the trademark proprietor requests "transfer" within the framework of IPL Art. 10, the court shall decide on transfer of the trademark to its legal proprietor without the consent of the representative and even contrary to his will[135]. From this point of view, the doctrine deems the right of the trademark proprietor to request the transfer of the trademark to himself as a "formative right (=right to alter the legal relationship unilaterally) exercised via litigation"[136].

On the other hand, it shall be pointed out that even though the conditions for claims based on representative trademarks are common, cumulative application in terms of claims of "invalidation" (IPL Art. 25/1, 6/2) and "transfer" (IPL Art. 10) is out of the question[137]. This means that an "invalidation of the trademark" and "transfer" cannot be requested from the court at the same time. The trademark proprietor must choose either one of these two[138]. If the trademark proprietor claims requests of invalidation and transfer through alternative pleading (CPL Art. 111), the court shall evaluate the principal request in the first place. In alternative pleading, the court may not evaluate and adjudicate the secondary claims of the plaintiff without dismissing the principal claim (CPL Art. 111/2). Therefore the principal claim of the trademark proprietor is significant. For example if the trademark proprietor has principally requested invalidation and the required conditions are fulfilled (IPL Art. 25/1, 6/2), the court shall give a ruling for invalidation and it shall not evaluate the request for transfer and shall not be able to rule in terms of such a request[139]. On the assumption that the principal request is a transfer (IPL Art. 10) and the secondary request is invalidation (IPL Art. 25/1, 6/2) in alternative pleading, the request for transfer shall be evaluated in the first place and the secondary request of invalidation shall be evaluated in case of dismissal of the transfer request[140].

Fuchs-Wissemann, p. 379.

133 **Tekinalp**, p. 465.

134 **Arkan**, Yabancı Marka, p. 13; **Karaman**, p. 123; **Paslı**, Etkiler, p. 379, fn. 353; **Hacker**, p. 835; **Fuchs-Wissemann**, p. 379.

135 In this context, the property of the trademark shall be transferred to the proprietor based on the decision of the court on the transfer and after entry of the judgment into force, the adjustment of the record in the trademark registry shall only have a declarative effect (**Paslı**, Etkiler, p. 380).

136 **Yasaman/Altay**, Vol. II, p. 696; **Karaman**, p. 123; **Paslı**, Etkiler, p. 379-380.

137 **Paslı**, Etkiler, p. 379.

138 PC Art. 6^{septies} also indicates that the proprietor must choose between "invalidation" and "transfer" (**Paslı**, Etkiler, p. 379).

139 **Çolak**, p. 909. We must add that the author is on the opinion that it shall be better to claim it as a principal request if invalidation shall be requested (**Çolak**, p. 909-910).

140 For an example case on this possibility see Decision of the 11th Chamber of the Court of Cassation dated 21.03.2014 and numbered 2012-16334/5593 (**Çolak**, p. 910-911); also see and cf. Decision of the 11th Chamber of the Court of Cassation dated 04.04.2011 and numbered 2009-9836/3827 (**Çolak**, p. 910).

Since the conditions for a request of invalidation based on IPL Art. 25/1 and 6/2 and a request for transfer based on IPL Art. 10 are common, the court shall be obliged to recognize whichever is the principal request of the plaintiff in case of fulfillment of such common conditions. From this point of view, if the plaintiff has explicitly requested invalidation within the framework of IPL Art. 25/1 and 6/2 and requested transfer as a secondary claim based on IPL Art. 10, the court cannot give precedence to the request of transfer[141]. If the conditions required by IPL Art. 25/1 and 6/2 are fulfilled –which are identical to the conditions required by IPL Art. 10– the court shall be obliged to recognize the proprietor's principal request for invalidation and give a ruling for invalidation of the trademark. Without prejudice to the provisions of law that provides for otherwise (CPL Art. 26/2), the judge is bound by the requests of the parties. Although he can decide less than the request, he may not rule on more or other than requested by the parties (CPL Art. 26/1). This rule is called "the principle of being bound by the request (=ultra petita prohibition)".

If the proprietor insists on alternative pleading, we are of the opinion that he should claim the request of transfer, which shall be in his favor under any circumstances, as the principal request and claim the request on invalidation as the secondary request. IPL Art. 10 is not only more advantageous for the proprietor since it relieves the burden of re-applying for registration before TPTO after invalidation and deletion of the registered trademark by granting the right to the property of an already existing registration and protects the proprietor against the risk of registration by third parties during the interim period but it also serves to the procedural economy in terms of trademark registration system by relieving the TPTO of the burden of monitoring a new registration procedure for the same trademark[142].

In order for the trademark to be transferred to the trademark proprietor based on IPL Art. 10, the trademark must be registered in TPTO trademark registry[143]. Thus if the trademark right shall end since the representative – who is also the formal right owner – does not renew the trademark despite expiry of the protection period [IPL Art. 28/1-(a)] or waives his trademark right [IPL Art. 28/1-(b)] and the trademark is deleted from the registry during the lawsuit filed on the request of transfer, the court cannot decide transfer of such a trademark anymore[144].

A decision of transfer made based on IPL Art. 10 – just as in the decision for invalidation (IPL Art. 27) – retroactively confirms the property and after finalization of the decision, no claims of any restrictive rights such as licensing or pledging can be

141 However see and cf. **Çolak**, p. 910.

142 **Paslı**, Etkiler, p. 379, fn. 352.

143 **Çolak**, p. 911.

144 **Çolak**, p. 911; also see Decision of the 11th Chamber of the Court of Cassation dated 22.09.2014 and numbered 12345/14249 (**Çolak**, p. 911).

raised against the proprietor of the trademark[145]. However there is no doubt that those who have concluded a licensing or pledge agreement with the representative during the period of registration of the trademark in his name, shall be able to claim damages from the representative if the conditions thereof are fulfilled[146].

VI. Time-Dependency of Requests and Registration in Bad Faith

PC Art. 6^{septies}/3 specifies *"Domestic legislation may provide an equitable time limit within which the proprietor of a mark must exercise the rights provided for in this Article."*. However Turkey did not utilize the opportunity of PC Art. 6^{septies}/3 that covers all claims based on representative trademarks and enables the determination of a period in terms of the said claims during DLPT period[147] and it also did not utilize such an opportunity in IPL neither. In other words, it does not provide for a time limit for exercising the rights regulated by the provisions of IPL regarding representative trademarks. However the fact that there is not a time limit specified in IPL in terms of exercising the rights granted by the provisions on representative trademarks shall not mean that the abovementioned rights can be used indefinitely[148]. On the contrary, the time limits in the Turkish legislation apply to the legal means based on which each claim in the provisions on representative trademarks[149]. Therefore the period of three months specified in IPL Art. 41/1 shall apply for opposing the application of a registration based on IPL Art. 6/2[150]. In terms of any claim for invalidation of IPL Art. 6/2 (IPL Art. 25/1), the period of prescription of five years specified in IPL Art. 25/6 shall apply[151]. Since the transfer claim is qualified as an alternative to the invalidation claim, the abovementioned period of five years will also apply for the claim of transfer regulated in IPL Art. 10[152].

However it must be emphasized that the five years period of prescription does not apply to the registrations in bad faith pursuant to the explicit provision in IPL Art. 25/6. This means that the lawsuit for invalidation is not subject to any specified period in case of registration in bad faith. Hence, if the representative has registered the trademark in bad faith, the lawsuits for invalidation (IPL Art. 25/1, 6/2) and transfer of the trademark (IPL Art. 10) –which is the alternative to invalidation– can be filed without being subject to a period of prescription.

145 **Paslı**, Etkiler, p. 380; also see **von Zumbusch**, p. 427-428; **Fuchs-Wissemann**, p. 379-380. This is caused due to the absence of a regulation for protection of confidence in the trademark registry in IPL regarding the said issues, just like it was in DLPT (see **Paslı**, Etkiler, p. 380 and also see **Arkan**, Marka Vol. II, p. 183-184; **Arkan**, Yabancı Marka, p. 13; **Karaman**, p. 123 mentioned on **Paslı**, Etkiler, p. 380, fn. 358). On this subject also see and cf. **Hacker**, p. 836.

146 On this subject also see and cf. IPL Art. 27/3-4.

147 **Arkan**, Yabancı Marka, p. 13; **Karaman**, p. 124; **Paslı**, Etkiler, p. 386.

148 **Paslı**, Etkiler, p. 386.

149 **Paslı**, Etkiler, p. 386.

150 **Paslı**, Etkiler, p. 386.

151 Regarding DLPT period see **Paslı**, Etkiler, p. 386-387.

152 **Paslı**, Etkiler, p. 387.

Let's point out that: It is not possible to say that all of the registered representative trademarks are categorically classified as registrations in bad faith. It is indisputable that the representative may have attempted for registration in bad faith by abusing his position and knowledge acquired in parallel to his authorization to use the trademark[153] or by violating his obligation of loyalty[154]. It is also indeed a fact that such attempts are observed often. However such fact shall not mean that all registered representative trademarks are registrations in bad faith[155]. Just as in every other trademark registration, each registration for a representative trademark shall be evaluated and determined in terms of registration in bad faith based on the particular conditions of each incident[156].

A distinction is required for the lapse of time to which the authorization of "prohibition" based on IPL Art. 10 is subject to. As analyzed above[157], the legal nature of the lawsuit regarding use of such authorization is controversial in the doctrine. Based on such, if the right of prohibition regulated by IPL Art. 10 (DLPT Art. 11) is assumed to be used via "a claim to prevent and stop the infringement" [DLPT Art. 62/1-(a); IPL Art. 149/1-(b), (c)], due to the reference to TCO in IPL Art. 157, the lapse of time of two and ten years regulated in TCO Art. 72/1 shall apply. However if the right of prohibition based on IPL Art. 10 is assumed to be used within the scope of general protection rules based on unfair competition within the framework of TCC Art. 54 ff., then a lapse of time of one and three years regulated by TCC Art. 60 shall apply[158]. Nevertheless, regardless of the opinion adopted, without prejudice to TCiC Art. 2, the lapse of time shall restart regarding the request of prohibition with each means of the use of the trademark[159].

The final remark we would like to add is that if a registration in bad faith is out of the question and the five year period of prescription provided for in IPL Art. 25/6 has expired, the proprietor cannot claim invalidation of the trademark based on IPL Art. 6/2 or transfer of the trademark to himself based on IPL Art. 10. Thus, after expiry of the five year period, the use by the representative of the trademark cannot

153 **Paslı**, Etkiler, p. 366.

154 **Tekinalp**, p. 421, 486.

155 See and cf. **Arkan**, Yabancı Marka, p. 13; **Karaman**, p. 124 who discuss that it may be considered that the representative will never act in good faith due to the absence of a specific time period for exercising the rights regulated by the representative trademarks provisions.

156 On this subject also see and cf. **Paslı**, Etkiler, p. 368-370, fn. 331 and p. 386-387; **Çolak**, p. 332, 909, 1039-1040; **Noyan/Güneş**, p. 158; Decision of the 11th Chamber of the Court of Cassation dated 17.04.2014 and numbered 111/7636 (**Çolak**, p. 332); Decision of the 11th Chamber of the Court of Cassation dated 01.06.2009 and numbered 2008-2952/6682 (**Çolak**, p. 332); Decision of the 11th Chamber of the Court of Cassation dated 25.06.2009 and numbered 2008-3616/7841 (**Çolak**, p. 332); Decision of the 11th Chamber of the Court of Cassation dated 26.09.2006 and numbered 2005-8389/9281 (**Çolak**, p. 333); Decision of the 11th Chamber of the Court of Cassation dated 11.10.2012 and numbered 2011-8375/15830 (**Çolak**, p. 333); Decision of the 11th Chamber of the Court of Cassation dated 23.11.2007 and numbered 2006-7640/14803 (**Noyan/Güneş**, p. 159).

157 See V, C.

158 **Paslı**, Etkiler, p. 387.

159 **Paslı**, Etkiler, p. 387, fn. 376; on this regard also see **Çolak**, p. 827-828.

be prohibited within the scope of IPL Art. 10. This means that the proprietor cannot have the use of a trademark prohibited if he cannot request invalidation based on IPL Art. 6/2 or transfer hereof to himself based on IPL Art. 10 due to the expiry of the period of prescription in IPL Art. 25/6. The use of the registered trademark by the representative cannot be prohibited on the grounds of IPL Art. 10 after this point.

VII. Conclusion

1. IPL Art. 6/2, 10 and 25/1 are the provisions regarding representative trademarks. These IPL provisions are based on PC Art. 6^{septies} regulations.

2. If the common conditions are fulfilled, the provisions regarding representative trademarks grant the following rights to the proprietor: To ensure rejection of the application and prevention of the registration by opposing the application for the registration of the trademark in the name of the representative (IPL Art. 6/2), to claim invalidation of the trademark if the trademark has been registered in the name of the representative (IPL Art. 25/1, 6/2), to claim transfer of the registration (trademark) to himself, also on the assumption that the trademark has been registered in the name of the representative (IPL Art. 10) and to request prohibition of the use of the trademark registered in the name of the representative (despite the registration) (IPL Art. 10).

3. "The trademark proprietor" referred to in IPL Art. 6/2 and 10 is the legal/real right owner of the mark (trademark) which the representative has registered or has applied for registration before TPTO. In such case, if the representative has acquired the registration of the trademark in his name before TPTO, the proprietor and the formal right owner of the trademark become different.

4. It must be noted that to exercise the provisions of IPL regarding representative trademarks (IPL Art. 6/2, 10, 25/1), the trademark proprietor and the person who has registered or applied for registration of the trademark in his name before TPTO must have a relationship which concerns the use of the trademark, distribution of the goods branded with the trademark or delivery of service or services under such trademark. The relationship between the proprietor and the person who wants to register or has registered the trademark in his name is defined as "commercial agency" or "commercial representation" in IPL.

5. The terms "commercial agent or representative" used in the provisions on representative trademarks shall not be limited to the commercial agent or (commercial) representative in the technical legal meaning specified in TCO Art. 547 ff. but shall be interpreted in a broad sense and any person who is authorized to use the trademark in Turkey (for example to sell the goods branded with the trademark or provide service or services under the trademark on behalf of the proprietor or himself) based on a

continuous and affiliated relationship pursuant to any attorney contract, exclusive distributorship agreement, labor contract, license agreement, franchise agreement, agency contract, brokerage contract, distributorship or dealership agreement shall be deemed as "representative" in terms of exercise of IPL Art. 6/2 and 10, whether or not granted the power to represent the proprietor in technical legal meaning.

6. There are three exceptional characteristics of the provisions on representative trademarks. These are: *(i)* precedence of the legal/real right owner (proprietor) over the formal right owner which is an exception to the principle of registration (IPL Art. 10; DLPT Art. 11), *(ii)* ability to transfer the trademark though court decision (IPL Art. 10; DLPT Art. 17) and *(iii)* being provided for as an exception to the principle of territoriality (IPL Art. 6/2; DLPT Art. 8/2).

7. The provisions on representative trademarks protect a common interest and aim to prevent any problem that may be caused by the proprietor and formal right owner being different parties. In parallel with the same interest they share, the conditions of application of the provisions on representative trademarks are common.

8. The provisions on representative trademarks apply to both the service marks and the trade marks. It is not required for the trademark to be well-known for the proprietor to exercise the protection granted by the provisions on representative trademarks.

9. Even if the conditions of application of the provisions on representative trademarks are common, the authority to exercise such provisions is not always the same. If there is a registered trademark, the requests for prohibition and transfer of this trademark (IPL Art. 10) or its invalidity (IPL Art. 25/1, 6/2) shall be sent to the court. However if there is an application for registration (IPL Art. 6/2), the proprietor opposes the application before TPTO and TPTO shall be the authority to make a decision about the opposition in question.

10. It must be accepted that the protection granted by the provisions regarding representative trademarks – despite the strict sense in their wording – is to the extent specified in IPL Art. 6/1. These provisions can be applied when the trademark subject to the application of registration by the representative is identical or similar in terms of both the sign and the goods or services of the trademark of the proprietor. If a trademark applied for registration or already registered in the name of the representative before TPTO is identical or similar to the trademark of the proprietor in terms of both the sign and the goods or services and if this situation causes a likelihood of confusion – including the relation possibility by the public – between them (IPL Art. 6/1), the provisions of the representative trademarks (IPL Art. 6/2, 10, 25/1) may apply. This is the first common condition required for application

of the provisions on representative trademarks. Therefore, the proprietor has the opportunities to oppose the registration application before TPTO (IPL Art. 6/2), to request prohibition of use or assignment in his favor of the trademark registered by such means (IPL Art. 10) or to claim invalidity of the trademark (IPL Art. 25/1, 6/2) if it causes a likelihood of confusion – including the relation possibility by the public – with his trademark because of the identity or similarity of the signs and identity or similarity of the goods or services that it covers.

11. The second common condition required for application of the provisions on representative trademarks is making application of registration or registration of the trademark without the authorization (consent) of the proprietor. The "authorization" mentioned hereby is "for registration of the trademark in the name of the representative before TPTO", meaning the authorization "for registration". Such condition is also fulfilled, if the proprietor approves the registration in the name of the representative later, even if it had not been requested permission from him in the first place. The registration now becomes subject to consent and "authorized" within the meaning in IPL Art. 6/2 and 10. The authorization or consent specified in IPL Art. 6/2 and 10 is not subject to any form requirement. It can also be "implied (implicit)" in such terms.

12. The final common condition required for application of the representative trademark is representative's failure to justify his action (IPL Art. 10), his inability to base his request for registration of the trademark in his name on a justifiable reason (IPL Art. 6/2). It must be pointed out that the "justifiable reason" mentioned hereby is another and a different concept from the "authorization" analyzed above. This means that the "authorization" and "justifiable reason" specified in the provisions regarding the representative trademarks are different terms. Thus for application of the provisions on representative trademarks, it is both required for the proprietor not to grant authorization and for the representative to fail justification of his action to request registration of the trademark in his name. In the doctrine there are two opposing views on whether such "justifiable reason" should be "contractual" or not. We are of the opinion that the "justifiable reason" should not be limited to contractual facts.

13. The first opportunity granted to the proprietor by the provisions on representative trademarks is to be able to prevent the registration by opposing the application for registration of the trademark in the name of the representative and (IPL Art. 6/2) to demand invalidity of the trademark in case the trademark has already been registered in the name of the representative (IPL Art. 25/1, 6/2). IPL enables the proprietor who did not or could not prevent the registration before TPTO during registration application to claim invalidity of the trademark (IPL Art. 25/1, 6/2). The proprietor

is protected even if he did not oppose the registration during the application process or his opposition is found unjustified and refused despite fulfillment of the common conditions.

14. IPL Art. 10 grants the trademark proprietor the right to demand from the court to prohibit the use of the trademark by the representative despite the registration of the trademark is in the name of the representative. This provision surrenders the principle of precedence of the formal right owner in appearance to protect the legal proprietor and allows prohibition of use of the registered trademark by the person for whom it has been registered (formal right owner).

15. Another opportunity granted by IPL to the proprietor of the trademark is to request from the court to transfer the registration to himself (IPL Art. 10). This provides the trademark proprietor with an alternative to the invalidation claim. The most important advantage of the possibility of transfer is that the proprietor will acquire the trademark right in Turkey with the precedence granted by the registration in the name of the representative. The transfer regulated by IPL Art. 10 is a "compulsory" transfer for which the consent of the transferor (the "representative" who is the formal right owner of the registered trademark) is not sought. From this point of view, the doctrine deems the right of the trademark proprietor to request the transfer of the trademark to himself as a "formative right exercised via litigation".

16. Turkey does not provide for a time limit for exercising the rights regulated by the provisions of IPL regarding representative trademarks. However the fact that there is not a time limit specified in IPL in terms of exercising of the rights granted by the provisions on representative trademarks shall not mean that the abovementioned rights can be used indefinitely. On the contrary, the time limits in the Turkish legislation for the legal means that these rights are based on applying to each claim in the provisions on representative trademarks.

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List of Abbreviations

Art.	:	Article
cf.	:	confer (compare)
CPL	:	Civil Procedure Law Nr. 6100
DLPT	:	Decree-Law (Nr. 556) on the Protection of Trademarks
ff.	:	and the following
fn.	:	footnote
IPL	:	Industrial Property Law Nr. 6769
MarkenG	:	Gesetz über den Schutz von Marken und sonstigen Kennzeichen (Law on the Protection of Trademarks and Other Hallmarks)
n.d.	:	no date
Nr.	:	number
OLG	:	Oberlandesgericht (Higher Regional Court)
p.	:	page
passim	:	throughout
PC	:	Paris Convention for the Protection of Industrial Property
pp.	:	pages
TCC	:	Turkish Commercial Code Nr. 6102
TCiC	:	Turkish Civil Code Nr. 4721
TCO	:	Turkish Code of Obligations Nr. 6098
TPI	:	Turkish Patent Institute
TPTO	:	Turkish Patent and Trademark Office (TURKPATENT)
Vol.	:	volume

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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

Die Auswirkung der Forderungsabtretung oder der Schuldübernahme auf die Konventionalstrafe

The Effect of the Transfer of Receivables or Assumption of Debt to the Penalty Clause

Alacağın Devri veya Borcun Üstlenilmesinin Cezaî Şarta Etkisi

Irem Yayvak Namli[1]

Zusammenfassung
Obwohl die Konventionalstrafe in vielen Konventionen in der Praxis enthalten ist, enthält sie viele kontroverse Fragen, die sowohl in der Lehre als auch in den Gerichtsentscheidungen noch zu klären sind. Eines dieser Probleme ist das Schicksal der Konventionalstrafe im Falle der Forderungsabtretung oder Schuldübernahme. In dieser Studie wird zunächst das Prinzip der Akzessorietät der Konventionalstrafe erörtert und anschließend die in der türkischen, schweizerischen und deutschen Lehre vertretenen Meinungen einbezogen. Abschließend möchten wir darauf hinweisen, dass die akzessorische Natur der Konventionalstrafe die kontroversen Themen in den Mittelpunkt stellt.

Schlüsselwörter
Konventionalstrafe, Forderungsabtretung, Schuldübernahme, Akzessorietät, Hauptschuld

Abstract
Although the penalty clause is included in many contracts in practice today, it contains several controversial issues that are still waiting to be resolved both in the doctrine and judicial decisions. One of these issues is the consequence of the penalty clause in the event of the transfer of the receivables or in case the debt is assumed. In our study, first, the accessory nature of the penalty clause will be discussed. Then, the opinions put forward on the subject in the Turkish, Swiss and German doctrines will be included. And finally, we will state our opinion focusing on the accessory nature of the penalty clause on the controversial issues.

Keywords
Penalty clause, Transfer of receivables, Assumption of debt, Accessory obligation, Principal debt

Öz
Cezai şart, uygulamada birçok sözleşmede yer almakla birlikte, gerek doktrinde gerekse yargı kararlarında halen çözümlenmeyi bekleyen birçok tartışmalı konu içermektedir. Bu konulardan biri ise alacağın devri veya borcun üstlenilmesi halinde cezai şartın akıbetidir. Çalışmamızda öncelikle cezai şartın fer'i niteliği ele alınacak olup, daha sonra Türk, İsviçre ve Alman doktrininde konu hakkında ileri sürülen görüşlere yer verilecektir. En son olarak ise tartışmalı hususlarda cezai şartın fer'i niteliğinin odak alındığı kanaatimiz belirtilecektir.

Anahtar Kelimeler
Cezai şart, Alacağın devri, Borcun üstlenilmesi, Fer'i borç, Asıl borç

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Extended Summary

Although the penalty clause is included in many contracts in practice today, it contains several controversial issues that are still waiting to be resolved both in the doctrine and in judicial decisions. One of these issues is the consequence of the penalty clause in the event of the transfer of receivables or in case the debt is assumed.

The penalty clause is a provision requiring financial compensation, which is promised to be paid to the other party in the event of the contract is being breached, either partially or fully. In Turkish Law, the penalty clause is regulated in Article 179 and in the following sections of the Turkish Code of Obligations number 6098. The penalty clause appears as a debt in connection with the principal debt. The emergence, continuity and termination of the penalty clause depends on the existence of the principal debt. The transfer of the receivable is regulated between Articles 183 and 194 of the Turkish Code of Obligations number 6098. Because of its accessory nature the penalty clause has significant consequences. One of these is the transfer of authority to demand a penalty clause of the new owner of the receivable in the event of the transfer of the said receivable. The Swiss and German doctrines have for many years placed an emphasis on the transfer of the receivable within the framework of the penalty clause. In this context, however, there are no obvious regulations in Turkish Law. Thus, many different views have arisen on the matter. The focus is set on whether the penalty clause can be transferred independently of the principal receivable. Moreover, many different opinions have also emerged about which creditor has the right to demand a penalty clause. The issue is generally handled depending on whether the penalty clause is due. Our present study focuses specifically on this latter detail.

In the event of the transfer of the principal receivable, the penalty clause which is not yet due will also be transferred to the transferee together with the principal receivable. The matter of transferring the penalty clause to a third party independently of the principal receivable before it is due is controversial. After the penalty clause is due, the principal-accessory debt relationship with the principal debt disappears. In this case, since the penalty clause turns into an independent receivable, the penalty clause does not have to pass onto the transferee when the principal receivable is transferred. In the event of the transfer of the receivable, a distinction should be made taking into account the general principles regarding whether the penalty clause can be transferred independently before or after it is due. Therefore, before the penalty clause is due, an interpretation should be made by paying attention to the fact that it has the accessory nature. In our study, our opinion on the controversial issues is explained in detail within the boundaries of this interpretation.

Assuming of debt is regulated in Article 195 and the following sections of the

Turkish Code of Obligations number 6098. If the debt is assumed, the accessory nature of the penalty clause comes to the fore regarding the status of the penalty clause. According to Article 198/1 of the TBK, the rights of the creditor other than those related to the personality of the debtor will be reserved even if the debtor has changed. This conclusion does not raise any doubt that the person who assumes the debt will be liable if the penalty clause is due after the debt is assumed. An important issue to address in terms of assuming the debt is whether or not it is possible for a third-party to assume the penalty clause, which has not been due yet, independently of the principal debt. Also, an interpretation should be made by paying attention to the accessory nature of the penalty clause in the controversial areas previously mentioned about assuming the debt. Before the penalty clause is due, it is not possible to independently assume this due to the accessory nature of the penalty clause. On the other hand, the penalty clause continues its existence as an independent debt after it is due. In this case, it is possible to assume it separately from the principal debt. In our study, an attempt was made to find a solution to the controversial issues on assuming debt by taking the German and Swiss Laws into account.

It should be noted that an interpretation should be made without forgetting that the penalty clause is an accessory debt if the receivable is transferred or the debt is assumed. When this method is pursued, it will be possible to obtain consistent results in terms of the effect of the transferred receivable or assumed debt on both the penalty clause which is due and the penalty clause which has not been due yet.

In our study, the accessory nature of the penalty clause will first be discussed. Then, the opinions put forward on the subject in the Turkish, Swiss and German doctrines will be included. And finally, we will state our opinion focusing on the accessory nature of the penalty clause on the controversial issues.

Die Auswirkung der Forderungsabtretung oder der Schuldübernahme auf die Konventionalstrafe

I. Einführung

Heutzutage ist es üblich, dass viele Konventionen die Konventionalstrafe beinhalten[1]. Die Konventionalstrafe ist eine Handlung von wirtschaftlichem Wert, von der versprochen wird, dass sie an den Vertragspartner gezahlt wird, falls der Vertrag überhaupt nicht oder nicht richtig erfüllt wird[2]. Die Konventionalstrafe im türkischen Recht ist ab Artikel 179 des türkischen Obligationenrechts Nr. 6098 aufgeführt worden. Durch die Bestimmung der Konventionalstrafe soll die vertragsgemäße Erfüllung der Forderung gewährleistet werden. Darüber hinaus gehört es zu den Zielen der Konventionalstrafe, Druck für die Schuldentilgung auszuüben und die gesetzliche Gläubigerstellung zu stärken[3].

Die Konventionalstrafe ist eine Handlung, die vom Bestand der Hauptverpflichtung abhängt. Dieses Abhängigkeitsverhältnis wird in der Lehre mit dem Begriff der „Akzessorietät" umschrieben. Die Tatsache, dass die Konventionalstrafe akzessorisch ist, hat wichtige rechtliche Konsequenzen in Bezug auf die Entstehung, Form, Beendigung der Schulden und viele andere Fragen. Hierbei ist eine der Fragen, bei denen die Akzessorietät von Bedeutung ist, die Auswirkung der Forderungsabtretung oder der Schuldübernahme auf die Konventionalstrafe. In diesem Zusammenhang hat die Forderungsabtretung oder die Schuldübernahme vor oder nach dem Fälligkeitsdatum der Konventionalstrafe unterschiedliche rechtliche Konsequenzen. In dieser Studie werden die rechtlichen Konsequenzen der Forderungsabtretung oder der Schuldübernahme im Hinblick auf die Konventionalstrafe untersucht.

1 **M. Kemal Oğuzman/ M. Turgut Öz**, Borçlar Hukuku: Genel Hükümler, B.2, 14. Aufl., İstanbul, Vedat Kitapçılık, 2018, s.534.

2 **Selahattin Sulhi Tekinay/ Sermet Akman/ Haluk Burcuoğlu/ Atilla Altop**, Tekinay Borçlar Hukuku: Genel Hükümler, 7. Aufl., İstanbul, Filiz Kitabevi, 1993, s.341; **Necip Bilge**, "Cezaî Şart", Ahmet Esat Arsebük'ün Aziz Hatırasına Armağan, Ankara, Güzel İstanbul Matbaası, 1958, s.39; **Kenan Tunçomağ**, Türk Hukukunda Cezai Şart, İstanbul, Baha Matbaası, 1963, s.6; **Fikret Eren**, Borçlar Hukuku: Genel Hükümler, 23. Aufl., Ankara, Yetkin Yayınları, 2018, s.1209; **Oğuzman/ Öz**, s.534; **Haluk N. Nomer**, Borçlar Hukuku: Genel Hükümler, 16. Aufl., İstanbul, Beta, 2018, Rn.235.1; **Ferit Hakkı Saymen/ Halid Kemal Elbir**, Borçlar Hukuku Dersleri: Umumi Hükümler, B.1, İstanbul, İsmail Akgün Matbaası, 1958, s.553.

3 **Manfred Löwisch/ Rainer Jagmann/ Volker Rieble**, J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch: Buch 2: Recht der Schuldverhältnisse: §§ 328-345 (Vertrag zugunsten Dritter, Draufgabe, Vertragsstrafe), Berlin, Sellier-de Gruyter, 2015, Vor Art 339, N.16; **Rolf Stürner**, Jauernig Bürgerliches Gesetzbuch: mit Rom I, Rom II, Rom III-VO, EG-UntVO/HUntProt und EuErbVO, Kommentar, 16. Aufl., München, C.H.Beck, 2015, Art 339, N.3; **Hanns Prütting/ Gerhard Wegen/ Gerd Weinreich**, Bürgerliches Gesetzbuch, Kommentar, 11. Aufl., Köln, Luchterhand Verlag, 2016, Vor Art 339, N.1; **Walter Erman**, Bürgerliches Gesetzbuch: Handkommentar, 14. Aufl., § 339-345, Köln, Verlag Dr. Otto Schmidt, 2014, Vor Art 339-345, Rn.1; **Reinhard Richardi/ Otfried Wlotzke/ Hellmut Wissmann/ Hartmut Oetker**, Münchener Handbuch zum Arbeitsrecht: Individualarbeitsrecht, B. I, 3. Aufl., München, Verlag C.H. Beck, 2009, §39, Rn.48; **Alfred Söllner**, "Vertragsstrafen im Arbeitsrecht", AuR, 1981, s.98; **Jan-Malte Niemann**, "Vertragsbruch: Strafabreden in Formularbeitsverträgen", RdA, 2013, Heft 2, s.93; **Hermann H. Haas/ Michael Fuhlrott**, "Ein Plädoyer für mehr Flexibilität bei Vertragsstrafen", NZA-RR, 2010/1, s.1. Siehe auch, **Tekinay/ Akman/ Burcuoğlu/ Altop**, s.342. Siehe auch, BGH, 20.01.2000, vıı zr 46/98, NJW 2000, 2106.

II. Die akzessorische Natur der Konventionalstrafe

Die Konventionalstrafe dient dazu, die ordnungsgemäße Erfüllung der Hauptschuld sicherzustellen. Mit anderen Worten, es wird als Garantie für die Hauptschuld entschieden. Infolgedessen hängt die Konventionalstrafe von Bestand und Gültigkeit der Hauptschuld ab, aber nicht umgekehrt[4]. Wenn also keine Hauptschulden vorliegen, gibt es keine Konventionalstrafe[5]. Daher ist für den Begriff der Konventionalstrafe dieser akzessorische Zusammenhang wesentlich[6].

Das Verhältnis zwischen der Konventionalstrafe und der Hauptschuld besteht bis zum Fälligkeitsdatum der Konventionalstrafe fort. Nach dem Fälligkeitsdatum wird die Strafe eine eigenständige Schuld. Daher hat der Verfall der Hauptschuld aus irgendeinem Grund nach Fälligkeit keine Auswirkungen auf die Konventionalstrafe[7]. Somit kann die Konventionalstrafe unabhängig vom Schicksal der Hauptschuld geltend gemacht werden[8].

Die Entstehung, Fortbestand und Verfall der akzessorischen Nebenschuld hängt jedoch vom Bestehen der Hauptschuld ab[9]. Die Beziehung zwischen der Konventionalstrafe und der Hauptschuld ist tatsächlich einseitig. Also, die Konventionalstrafe richtet sich nach der Hauptschuld; die Hauptschuld hängt jedoch nicht vom Vorliegen der Konventionalstrafe ab. Dieses Resultat wird in dem Türkischen Obligationenrecht Art.182/2 deutlich erläutert. Im schweizerischen Obligationenrecht wird es nicht einmal erwähnt. Der Verfall der Konventionalstrafe aus irgendeinem Grund keine Auswirkungen auf die Gültigkeit der Hauptschuld[10].

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4 **Eugen Bucher**, Schweizerisches Obligationenrecht: Allgemeiner Teil ohne Deliktsrecht, 2. Aufl., Zürich, Schulthess Polygraphischer Verlag, 1988, s.523; **Rudolf M. Reck**, Lohnrückbehalt, Kaution und Konventionalstrafe im schweizerischen Arbeitsrecht, Zürich, ADAG Administration & Druck AG, 1983, s.99 und 110; **Andreas Von Tuhr/ Arnold Escher**, Allgemeiner Teil des Schweizerischen Obligationenrechts, B. II, 3. Aufl., Zürich, Schulthess Polygraphischer Verlag AG, 1974, s.278; **Roland Bentele**, Die Konventionalstrafe nach Art. 160-163 OR, Freiburg-Schweiz, Paulusdruckerei, 1994, s.31; **Jauernig**, Art 339, N.2.

5 **Franz Jürgen Säcker/ Roland Rixecker/ Hartmut Oetker/ Bettina Limperg**, Münchener Kommentar zum Bürgerlichen Gesetzbuch, B. II: Schuldrecht-Allgemeiner Teil, 7. Aufl., München, C. H. Beck, 2016, Art 339, Rn.14; **Von Tuhr/ Escher**, s.278; **Walter Schoch**, Begriff, Anwendung und Sicherung der Konventionalstrafe nach schweizerischem Recht, Bern, Stämpfli & Cie., 1935, s.16; **Bucher**, s.523; **Prütting/ Wegen/ Weinreich**, Vor Art 339, N.2; **MüArbR/Reichold**, §39, Rn.48; **Reck**, s.99; **Peter Gauch/ Walter R. Schluep/ Jörg Schmid/ Heinz Rey**, Schweizerisches Obligationenrecht Allgemeiner Teil: ohne ausservertragliches Haftpflichtrecht, B. II, 7.Aufl., Zürich, Schulthess Polygrapischer Verlag, 1998, Rn.3959; **Bentele**, s.31; **Otto Palandt**, Bürgerliches Gesetzbuch mit Nebengesetzen, B. VII, 76. Aufl., München, C.H. Beck Verlag, 2017, s.570; **Niemann**, s.92; **Alfred Koller**, Schweizerisches Obligationenrecht Allgemeiner Teil: Handbuch des allgemeinen Schuldrechts ohne Deliktsrecht, 3. Aufl., Bern, Stämpfli Verlag AG, 2009, § 81, Rn.4; **Saymen/ Elbir**, s.554; **Bilge**, s.67; **Tunçomağ**, Cezaî Şart, s.15; **Oğuzman/ Öz**, s.541; **Tekinay/ Akman/ Burcuoğlu/ Altop**, s.342-343; **Nomer**, Rn.237; **Ayça Akkayan Yıldırım**, "Cezai Şartın İşlevi Türk ve Amerikan Hukukları Açısından Karşılaştırmalı Bir Değerlendirme", İÜHFM, B. 61, N.1-2, 2003, s.366-367.

6 **Tunçomağ**, Cezaî Şart, s.15; **Oğuzman/ Öz**, s.541; **Tekinay/ Akman/ Burcuoğlu/ Altop**, s.342; **MüKoBGB/ Gottwald**, Art 339, Rn.14; **Jauernig**, Art 339, N.17; **Haas/ Fuhlrott**, s.1; **Niemann**, s.92.

7 **Von Tuhr/ Escher**, s.279; **Reck**, s.100; **Dimitri Santoro**, Die Konventionalstrafe im Arbeitsvertrag, Bern, Stämpfli Verlag AG, 2001, s.10 **Tunçomağ**, Cezaî Şart, s.16; **Bilge**, s.74; **Eren**, s.1211; **Akkayan Yıldırım**, s.367.

8 **Tunçomağ**, Cezaî Şart, s.16; **Eren**, s.1211; **Von Tuhr/ Escher**, s.279; **Reck**, s.100; **Santoro**, s.10.

9 **Tunçomağ**, Cezaî Şart, s.15; **Oğuzman/ Öz**, s.541; **Tekinay/ Akman/ Burcuoğlu/ Altop**, s.342-343; **Nomer**, Rn.237.

10 **Von Tuhr/ Escher**, s.279; **Reck**, s.100; **Santoro**, s.7; **Saymen/ Elbir**, s.554; **Oğuzman/ Öz**, s.543-544; **Nomer**, Rn.237.5.

III. Konventionalstrafe im Falle der Forderungsabtretung

Die Forderungsabtretung basiert auf das türkische Obligationenrecht Nr. 6098 Art.183-194. Die Forderungsabtretung ist die Abtretung der Forderungen aus einem Schuldverhältnis durch den zwischen dem Schuldner und dem Gläubiger abgeschlossenen Vertrag entstanden worden ist[11]. Eine wichtige Folge der Tatsache, dass es sich bei der Konventionalstrafe um eine akzessorische Natur handelt, ist die Abtretung der Befugnis, die Konventionalstrafe zu beantragen, wenn die Forderung an den Dritten abgetreten wird[12].

Normalerweise hat jeder, der eine Schuldenbeziehung eingeht, den Titel eines Gläubigers und Schuldners. In den Artikeln 183 des türkischen Obligationenrechts und ihrer Fortführung ist jedoch festgelegt, dass die Forderungen ohne Einwilligung des Schuldners an einen andern abgetreten werden können. Solange das Gesetz, die Vereinbarung oder die Natur des Rechtsverhältnisses diese Abtretung nicht entgegenstehen. Die Forderungsabtretung bedarf zu ihrer Gültigkeit der schriftlichen Form[13].

In der schweizerischen und deutschen Lehre wird seit vielen Jahren die Frage der Abtretung im Rahmen der Konventionalstrafe behandelt. Insbesondere zu den umstrittenen Fragen, ob die Konventionalstrafe unabhängig von der Hauptforderung abtreten werden kann und welcher Gläubiger zur Forderung der Konventionalstrafe berechtigt ist, haben sich viele unterschiedliche Meinungen ergeben. Das Problem wird normalerweise behandelt, je nachdem, ob die Konventionalstrafe fällig ist oder nicht. In Bezug auf die Systematik der Studie wird das Thema durch diese Unterscheidung untersucht.

A. Die Auswirkung der Abtretung von Hauptforderungen auf die nicht fällige Konventionalstrafe

Im Falle der Abtretung der Hauptforderung wird die noch nicht fällige Konventionalstrafe zusammen mit der Hauptforderung auch an den Erwerber

11 **Von Tuhr/ Escher**, s.329, **Max Gmür**, Kommentar zum Schweizerischen Zivilgesetzbuch: Obligationenrecht Art 68-183 (*Becker*), B. VI, Bern, Verlag von Stämpfli Cie., 1917, OR Art 164, N.1; **Bucher**, s.536; **Theo Guhl/ Alfred Koller/ Anton Schnyder/ Jean Nicolas Druey**, Das Schweizerische Obligationenrecht: mit Einschluss des Handels- und Wertpapierrechts, 9. Aufl., Zürich, Schulthess, 2000, §34, Rn.1; **Tekinay/ Akman/ Burcuoğlu/ Altop**, s.240; **Kenan Tunçomağ**, Türk Borçlar Hukuku, Genel Hükümler, B. I, 6. Aufl., İstanbul, Sermet Matbaası, 1976, s.644; **Tolunay Ozanemre Yayla**, Alacağın Devri İşleminin Geçerliliği ve Sebeple Olan İlişkisi (İllîliği), Ankara, Turhan Kitabevi, 2019, s.42.

12 **Hugo Oser/ Wilhelm Schönenberger**, Zürcher Kommentar zum Schweizerischen Zivilgesetzbuch, B. V: Erster Halbband, Obligationenrecht, Art 1-183 OR, 2. Aufl., Zürich, Schulthess, 1929, Vor. zu Art. 160-163 OR, Rn.18; **Tunçomağ**, Cezaî Şart, s.15; **MüKoBGB/ Gottwald**, Art 339, Rn.15; **Schoch**, s.48; **Palandt/ Grüneberg**, s.572; **Prütting/ Wegen/ Weinreich**, Vor Art 339, N.2; **Erman/ Schaub**, Art 339, Rn.4; **Oğuzman/ Öz**, s.561; **Bilge**, s.74; **Tekinay/ Akman/ Burcuoğlu/ Altop**, s.250-251.

13 **Bentele**, s.100-101; **Oser/ Schönenberger**, Art 164 OR, Rn.8; **Schoch**, s.50; **Von Tuhr/ Escher**, s.329; **Oğuzman/Öz**, s.562; **Tunçomağ**, Türk Borçlar Hukuku, s.1074 usw.; **Tekinay/ Akman/ Burcuoğlu/ Altop**, s.240; **Eren**, s.1252 usw.; **Kemal Dayınlarlı**, Borçlar Kanununa Göre Alacağın Temliki, 4. Aufl., Ankara, Dayınlarlı Hukuk Yayınları, 2010, s.76 usw., s.62 usw.; **Ozanemre Yayla**, s.225 usw.

weitergegeben. Tatsächlich wird diese Angelegenheit im türkischen Obligationenrecht Art.189 mit folgenden Worten angegeben *"Vorzugsrechte und Nebenrechte gehen mit der Forderung über, mit Ausnahme derer, die untrennbar mit der Person des Abtretenden verknüpft sind."* Es wird nicht einmal angestrebt, dass sich die Parteien auf diese Angelegenheit einigen[14].

Es ist fraglich, ob es unabhängig von der Hauptforderung an einen Dritten abtreten werden kann oder nicht, bevor die Konventionalstrafe fällig wird. Nach deutscher Rechtsprechung kann es in Ausnahmefällen möglich sein, die noch nicht fällige Konventionalstrafe unabhängig von der Hauptforderung abzutreten[15]. Trotz der Forderungsabtretung nach dieser Meinung bleibt die Befugnis beim Gläubiger der Hauptforderung, die Konventionalstrafe aufgrund der Akzessorietät zu verlangen[16]. Im türkischen Recht gibt es auch Autoren, die die Meinung vertreten, dass noch nicht fällige Forderungen als erwartete Rechte abtreten werden können, wenn die Forderung festgestellt oder identifizierbar ist. In diesem Fall entstehen zukünftige Forderungen direkt aus dem Vermögen des Erwerbers[17].

B. Die Auswirkung der Abtretung der Hauptforderungen auf die fällige Konventionalstrafe

Nach Fälligkeit der Konventionalstrafe wird die Beziehung zwischen den Nebenrechten und der Hauptforderung aufgehoben[18]. In diesem Fall muss die Konventionalstrafe bei der Abtretung der Hauptforderung nicht auf den Erwerber übergehen, da die Konventionalstrafe zu einer selbstständigen Forderung geworden ist. Es kann jedoch von den Vertragsparteien entschieden werden, ob die Konventionalstrafe zusammen mit der Hauptforderung an den Erwerber weitergegeben wird. Andernfalls wird die Konventionalstrafe nicht auf den Erwerber abgetreten und verbleibt in der Vermögen des Abtreters[19]. In der Lehre ist jedoch noch umstritten, ob die fällige Konventionalstrafe unabhängig von der Hauptforderung abtreten werden kann.

Die gesetzlichen Bestimmungen zu diesem Thema haben keine deutliche Regelung. Ein schweizerischer Autor besagt, dass die Konventionalstrafe unabhängig von der Hauptschuld weder vor noch nach dem Fälligkeitsdatum abtreten werden kann. Denn

14 **Kurt Schellhammer**, Schuldrecht nach Anspruchsgrundlagen: samt BGB Allgemeiner Teil, 9. Aufl., Heidelberg, C.F.Müller, 2014, Rn.1487; **Bentele**, s.32; **Schoch**, s.49; **Becker**, Art 160 OR, N.25; **Gauch/ Schluep/ Rey**, Rn.4060; **Oğuzman/ Öz**, s.581 usw.; **Eren**, s.1268; **Bilge**, s.74; **Dayındarlı**, s.196; **Köksal Kocaağa**, Ceza Koşulu (Sözleşme Cezası), 2. Aufl., Ankara, Yetkin Yayınları, 2018, s.159.

15 **MüKoBGB/ Gottwald**, Art 339, Rn.15.

16 **MüKoBGB/ Gottwald**, Art 339, Rn.15. Siehe auch, **Palandt/ Grüneberg**, s.571.

17 **Tunçomağ**, Türk Borçlar Hukuku, s.1082. Siehe auch, **Tekinay/ Akman/ Burcuoğlu/ Altop**, s.248-249; **Dayınlarlı**, 2010, s.163; **Von Tuhr/ Escher**, s.349; **Becker**, Art 164, N.16.

18 **Von Tuhr/ Escher**, s.279; **Reck**, s.100; **Tunçomağ**, Cezaî Şart, s.16; **Eren**, s.1211.

19 **Von Tuhr/ Escher**, s.356; **Bilge**, s.75; **Kocaağa**, s.160.

die Konventionalstrafe hängt immer noch von der Hauptschuld ab. Andernfalls kann der Zweck der Sicherung der Forderung durch eine Konventionalstrafe nicht erreicht werden. Darüber hinaus wird gezeigt, dass es nicht angemessen ist, dass die dritte Person, die nicht einmal das Recht hat, die Erfüllung der Hauptschuld zu verlangen, Konventionalstrafe verlangen kann[20].

In der Doktrin wird auch die Auffassung vertreten, dass die Abtretung der Konventionalstrafe unabhängig von der Hauptschuld, die vor der Abtretung der Schuld fällig ist oder nicht, keinen Nachteil anrichtet[21]. Nach dieser Auffassung bewirkt die Abtretung der Konventionalstrafe keinen Unterschied in der Situation des Schuldners. In der Tat gibt es kein negatives Ergebnis für den Schuldner, um die Konventionalstrafe für den Abtretende oder Erwerber zu erfüllen. Nach einer ähnlichen Auffassung kann die Konventionalstrafe eigenständig abgetreten werden, da das Recht, eine Forderung geltend zu machen, nach Fälligkeit der Konventionalstrafe unabhängig wird[22].

Eine andere Meinung zu diesem Thema unterscheidet ohne Angabe von Gründen zwischen den Arten der Konventionalstrafe. Dementsprechend kann die zur Ausführung kumulative Konventionalstrafe nach Fälligkeit unabhängig abgetreten werden. Andererseits kann die alternative Konventionalstrafe nach ihrer Fälligkeit nicht getrennt von der Hauptschuld abgetreten werden[23]. Der Grund für diese Ansicht ist wahrscheinlich der Wunsch, Streitigkeiten über das Wahlrecht der Gläubiger in der alternativen Konventionalstrafe zu vermeiden.

Im Hinblick auf diese Diskussion gibt es eine andere Meinung, die "Recht" und "Forderungsanspruch" unterscheidet. Nach dieser Auffassung sind das Recht auf eine Konventionalstrafe und der Anspruch auf das Recht auf eine Konventionalstrafe unterschiedliche Begriffe[24]. Tatsächlich ist das Recht auf eine Konventionalstrafe ein weiter gefasster Begriff, da er den Forderungsanspruch einschließt, eine Konventionalstrafe zu verlangen. Der Gläubiger kann sein Recht, eine Konventionalstrafe zu verlangen, auf einen Dritten abtreten. Der Forderungsanspruch verbleibt nicht unbedingt bei der Person, die das Recht auf eine Konventionalstrafe hat. Das Recht auf eine Konventionalstrafe kann jedoch nicht auf den Dritten abgetreten werden und verbleibt beim Gläubiger selbst; weil dieses akzessorische

20 **Josef Kohler**, Lehrbuch des bürgerlichen Rechts, Berlin, Heymann, 1904, 143, §50.

21 **Paul Oertmann**, Kommentar zum Bürgerlichen Gesetzbuche und seinen Nebengesetzen: Das Recht der Schuldverhältnisse, 2. Aufl., Berlin, Heymann, 1906, 270, §399; **Bentele**, s.100; **Becker**, Art 164, N.15; **Oser/Schönenberger**, Art 164 OR, Rn.4. Vgl. **Tunçomağ**, Cezaî Şart, s.88.

22 **Max Stahel**, Die Konventionalstrafe mit spezieller Berücksichtigung des Schweizerischen Obligationenrechts, Zürich 1898, s.79-80; **MüKoBGB/ Gottwald**, Art 339, Rn.15.

23 **Manfred Löwisch/ Volker Rieble/ Jan Busche/ Dirk Looschelders**, J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch, Buch 2 - Recht der Schuldverhältnisse: §§ 397-432 (Erlass, Abtretung, Schuldübernahme, Mehrheit von Schuldnern und Gläubigern), Berlin, Sellier-de Gruyter, 2017, Art 401, Rn.281.

24 **Schoch**, s.50-51; **Tekinay/ Akman/ Burcuoğlu/ Altop**, s.249-250.

Recht nicht vom Hauptrecht getrennt werden kann. Nach deutschem Recht wird anerkannt, während dem Dritten die Befugnis abgetreten werden kann, anstelle der Abtretung der Forderungen die Leistung in seinem Namen zu verlangen[25]. In diesem Fall behält der Gläubiger den Titel des Gläubigers. Der Vertreter dieser Ansicht im türkischen Recht ist Akyol[26]. Eine andere Ansicht im türkischen Recht kritisiert diese Ansicht jedoch und argumentiert, dass der „Forderungsanspruch" und das „Recht" nicht getrennt werden können, da diese eng miteinander verbunden sind[27].

Ein weiteres wichtiges Problem ergibt sich, wenn die Auffassung vertreten wird, dass die Abtretung der Konventionalstrafe unabhängig von der Hauptschuld erfolgt. Gehört in diesem Fall das Recht, alternative Konventionalstrafe zu verlangen, dem Abtretende oder dem Erwerber? Zunächst ist festzuhalten, dass sich die Parteien im Vertrag eindeutig auf dieses Thema einigen können[28]. Die Tatsache, dass es diesbezüglich im Vertrag keine Regelung gibt, wird in der Doktrin erörtert. Einer Meinung nach wenn die Konventionalstrafe auf den neuen Gläubiger unabhängig von der Hauptforderung abgetreten wird, sollte das Wahlrecht auch auf den Erwerber übergehen. Denn der Erwerber ist bestrebt, mit der Abtretung alle rechtlichen Konsequenzen zu tragen[29]. Andererseits wird in der Doktrin hervorgebracht, dass der Abtretende, der die Hauptforderung hat, in der Regel das Wahlrecht hat[30].

C. Unsere Meinung

Im Rahmen der allgemeinen Grundsätze ist zu unterscheiden, ob die Konventionalstrafe im Rahmen der Forderungsabtretung selbstständig nach oder vor Fälligkeit abgetreten werden kann.

Erstens kann die Konventionalstrafe vor Fälligkeit nicht selbstständig abgetreten werden, da die Konventionalstrafe akzessorische Natur hat. Infolgedessen übernimmt man mit der die Hauptforderung auch die mit der Forderung verbundene Konventionalstrafe. Daher wäre es angemessener, eine Stellungnahme abzugeben, bevor die Konventionalstrafe fällig wird, ohne deren akzessorischen Charakter zu vernachlässigen.

Zweitens sollte berücksichtigt werden, dass die Abtretung der Konventionalstrafe auch unserer Meinung nach von der Hauptforderung unabhängig ist, nachdem die Konventionalstrafe fällig ist. Sofern im Vertrag nichts anderes vereinbart ist, steht der selbständigen Weitergabe der Konventionalstrafe an den Dritten unabhängig

25 **Karl Larenz**, Allgemeiner Teil des Deutschen Bürgerlichen Recht, 6. Aufl., München, C.H. Beck Verlag, 1983, s.233.

26 **Şener Akyol**, Alacaklının Verdiği Üçüncü Şahsın İfayı Kendi Adına Talep Yetkisi, İstanbul 1981, s.7 usw.

27 **Tekinay/ Akman/ Burcuoğlu/ Altop**, s.249-250.

28 **Tunçomağ**, Cezaî Şart, s.90; **Bentele**, s.101.

29 **Tunçomağ, Cezaî Şart,** s.89-90.

30 **Becker**, Art 160 OR, N.25; **Bilge**, s.75.

vom Schicksal der Hauptforderung daher nichts im Wege. In diesem Fall ist jedoch vor allem zu erörtern, welcher Gläubiger berechtigt ist, eine Konventionalstrafe zu verlangen, wenn die Konventionalstrafe unabhängig auf einen Dritten abgetreten wird. In diesem Fall sind wir der Ansicht, dass das Wahlrecht zwischen der Erfüllung der Hauptforderung und der Konventionalstrafe nicht voneinander getrennt werden sollte, insbesondere nicht im Hinblick auf die alternative Konventionalstrafe. In diesem Fall führt die getrennte Gewährung des Anspruchs beider Gläubiger zu der Frage, welcher Gläubiger von seinem Wahlrecht Gebrauch gemacht hat, und beseitigt das Bestehen des Wahlrechts, das das wichtigste dem Eigentümer der Hauptforderung eingeräumte Recht ist. Aus diesem Grund ist es die am besten geeignete Lösung, beim Gläubiger zu bleiben, der das Recht hat, die Hauptforderung zu verlangen.

In Bezug auf die alternative Konventionalstrafe betonen wir, dass wir der Meinung sind, dass die Wahl des Gläubigers zwischen der Erfüllung der Hauptforderung und der Konventionalstrafe laut dem türkischen Obligationenrecht Art. 179/1 als "Wahlrecht" zugelassen werden sollte. Das Wahlrecht ist in diesem Zusammenhang ein Gestaltungsrecht und geht in der Regel mit der Abtretung der Forderung auf den Erwerber einher[31]. Nach der Lehre, an der wir uns anschließen, geht das Gestaltungsrecht jedoch nicht auf den Erwerber über, wenn dieser verpflichtet ist, Vertragspartner des entstandenen Vertrags zu sein[32]. Wenn wir uns mit unserem Thema auseinandersetzen, wenn die fällige alternative Konventionalstrafe unabhängig von der Hauptforderung abtreten wird, das Wahlrecht tatsächlich mit der Hauptforderung zusammenhängt, wird der Anspruch auf das Recht auf eine Konventionalstrafe nicht auf den Erwerber übertragen. Dieses Recht verbleibt beim Abtretenden. Wird die Konventionalstrafe auch an eine andere Person abgetreten, der die Konventionalstrafe nicht übernimmt, sollte anerkannt werden, dass das Wahlrecht beim Erwerber liegt, der die Hauptforderung hat.

In diesem Fall, wenn der Gläubiger der Hauptforderung sich für die Erfüllung der Konventionalstrafe entscheidet, sollte die Konventionalstrafe an dem Erwerber erfüllt werden; in der Tat ist er der Inhaber der Konventionalstrafe. Wenn der Inhaber der Hauptforderung hingegen sein Wahlrecht für die Erfüllung der Hauptforderung ausübt, kann der Erwerber die Konventionalstrafe nicht mehr geltend machen. Mit diesem Ergebnis sollte nicht davon ausgegangen werden, dass der Erwerber einen Rechtsverlust erlitten hat. Daher sollte diese Situation im Abtretungsvertrag berücksichtigt werden, und es sollten Vorkehrungen mit den Bestimmungen getroffen werden, um einen Interessenausgleich in der internen Beziehung sicherzustellen.

31 **Von Tuhr/ Escher**, s.356-357; **Oğuzman/ Öz**, s.583; **Tekinay/ Akman/ Burcuoğlu/ Altop**, s.251; **Eren**, s.1268.

32 **Von Tuhr/ Escher**, s.342-343; **Peter Gauch/ Walter R. Schluep/ Jörg Schmid/ Heinz Rey**, Schweizerisches Obligationenrecht Allgemeiner Teil: ohne ausservertragliches Haftpflichtrecht, B. I, 7.Aufl., Zürich, Schulthess Polygrapischer Verlag, 1998, Rn.3459 usw.; **Oğuzman/ Öz**, s.583-584; **Tekinay/ Akman/ Burcuoğlu/ Altop**, s.251; **Eren**, s.1268.

IV. Konventionalstrafe bei der Schuldübernahme

A. Die Auswirkung der Schuldübernahme auf die Konventionalstrafe

Die Übernahme der Schuld ist im türkischen Obligationenrecht Nr. 6098 Art.195 aufgeführt. In der Doktrin gibt es eine allgemeine Definition dieses Konzepts für den Fall, dass jemand Schulden übernimmt und zum Schuldner wird, unter der Bedingung, dass die Schuld in einem Schuldverhältnis steht, an dem er zuvor nicht teilgenommen hat[33]. Zur Schuldübernahme ist auch die Zustimmung des Gläubigers erforderlich.

Im Falle einer Schuldübernahme zeigt sich hier in Bezug auf sein Schicksal auch die akzessorische Natur der Konventionalstrafe. In Artikel 198/1 des türkischen Obligationenrechts ist geregelt, dass auch bei einem Schuldnerwechsel die Nebenrechte des Gläubigers, die nicht mit der Person des bisherigen Schuldners untrennbar verknüpft sind, vorbehalten bleiben. Infolge des zwischen dem Gläubiger und dem Übernehmer abgeschlossenen Vertrages gehen dementsprechend die Hauptschuld und folglich die Konventionalstrafe auf den Übernehmer über[34]. Diese Schlussfolgerung lässt keine Zweifel daran aufkommen, dass die Haftung zu vertreten ist, wenn die Konventionalstrafe nach der Schuldübernahme fällig wird. Aus diesem Artikel kann jedoch nicht hervorgeholt werden, von welchem Schuldner die Konventionalstrafe verlangt werden soll, die fällig ist, bevor die Schuld übernommen wurde. Eine Ansicht in der Doktrin besagt, dass in diesem Fall die Konventionalstrafe vom bisherigen Schuldner verlangt werden sollte[35]; in der anderen Ansicht wird besagt, dass der Schuldner angefordert werden soll, der die Schuld übernommen hat[36]. Nach der ersten Ansicht wird die fällige Konventionalstrafe ihren akzessorischen Charakter verlieren. Sofern im Vertrag nicht anders vereinbart ist, geht die Schuld daher nicht auf den Übernehmer über. Nach der zweiten Ansicht werden jedoch sowohl vor als auch nach dem Fälligkeitsdatum die Konventionalstrafe vom Übernehmer verlangt. Denn die gegenteilige Annahme widerspricht dem Zweck und der Qualität des Instituts. Die Parteien können jedoch etwas anderes vereinbaren[37]. Tatsächlich gilt bei der Übernahme der Schuld auch der Übernehmer, der keinen Wille hat, die fällige Konventionalstrafe nicht zu bezahlen, als die Konventionalstrafe übernehmend[38].

33 **Oser/ Schönenberger**, Vor. Art 178 OR, Rn.1; **Didem Özcan**, Borcun Üstlenilmesi, İstanbul, On İki Levha Yayıncılık, 2017, s.6.

34 **Oser/ Schönenberger**, Vor. Art 178 OR, Rn.3; **Becker**, Art 178 OR, N.2; **Max Keller / Christian Schöbi**, Allgemeine Lehren des Vertragsrechts: Das Schweizerische Schuldrecht, B. I, 3. Aufl., Basel/Frankfurt, Helbing & Lichtenhahn, 1988, s.80; **Zafer Kahraman**, Karşılaştırmalı Hukukta Borcun Dış Üstlenilmesi (Borcun Nakli), İstanbul, Vedat Kitapçılık, 2013, s.249.

35 **Oser/ Schönenberger**, Art 178 OR, Rn.3.

36 **Von Tuhr/ Escher**, s.392; **Gauch/ Schluep/ Rey**, Rn.3801; **Oğuzman/ Öz**, s.617-618; **Tekinay/ Akman/ Burcuoğlu/ Altop**, s.276-277; **Eren**, s.1279; **Kahraman**, s.253-254; **Kocaağa**, s.161.

37 **Von Tuhr/ Escher**, s.392; **Keller/ Schöbi**, s.80; **Gauch/ Schluep/ Rey**, Rn.3801; **Oğuzman/ Öz**, s.617-618; **Tekinay/ Akman/ Burcuoğlu/ Altop**, s.276-277; **Tunçomağ**, Türk Borçlar Hukuku, s.1133; **Ferit Hakkı Saymen**, Borçlar Hukuku Dersleri, Umumi Hükümler, B. I, İstanbul, Akgün Matbaası, 1950, s.269, **Kocaağa**, s.161.

38 **Becker**, Art 178 OR, N.2; **Keller/ Schöbi**, s.80; **Kahraman**, s.254.

Ein wichtiger Aspekt, der bei der Übernahme der Hauptschuld und der Konventionalstrafe durch den Dritten berücksichtigt werden sollte, ist, ob es dem Dritten möglich ist, die noch nicht fällige Konventionalstrafe unabhängig von der Hauptschuld zu übernehmen. Einer Meinung nach ist es nicht möglich, dass der Schuldner der Konventionalstrafe ein Dritter ist, der nicht der Schuldner der Hauptschuld ist. Dies liegt daran, dass der Schuldner verpflichtet ist, die Schulden an den Gläubiger zu zahlen[39]. Nach gegenteiliger Meinung kann die Konventionalstrafe unabhängig von der Hauptschuld auf den Dritten übertragen werden. Tatsächlich wird davon ausgegangen, dass bedingte und zukünftige Schulden von Dritten in Bezug auf die Konventionalstrafe übernommen werden können[40].

B. Unsere Meinung

In Bezug auf die Schuldübernahme sollten wir auch auf die akzessorische Natur der Konventionalstrafe eingehen, die in der Forderungsabtretung erwähnt wird.

Aufgrund der Akzessorietät ist es nicht möglich, die Hauptschuld unabhängig zu übernehmen, bevor die Konventionalstrafe fällig wird. Wenn die Hauptschuld auf den Dritten übertragen wird, ist der Dritte nunmehr an die Konventionalstrafe gebunden. Zum anderen bleibt die Konventionalstrafe nach Fälligkeit als eigenständige Schuld bestehen. In diesem Fall ist es möglich, sie getrennt von der Hauptschuld zu übernehmen. Denn aufgrund der Konventionalstrafe, die durch den Verlust ihrer akzessorische Natur selbständig geworden ist, kann sie nur dann auf den Schuldner übergehen, wenn dies im Vertrag gesondert geregelt ist.

Im letzten Fall, wenn die Hauptschuld nicht übernommen wird und nur die selbstständige Konventionalstrafe übernommen wird, hat der Gläubiger zwei Möglichkeiten. Mit anderen Worten, wenn der Gläubiger die Erfüllung der Hauptforderung wählt, sollte er / sie einen Antrag vom Schuldner dieser Forderung stellen. Wenn der Gläubiger von seinem Recht Gebrauch macht, das Recht auf Zahlung einer Konventionalstrafe zu wählen, wird er die Strafe vom Schuldner dieser Forderung verlangen. Kurz gesagt, jeder Schuldner sollte für seine eigenen Schulden verantwortlich sein.

V. Fazit

Im Falle der Forderungsabtretung oder der Schuldübernahme ist das Schicksal der Konventionalstrafe insbesondere im schweizerischen und deutschen Recht seit langem umstritten. Da es im türkischen Recht keine klare Regelung gibt, sind in diesem Zusammenhang viele unterschiedliche Meinungen zu diesem Thema entstanden.

39 **Bilge**, s.75.

40 **Tunçomağ**, Cezaî Şart, s.90; **Kahraman**, s.253.

Aufgrund der Auslegung, die vorgenommen werden muss, ohne zu vergessen, dass die Konventionalstrafe akzessorische Natur hat, ist es jedoch möglich, hinsichtlich der Auswirkung der Forderungsabtretung oder der Schuldübernahme sowohl auf die fälligen als auch auf die nicht fälligen Konventionalstrafen einheitliche Schlussfolgerungen zu ziehen.

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Abkürzungen/ List of Abbreviations

Art.	: Artikel
Aufl.	: Auflage
AuR	: Arbeit und Recht
B.	: Band
İÜHFM	: İstanbul Üniversitesi Hukuk Fakültesi Mecmuası
N.	: Nummer
NZA-RR	: Rechtsprechungs-Report Arbeitsrecht
OR	: Obligationenrecht
RdA	: Recht der Arbeit
Rn.	: Randnummer
s.	: Seite
Vgl.	: Vergleich

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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

Processing Data Made Public by the Data Subject under Swiss, European Union and Turkish Laws

İsviçre, Avrupa Birliği ve Türk Hukuklarına Göre İlgili Kişi Tarafından Kamuya Sunulmuş Verinin İşlenmesi

Nafiye Yucedag[1]

Abstract

The Law on the Protection of Personal Data numbered 6698 which was accepted on 24 March 2016 and was published on the Official Gazette dated 7 April 2016 and numbered 2967 is an adoption of the 95/46/EC Directive. The 95/46/EC Directive was repealed by the 2016/679/EU General Data Protection Regulation. However both regulations provide similar rules in regard to the processing of data made public by the data subject. In the Law on the Protection of Personal Data some provisions related to general justification grounds, one of which is the data made public by the data subject, differ with respect to those under European Union Law. In this study, the regulation on making data public by the data subject as a ground of justification has been evaluated in line with the aim of the Law on the Protection of Personal Data. In addition, European Union and Swiss Laws have been examined from a comparative perspective in order to shed light on the interpretation of the Law on the Protection of Personal Data.

Keywords

Personal data, Justification grounds, Making data public

Öz

24 Mart 2016 tarihinde kabul edilmiş ve 7 Nisan 2016 gün ve 29677 sayılı Resmi Gazete yayımlanmış olan 6698 sayılı Kişisel Verilerin Korunması Kanunu, temelde, 95/46/AT sayılı Yönerge'yi esas almıştır. 95/46/AT sayılı Yönerge ise, 2016/679/AB sayılı Tüzük ile yürürlükten kaldırılmıştır. Bununla birlikte her iki düzenleme ilgili kişi tarafından alenileştirilmiş kişisel verilerin işlenmesine ilişkin benzer kurallar getirmektedir. Öte yandan, ilgili kişinin kendisi tarafından kişisel verilerin alenileştirilmiş olması da dâhil olmak üzere genel hukuka uygunluk sebepleri açısından, Kanun'da, Yönerge'den farklı düzenlenmiş hususlar da bulunmaktadır. Bu çalışmada kişisel verilerin ilgili kişinin kendisi tarafından alenileştirilmesi hukuka uygunluk sebebi, Kanun'un amacına uygun olarak değerlendirilmiştir. Ayrıca, Avrupa Birliği ve İsviçre Hukuku düzenlemeleri karşılaştırmalı olarak Kişisel Verilerin Korunması Kanunu'nun uygulanmasına yol gösterici olması için incelenmiştir.

Anahtar Kelimeler

Kişisel veri, Hukuka uygunluk sebepleri, Alenileştirme

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Processing Data Made Public by the Data Subject under Swiss, European Union and Turkish Laws

I. Introduction

The Law on the Protection of Personal Data[1] which was accepted on 24 March 2016 and which was published on the Official Gazette dated 7 April 2016 and numbered 2967 is an adoption of the 95/46/EC Directive[2]. The 95/46/EC Directive was repealed by Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC[3]. However, some provisions in the Turkish Data Protection Code differ with respect to those under the 95/46/EC Directive and GDPR. Making data public as a justification ground has been regulated under the Law on the Protection of Personal Data and is considerably different from the 95/46/EC Directive Art. 8(2)(e) and GDPR Art. 9(2)(e). According to LPPD Art. 5(2)(d) personal data may be processed without seeking the explicit consent of the data subject if the data concerned is made available to the public by the data subject himself. Swiss Federal Act on Data Protection Art. 12(3) and Law on the Protection of Personal Data Art. 5(2)(d) share considerable similarities compared to GDPR Art. 9(2)(e). GDPR Art. 9(2)(e) does not only require data to be sensitive but also requires that sensitive data should be manifestly made public. Therefore, a comparative analysis with Swiss Law in addition to European Union Law has also been conducted in order to shed light on the interpretation of the Law on the Protection of Personal Data Art. 5(2)(d).

II. Processing Data Made Accessible to the Public by the Data Subject under Swiss Law

A. In General

According to the Swiss Federal Act on Data Protection[4] Art. 12(3): "*As a rule there is no breach of personality rights if the data subject has made the data generally accessible and has not expressly prohibited its processing*." Under Swiss Law then, processing data which has been made generally accessible by the data subject is in

1 Law on the Protection of Personal Data numbered 6698 published on the Official Gazette dated on 7 April 2016 and numbered 2967 (hereafter "LPPD").

2 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (hereafter "95/46/EC Directive").

3 Regulation 2016/679 Of The European Parliament And Of The Council Of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (hereafter "GDPR").

4 Bundesgesetz über den Datenschutz numbered 235 (hereafter "DSG").

principle not considered to be breaching the privacy of the data subject. The law-maker has accepted a legal presumption (by stating that "*as a rule" "in der Regel*") that can be refuted[5].

B. Making Data Generally Accessible

First, under DSG Art. 12(3) the data should be made publicly accessible. Data is made generally accessible to the public when an indeterminate number of people has access to it without any significant obstacle[6]. It is required that the data subject takes all necessary steps to make the data publicly accessible. Even if the data is not eventually announced to the public, the requirement of making it publicly accessible under DSG Art. 12(3) would be met[7]. If the data subject has made a press release and the article that quotes the data subject is not published, it will be accepted that the data is made accessible to the public under the terms of Art. 12(3)[8].

The data subject should knowingly and willing make the data accessible to the public. If the data is published on a public register without the data subject's will and knowledge, DSG Art. 12(3) will not be applicable. Similarly, personal data that must be published because of a legal obligation is not covered by DSG Art. 12(3)[9].

The data subject is actually not obliged to make the data accessible to the public themselves. A third party can make the data publicly accessible provided that he/she has acted with the knowledge and will of the data subject. This would be the case if the data subject is registered in a public directory (for instance the telephone directory)[10].

It is also important to evaluate a person's actions in the public space. In public spaces, a person's appearance and behaviour might be observed by others. However, in many cases the data subject will not be determinable and therefore data protection concerns will not be raised. Even when it is possible to determine the data subject, he/she would not be making his/her data publicly accessible willingly and knowingly by appearing in public spaces. Being in a public space would not necessarily result in making the data accessible to the public since the data subject would assume that

5 **David Rosenthal/ Yvonne Jöhri**, Handkommentar zum Datenschutzgesetz sowie weiteren, ausgewählten Bestimmungen, Schulthess Juristische Medien AG, 2008,, Art. 12, Nr. 50; **Corrado Rampini,** Basler Kommentar, Datenschutzgesetz, ed. Vogt Nedim Peter/Maurer-Lambrou Urs, 3. Auflage, Basel, 2014, Art. 12, Nr. 18; Bundesverwaltungsgericht, Decision Nr. A-3144/2008 dated 27.5.2009, Nr. 9.3.5; but see **Marc, Wullschleger**, "Die Durchsetzung des Urheberrechts im Internet, SMI - Schriften zum Medien- und Immaterialgüterrecht" Band/Nr. 101, 2015, pp. 28-58, Nr. 82.

6 **Rosenthal/Jöhri**, Art. 12, Nr. 54; **Wullschleger**, Nr. 84; **Nafiye Yücedağ**, **"**The Protection Of IP Addresses In Peer-To-Peer (P2P) Networks", 13th International Conference on Internet, Law & Politics "Managing Risk in the Digital Society", Huygens Editorial, Barselona, 2017, p. 349.

7 **Rosenthal/Jöhri**, Art. 12, Nr. 54 and 63.

8 **Rosenthal/Jöhri**, Art. 12, Nr. 63.

9 **Wullschleger**, Nr. 84.

10 **Rosenthal/Jöhri**, Art. 12, Nr. 55.

passers-by or travellers in public transport would have no interest in taking his/her picture, following his/her consumption habits or listening to his/her telephone conversations[11].

Similarly, if the data subject was photographed by a hidden or overt camera, but was not in a position to assume unambiguously that the images would be made accessible to the public, any publication would not only be done without the knowledge of the data subject, but also without their will. If a person attends a party where journalists are also invited, he/she should assume that the pictures taken at that event will be published. On the other hand, publishing photographs of a private funeral without the consent of the mourners, even if the ceremony takes place in a public place, would not be considered lawful processing under DSG Art. 12(3)[12].

If the data subject knows that personal data are to be made generally accessible (for instance in the form of a newspaper report) and the data subject remains passive, DSG Art. 12 (3) will not be applicable. However, the fact that processing of personal data has been tolerated may be of some relevance in the context of justification on the basis of an overweighting private or public interest[13].

In the event of a dispute, the data controller must prove not only that he obtained the personal data from a publicly accessible source, but also that the data in question, with the knowledge and will of the data subject, was made accessible to the public. This will often be difficult for the data controller, especially when the data is not directly obtained from the data subject[14]. The data controller must also prove that all personal data has been made generally accessible to the public by the data subject. If the personal data made accessible to the public is supplemented by further data which is not made accessible to the public, the data controller cannot base their claim on the presumption provided under DSG 12(3) for the processing of this further data. On the other hand, the data controller can use personal data that the data subject has made publicly accessible on various media (for instance citations from various interviews, supplemented with images from the data subject's website) and combine them[15].

C. No Prohibition on Processing

The presumption under DSG Art. 12(3) provides that once the data has been made accessible to the public by the data subject, there is no breach of privacy. In order to apply this presumption however, the data subject should not have expressly prohibited the processing. By prohibiting the processing, the data subject regains control of

11 see. **Rosenthal/Jöhri**, Art. 12, Nr. 57.

12 **Rosenthal/Jöhri**, Art. 12, Nr. 59.

13 **Rosenthal/Jöhri**, Art. 12, Nr. 56.

14 **Rosenthal/Jöhri**, Art. 12, Nr. 64.

15 **Rosenthal/Jöhri**, Art. 12, Nr. 65.

publicly accessible personal data[16]. This also means that processing is possible until the data subject declares a prohibition. Under certain circumstances, personal data that has been made accessible to the public can be transferred by a third party, without this third party being aware of any prohibition. In practice, this leads to difficulties, especially when personal data is on the internet, which for instance can be the case for vacation photos, which may be accessible worldwide by anyone. In practice, the data subject will be almost unable to prohibit the subsequent processing by third parties as soon as the personal data has become generally accessible on the internet[17].

The express prohibition applies only for the addressee. In accordance with the general rules of the Code of Obligations, a declaration of will can only have an effect if it is addressed to and received by a data controller[18]. The data subject may prohibit a particular newspaper from using photographs which previously were made public[19], but the prohibition of processing should reach the addressee. Pop-ups, in this respect, might not be an effective means because pop-up blockers might be in place[20]. In order to interpret a declaration of prohibition, the general provisions of the Code of Obligations on declarations of will must also be taken into account. If the prohibition is provided through an agreement, the general provisions of the Code will be applicable to the validity of this clause. The clause, therefore, might be characterized as an unfair contractual term[21].

D. The Presumed Public Availability Aim of the Data Subject

The presumption, nonetheless, can be rebutted even when the data subject has made the data generally accessible to the public and has not prohibited its processing. In this context, an objective assessment can be conducted by taking into account the understanding of a reasonable data controller. What should be evaluated is whether the data controller has processed the data in the same way and with the same aim as the data subject in the concrete circumstances of the case[22]. Data controllers can

16 **Wullschleger**, Nr. 91.

17 **Wullschleger**, Nr. 91.

18 **Wullschleger**, Nr. 92.

19 **Rosenthal/Jöhri**, Art. 12, Nr. 67.

20 **Rosenthal/Jöhri**, Art. 12, Nr. 70.

21 **Rosenthal/Jöhri**, Art. 12, Nr. 71.

22 See **Rosenthal/Jöhri**, Art. 12, Nr. 75; **BSK DSG/Rampini**, Art. 12, Nr. 18; **Yücedağ**, The Protection of IP Addresses in Peer-To-Peer (P2P) Networks, p. 349. European Court of Human Rights in its decisions has taken into account the reasonable expectation criterion in relation to the protection of private life in a public space, which might seem to be a similar limitation to the obvious publication aim of the data subject under Swiss Law. According to the ECHR "*There are a number of elements relevant to a consideration of whether a person's private life is concerned in measures effected outside a person's home or private premises. Since there are occasions when people knowingly or intentionally involve themselves in activities which are or may be recorded or reported in a public manner, a person's reasonable expectations as to privacy may be a significant, although not necessarily conclusive, factor. A person who walks down the street will, inevitably, be visible to any member of the public who is also present. Monitoring by technological means of the same public scene (for example, a security guard viewing through closed-circuit television) is of a similar character. Private life considerations may arise, however, once any systematic or permanent record comes into existence of such material from the public domain*" (P.G. and J.H. v. the United Kingdom, Case No. 44787/98, Para. 57). In the Peck v. United Kingdom

process the data made generally accessible subject to the obvious public accessibility aim of the data subject (*ersichtlichen Veröffentlichungszwecks*)[23].

For instance, an e-mail address made available by the data subject on a website does not mean that he/she agrees to receiving spam mail[24]. Similarly, if a newspaper publishes the image of a singer whose dress has accidentally slipped during a performance so that part of her breast became visible, such a processing would be viewed as running against the public availability aim of the data subject[25]. However, if a newspaper publishes the image of a speaker at an event, such processing would be viewed as in line with the public availability aim of the data subject[26]. This criterion would also prevent misuse of data on the internet.

According to another view, it cannot be excluded that the presumed aim of the data subject is not supported by the text of Art. DSG 12(3)[27]. *Wullschleger* states that the unwritten criterion of the presumed aim is problematic if the informational right to self-determination is taken seriously, since under DSG Article 12(3) the processing of publicly accessible data is permitted until processing is expressly prohibited[28].

If the data is processed against the presumed will of the data subject by breaching his/her privacy, DSG Art. 12(3) will not be applicable. However, even if the presumption under DSG Art. 12(3) is refuted, the data controller may rely on the justification grounds of Art. 13. According to Art. 13(1), a breach of personality rights is unlawful unless it is justified by an overriding private or public interest or by law. Art. 13 (2) mentions various reasons for justification, and this list is not exhaustive. While balancing the interest of the data subject with a private or public interest, data that has been made accessible to the public can be taken into account. It might be said that if the data has never been made accessible to the public, the threshold for the assessment of the breach of personality rights will be higher. There will be a reduction of the interest attached to the protection against personality rights breach

case, the Court also used the reasonable expectation test. The applicant had attempted suicide by cutting his wrists and the immediate aftermath of the incident was recorded. The footage and photos of the applicant were then released on many audio-visual media. The court decided that "*the relevant moment was viewed to an extent which far exceeded any exposure to a passer-by or to security observation (...) and to a degree surpassing that which the applicant could possibly have foreseen when he walked in Brentwood on 20 August 1995*" (Peck v. The United Kingdom, Case No. 44647/98, Para. 62). A reasonable person under the same circumstances as Mr. Peck would not foresee that the data would have been used and disclosed in such a manner (**Tomás Gómez-Arostegui**, "Defining Private Life Under the European Convention on Human Rights by Referring to Reasonable Expectations", California Western International Law Journal, Vol. 35 (2005) No. 2, p. 171) see also Perry v. United Kingdom, Case No. 63737/00, Para. 40 et seq.

23 **BSK DSG/Rampini**, Art. 12, Nr. 18; Bundesverwaltungsgericht, Case Nr. A-3144/2008 dated 27.5.2009, Para. 9.3.5.

24 **BSK DSG/Rampini**, Art. 12, Nr. 18; **Amédéo Wermelinger**, Datenschutzgesetz, ed. Bruno Baeriswyl/ Kurt Pärli, Stämpflis Handkommentar, 2015, Art. 12, Nr. 11.

25 **Rosenthal/Jöhri**, Art. 12, Nr. 77.

26 **Rosenthal/Jöhri**, Art. 12, Nr. 78.

27 **Wullschleger**, Nr. 86.

28 **Wullschleger**, Nr. 86.

when the data subject makes the data available to the public[29]. It can be also accepted that, in such cases, the threshold for considering that a public or private interest is overriding might be reduced as well[30].

III. Processing Data Made Manifestly Public by the Data Subject under European Union Law

Personal data is defined under 95/46/EC Directive as "*any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity*". Personal data might be categorized either as sensitive data or as data other than the sensitive data. According to Article 8(2)(e) of the 95/46/EC Directive, data relating to "racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, health or sex life" are considered to be "special categories" of data or in other words, sensitive data.

The protection grounds for sensitive data are regulated under Art. 8 of the 95/46/EC Directive. 95/46/EC Directive Art. 8(2)(e) states that processing data which is manifestly made public by the data subject is not prohibited. The General Data Protection Regulation similarly provides in Art. 9(2)(e) that the processing of sensitive data which is manifestly made public by the data subject is not prohibited.

A. Application of General Justification Grounds to Data Made Public by the Data Subject

95/46/EC Directive Art. 7 regulates the criteria for making data processing legitimate, which would apply at least to the processing of non-sensitive data. However, it is questionable whether only the justification grounds mentioned under 95/46/EC Directive Art. 8 would be sufficient to consider the processing of sensitive data lawful. 95/46/EC Directive Art. 8 prohibits the processing of sensitive data with exceptions. These exceptions may however be regarded as requirements that limit the scope of the prohibition. Nonetheless, these requirements do not *per se* constitute a legitimate justification ground for the processing in all cases[31]. The Working Party in its opinion numbered 06/2014 considered that "*an analysis has to be made on a case by case basis whether 95/46/EC Directive Art. 8 in itself provides for stricter and sufficient conditions*"[32].

29 **Rosenthal/Jöhri**, Art. 12, Nr. 80; **Yücedağ**, The Protection of IP Addresses in Peer-To-Peer (P2P) Networks, p. 349 - 350.

30 **Rosenthal/Jöhri**, Art. 12, Nr. 81.

31 Article 29 Data Protection Working Party, Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC, p. 15, fn. 30; See also **Nilgün Başalp,** Kişisel Verilerin Korunması ve Saklanması, Yetkin Yayınları, Ankara, 2004, p. 45.

32 Article 29 Data Protection Working Party, Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC, p. 15.

95/46/EC Directive Art. 8(2)(e) states that processing data which is manifestly made public by the data subject is not prohibited. However, this justification ground regulates only the processing of sensitive data. It is questionable whether once data is made publicly available by its subject, its processing will be considered lawful. The data which is sensitive, once made public by the data subject, is still personal data. Thus, personal data which is not sensitive cannot be processed even if it is manifestly made public by the data subject, since 95/46/EC Directive Art. 7 does not provide for such a justification ground[33]. In order to justify the processing of such data, one of the justification grounds of Article 7 must exist. Therefore, if sensitive data which is made available to the public is processed, one of the justification grounds under Article 7 will be met *a fortiori*. In this context, data made manifestly public under Article 8 (2)(e) will not always result in making the processing of such data lawful. In most of these cases, a balancing of interest under Art. 7(f) will be necessary[34].

The General Data Protection Regulation similarly regulates under Art. 9(2)(e) that processing sensitive data which is manifestly made public by the data subject is not prohibited. However, it is not enough for the personal data to be publicly accessible. Making data available to the public must be the result of a deliberate act of the data subject[35]. A data subject who expressly makes their data available to the public waives their right to the special protection provided under GDPR Art. 9. However, the general protection provisions under GDPR Art. 6 will remain applicable[36]. In this case, the legislature considers that there is no particular need for protection of the data made public, so that the lawfulness of the processing is governed solely by the general grounds provided under Article 6 (1)[37].

B. Data Manifestly Made Public

The term 'making public' is defined neither under 95/46/EC Directive nor under the GDPR. It is generally accepted that the data is made available to the public when an indeterminate number of people has access to it without any significant obstacle[38]. On social networks, whether or not the data is made available to the public will depend

33 Article 29 Data Protection Working Party, Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC, p. 15, fn. 31.

34 Article 29 Data Protection Working Party, Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC, p. 15.

35 **Thomas Petri**, Datenschutzrecht, DSGVO mit BDSG, ed. Spiros Simitis/ Geritt Hornung/Indra Spiecker gen. Döhmann, Datenschutzrecht, DSGVO mit BDSG, Nomos Verlag, 2019, Art. 9, Nr. 57.

36 **Thilo Weichert**, Datenschutz-Grundverordnung Kommentar, ed. Jürgen Kühling/Benedikt Buchner, 2. Auflage, München 2018, Art. 9, Nr. 77.

37 **Sebastian Schulz**, DS-GVO – Datenschutzgrundverordnung VO (EU) 2016/679 – Kommentar, ed. Peter, Gola, 2. Aufl. 2018, Art. 9, Nr. 25; **Marion Albers/ Raoul-Darius Veit,** Beck'scher Online-Kommentar Datenschutzrecht, 29. edition, Heinrich Amadeus Wolff/Stefan Brink, München, 2018, Art. 9, Nr. 63 and 64; Simitis/Hornung/Spiecker/Petri, Art. 9, Nr. 57.

38 **Gola DS-GVO/Schulz DS-GVO**, Art. 9, Nr. 26; **BeckOK DatenschutzR/Albers/Veit DS-GVO,** Art. 9, Nr. 65; **David Kampert**, Europäische Datenschutzgrundverordnung, ed. Gernot Sydow, 2. Auflage, Nomos Verlagsgesellschaft, 2018, Art.9, Nr. 31.

on those data being available to the general public or only within closed groups or circles[39], according to the privacy settings chosen by the data subject. However, because of the amount of the friends with whom the data has been shared and because it is not always manageable for the data subject, the data should be accepted as made available to the public[40]. Similarly, if anyone can become a member of a network, the data made available to all users of that network even if the number of people is determinable at the time of making data available[41]. It is necessary to assess the recipient radius according to the understanding of the data subject at the time the data is made available. In cases where the data subject could not have expected that, in the foreseeable future, the number of recipients would grow to an unmanageable level, the data should not be considered as having been made available to the public. This could happen where the accessibility status of a closed group has changed in time[42].

The term 'manifestly' is intended to prevent a data subject losing the special protection provided under Art. 9(2)(e) in cases where a third party discloses the sensitive data to the public. Therefore, not all publicly available data will fall under Art. 9(2)(e), as the mere fact that data is publicly available is not sufficient to forego the protection provided under Art. 9. The public availability of the data must obviously be the result of the will of the data subject[43]. This is not the case, for instance, if the public availability of the data is based on an administrative or judicial decision without the consent of the data subject[44].

Furthermore, a mere tolerance of the processing by the data subject will not usually suffice[45]. In the case of public profiles on social networks, the personal data provided will be considered as available to the public[46].

If the data controller, through profiling, derives sensitive personal data from non-sensitive personal data that the data subject has made public, that sensitive personal data is therefore typically not manifestly made public. The opposite outcome would hardly be consistent with the principle of good faith under GDPR Art. 5 (1)(a)[47].

In order to assess whether the data is made available to the public, the understanding of an objective external observer should be taken into account[48]. If the data controller,

39 **Gola DS-GVO/Schulz DS-GVO**, Art. 9, Nr. 26.

40 **Kühling/Buchner/Weichert DS-GVO**, Art. 9, Nr. 78.

41 See **Simitis/Hornung/Spiecker/Petri**, Art. 9, Nr. 58.

42 See **Gerald Spindler/ Lukas Dalby**, Recht der elektronischen Medien, ed. Gerald Spindler/ Fabian Schuster, 4. Auflage, Verlag C.H. Beck, München, 2019, Art. 9, Nr. 14

43 **Sydow/Kempert**, Art.9, Nr. 32.

44 **Sydow/Kempert**, Art.9, Nr. 32.

45 **Simitis/Hornung/Spiecker/Petri**, Art. 9, Nr. 59.

46 **Kühling/Buchner/Weichert DS-GVO**, Art. 9, Nr. 79.

47 **Simitis/Hornung/Spiecker/Petri**, Art. 9, Nr. 61.

48 See **Simitis/Hornung/Spiecker/Petri**, Art. 9, Nr. 59; **Kühling/Buchner/Weichert DS-GVO**, Art. 9, Nr. 80; **BeckOK DatenschutzR/Albers/Veit DS-GVO**, Art. 9, Nr. 66.

or a reasonable person in the position of the data controller, has an understanding that the data is made available to the public, even if the understanding of the data subject contradicts it, the data should be accepted as having been made publicly available. In cases of uncertainty as to whether the data has been made available by the data subject, this justification ground will not be applicable[49].

For instance, in most cases it will be doubtful that data found in internet and press publications has been made public by the data subject[50]. The same applies to press releases, unless it is clear that the information comes from the data subject, for instance through the use of authorized quotations[51].

Websites accessible only to a limited number of friends should not be considered as public[52]. Personal data provided on the websites of persons other than the data subject is not manifestly made public, unless the consent of the data subject is apparent from the circumstances. Information accessible via a search engine cannot lead to the conclusion that this data has been made available to the public by the data subject[53]. In cases of a personal blog or publicly accessible member messages with the name of the data subject or telephone directories in which one can register voluntarily, the data can be assumed to be made available to the public by the data subject[54].

The mere presence of sensitive data in public spaces is not sufficient to make data available to the public[55]. Therefore, participation in a public event does not legitimize the processing of sensitive data (for instance media reports or photographs about this event) obtained because of this participation[56]. Making certain data accessible to an indeterminate group of people cannot be equated with moving in a public space[57].

IV. Processing Data Made Available to the Public by the Data Subject under Turkish Law

According to the Law on the Protection of Personal Data Art. 5(2)(d) personal data may be processed without seeking the explicit consent of the data subject if the data concerned is made available to the public by the data subject himself. For this purpose, according to the Turkish Data Protection Authority, making data available to

49 See **Kühling/Buchner/Weichert DS-GVO**, Art. 9, Nr. 80.

50 **Kühling/Buchner/Weichert DS-GVO**, Art. 9, Nr. 80.

51 **Kühling/Buchner/Weichert DS-GVO**, Art. 9, Nr. 82.

52 **Kühling/Buchner/Weichert DS-GVO**, Art. 9, Nr. 82.

53 **Kühling/Buchner/Weichert DS-GVO**, Art. 9, Nr. 82.

54 **Kühling/Buchner/Weichert DS-GVO**, Art. 9, Nr. 81.

55 **BeckOK DatenschutzR/Albers/Veit DS-GVO**, Art. 9, Nr. 66; **Alexander Schiff,** DSGVO Datenschutz - Grundverordnung Kommentar Eugen Ehmann/ Martin Selmayr, C.H. Beck, 2018, Art. 9, Nr. 46.

56 **BeckOK DatenschutzR/Albers/Veit DS-GVO**, Art. 9, Nr. 66.

57 **Ehmann/Selmayr/Schiff DS-GVO**, Art. 9, Nr. 46.

the public means making data knowable by everyone[58]. For instance, the publication of employees' corporate telephone numbers and e-mail addresses on corporate websites makes this data available to the public[59].

As explained above, processing data made publicly available by the data subject is considered to be lawful under Swiss Law and European Union Law only if certain conditions have been met. Art. 12(3) of the Swiss Federal Act on Data Protection and Art. 5(2)(d) of the Law on the Protection of Personal Data share considerable similarities compared to Art. 9(2)(e) of the GDPR. Unlike GDPR Art. 9(2)(e), these two rules are not applicable to sensitive data and require data to be publicly accessible. In this regard, GDPR Art. 9(2)(e) does not only require data to be sensitive, but also that this sensitive data should be manifestly made public. This term manifestly raises the threshold for the application of the article and prevents the data subject from losing the special protection provided under GDPR Art. 9(2)(e) under strict conditions. Considering that GDPR Art. 9(2)(e) is applicable to sensitive data, the application of a high threshold can be deemed necessary.

In the General Preamble of the Law on the Protection of Personal Data, it is stated that there is no worthy legal protection in the processing of the data made available to the public by the data subject[60]. However, this assumption stated in the Preamble will not be valid in all cases. Moreover, this assumption is not in line with the personal data protection aim and European Union Law. According to GDPR Art. 9(2)(e) once the data has been made manifestly available to the public, the data subject waives his/her right only to special protection provided under GDPR Art. 9. However, the data subject is not left without any protection since the justification grounds under Art. 6 will still be applicable. The fact that the data has been made publicly available by the data subject will not make its processing lawful for any purpose and in any manner.

In this regard, LPPD Art. 5(2)(d) should be interpreted narrowly according to the purpose of the Law. Even when data has been made available to the public by the data subject, it should not be possible to deem the processing to be lawful if the data has not been processed in line with the publication aim in the concrete circumstances of

58 Kişisel Verileri Koruma Kurumu, 6698 Sayılı Kanun'da Yer Alan Terimler, p. 9 (https://www.kvkk.gov.tr/SharedFolderServer/CMSFiles/7452edd6-9ce1-4988-9cfc-95b3758fbd1b.pdf, last online access 15.10.2019)

59 **Kişisel Verileri Koruma Kurumu**, Kişisel Verilerin Korunması Kanuna İlişkin Uygulama Rehberi, p. 44. (https://www.kvkk.gov.tr/SharedFolderServer/CMSFiles/0517c528-a43d-49f5-b1eb-33dc666cb938.pdf, last online access 15.10.2019), s. 76.

60 LPPD, General Preamble, p. 20; Similarly **Furkan Güven Taştan,** Türk Sözleşme Hukukunda Kişisel Verilerin Korunması, On İki Levha Yayıncılık, İstanbul, 2017, p. 172. According to *Aydın* making data available to public would mean an implicit consent. (**Sedat Erdem Aydın**, AİHM İçtihatları Bağlamında Kişisel Verilerin Kaydedilmesi Suçu, On İki Levha Yayıncılık, İstanbul, 2015, p. 147). According to our opinion in this case there is no implicit consent. If one would have to refer to consent, it could only be a presumed consent. See also Turkish Court of Appeals, 12. Criminal Chamber, File No. 2014/4081, Decision No. 2014/19490 (Kazancı Elektronik Hukuk Yayımcılığı, last online access 15.10.2019).

the case[61]. The data controller has to process the data in the same way and with the same aim as the data subject could reasonably expect him to.

The Turkish Data Protection Authority also stated that personal data should not be used beyond the purpose of publication. For instance, it is not possible to use for marketing purposes the contact information of a data subject who has provided his/her contact information in order to sell his/her vehicle through a website where second-hand vehicles are sold[62]. Similarly, if, for the evaluation of an application for a job, an employer checks the profiles of the candidates on various social networks and includes information from these networks that is not related to the business life of the data subject, the data processing would fall beyond the publication aim of the data to the public. However, processing can be considered to be lawful under LPPD Art. 5 (2)(f), if the processing of the data available on the social media networks is necessary to assess specific risks regarding candidates for a specific function and the candidates are well informed[63].

According to LPPD Art. 28 (2)(b) "*Provided that it is in compliance with and proportionate to the purpose and fundamental principles of this Law, Article 10 regarding the data controller's obligation to inform, Article 11 regarding the rights of the data subject, excluding the right to demand compensation, and Article 16 regarding the requirement of enrolling in the Registry of Data Controllers shall not be applied*" where personal data processing is carried out on the data which is made public by the data subject himself/herself. According to this provision, the rights of the data subject, excluding the right to demand compensation, cannot be remedied. In this regard, the Law on the Protection of Personal Data will in part not be applicable to the data made available to the public by the data subject. For instance, if a person shares personal data in a publicly accessible way on a social media network, the processing of such data will be covered by Turkish Data Protection Law only in part[64].

If the data subject made the data publicly available, he/she can to demand compensation but will not be able to learn whether his/her personal data are processed or not, to request information if his/her personal data are processed, to learn the purpose of his/her data processing and whether this data is used for intended

61 **Nafiye Yücedağ**, "Medeni Hukuk Açısından Kişisel Verilerin Korunması Kanunu'nun Uygulama Alanı Ve Genel Hukuka Uygunluk Sebepleri", İstanbul Üniversitesi Hukuk Fakültesi Mecmuası, Nr.75, Y. 2018, p. 781; See also **Şehriban İpek Aşıkoğlu**, Avrupa Birliği ve Türk Hukukunda Kişisel Verilerin Korunması ve Büyük Veri, İstanbul Üniversitesi Hukuk Fakültesi Özel Hukuk Yüksek Lisans Tezleri Dizisi No:5, On İki Levha Yayıncılık, İstanbul, 2018, p. 131. According to differing opinion processing has to in line with the general principles under KVKK Art. 4 (**Elif Küzeci**, Kişisel Verilerin Korunması, Turhan Kitapevi, Ankara, 2019, p. 346; **Murat Volkan Dülger**, Kişisel Verilerin Korunması Hukuku, Hukuk Akademisi Yayıncılık, İstanbul, 2019,p. 326). In this regard processing public data by data controller data has to be in line with the publication purpose of the data subject. This opinion derives the purpose limitation based on the principle of data minimization.

62 **Kişisel Verileri Koruma Kurumu**, Kişisel Verilerin Korunması Kanuna İlişkin Uygulama Rehberi, p. 76.

63 **Article 29 Data Protection Working Party,** Opinion 2/2017 on data processing at work, p. 11.

64 **Kişisel Verileri Koruma Kurumu**, Kişisel Verilerin Korunması Kanuna İlişkin Uygulama Rehberi, p. 44.

purposes, to know the third parties to whom his/her personal data is transferred at home or abroad, to request the rectification of the incomplete or inaccurate data, if any, and to request the erasure or destruction of his/her personal data under the conditions laid down in Article 7. In addition, he/she will not be able to object to the processing, exclusively by automatic means, of his/her personal data, which leads to an unfavourable consequence for him/her.

This provision can be criticized in two respects. First of all, the act must be unlawful in order for compensation for the damages caused by the act to be awarded, according to the rules of tort law. As a rule, then, there will be no liability for an act unless it is an unlawful act (TCO Art. 49). However, although an act is deemed to be lawful, it is possible liability for damages to arise. For example, in case of necessity, a person who damages the property of another in order to protect himself/herself or another person against imminent damage or danger must pay damages [TCO Art. 64 (2)]. The victim must bear this loss and, in return, the offender must make a sacrifice by compensating the damage to the extent that equity requires (the principle of balancing of sacrifices)[65].

In our opinion, the legislator did not intend to provide a legal basis for balancing of sacrifices if the act is in accordance with the law. The processing of personal data made public by the data subject is either lawful or unlawful. If the processing of data made public by the data subject is lawful, there would be no reason for the data controller to enact a sacrifice in order to compensate for the damages. Secondly, it may be vital for the data subjects to exercise their rights, other than the right to compensation, provided under LPPD Art. 11. In particular, data subjects will have an interest in learning whether their personal data are processed or not, requesting information if their personal data are processed, learning the purpose of their data processing and whether this data is used for intended purposes, knowing the third parties to whom their personal data is transferred at home or abroad, requesting the rectification of the incomplete or inaccurate data, if there is any, and in requesting the erasure or destruction of their personal data. In our opinion taking away these rights from the data subject is not appropriate[66].

V. Conclusion

According to LPPD Art. 5(2)(d) personal data may be processed if the data concerned is made available to the public by the data subject. Similarly, according to Swiss Federal Act on Data Protection Art. 12(3); "*As a rule there is no breach of personality rights if the data subject has made the data generally accessible and*

65 **İlhan Ulusan**, Medeni Hukukta Fedakârlığın Denkleştirilmesi İlkesi ve Uygulama Alanı, 2. Bası, Vedat Kitapçılık, İstanbul, 2012, p. 99 et seq.

66 **Yücedağ**, Medeni Hukuk Açısından, p.781.

has not expressly prohibited its processing". The data made available to the public means that an indeterminate number of people has access to it without any significant obstacle. For instance, on corporate websites, publication of employees' corporate telephone numbers and e-mail addresses means data has been made available to the public. In this regard under Swiss Law it is widely accepted that the data made available to the public by the data subject shall be processed in line with the publication aim of the data subject in the concrete circumstances of the case.

According to GDPR Art. 9(2)(e) once the data has been made manifestly available to the public, the data subject waives his/her right only to special protection provided under GDPR Art. 9. However, the data subject is not left without any protection since the justification grounds under Art. 6 will still be applicable. Therefore, processing data made public by the data subject will be subject to a twofold test under European Union Law.

Even if the wording of LPPD Art. 5(2)(d) does not require any limitation on the processing of the data made public, as in the case of DSG Art. 12(3), taking into account the aim of the Law on the Protection of Personal Data, LPPD Art. 5(2)(d) should be interpreted narrowly. The data made available to the public by the data subject shall be processed in line with the publication aim of the data subject in the concrete circumstances of the case. Processing should not be deemed lawful unless another justification ground exists.

According to LPPD Art. 28(2)(b) the rights of the data subject, excluding the right to demand compensation, shall not be applied if the data was made available to the public by the data subject. According to our opinion the legislator does not intend to provide a legal basis, as a sacrifice for the data controller, for the compensation if the act is in accordance with the law. It may also be significantly important for the data subjects to exercise their rights, other than the right to compensation, provided under LPPD Art. 11. Therefore, LPPD Art. 5(2)(d) shall be strictly interpreted considering that the data subject cannot remedy the other rights apart from the right to compensation.

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