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RESEARCH ARTICLE

Les Conventions Préparatoires

Preparatory Conventions

Pelin Işıntan*

Résumé
La phase précontractuelle est une zone grise, difficile à cerner et gouvernée par la liberté contractuelle. Les parties sont libres d'organiser leurs pourparlers conventionnellement et s'imposer des devoirs contractuels même en période précontractuelle. Par convention précontractuelle nous entendons un acte bilatéral qui vise la conclusion du contrat négocié. Puisque le Code des Obligations turc ne consacre pas une section spécifique aux pourparlers les parties ont grand intérêt à organiser cette phase et définir les règles à suivre et leurs comportements réciproques. Les parties peuvent former des actes précontractuels sous des formes et avec des contenus très variés. Nous allons nous limiter aux actes bilatéraux conclus entre les parties puisque nous examinons les conventions préparatoires. Par conséquent, les actes unilatéraux tels que la lettre d'intention envoyée par l'une des parties avec l'intention de débuter les pourparlers ne seraient pas traités dans cet article. Ainsi nous envisageons une étude sur les conventions précontractuelles en tenant compte de leur effet obligatoire. Dans un premier temps, nous traiterons les conventions qu'on pourrait appeler les contrats préparatoires qui créent un effet obligatoire pour au moins une des parties, et ensuite nous examinerons les conventions munies d'un tel effet.

Mots-Clés
Phase précontractuelle, négociations, avant-contrat, punctation, engagement d'honneur

Abstract
The precontractual phase is a gray area, difficult to define, and governed by freedom of contract. Even during the precontractual phase, the parties retain the freedom to organize their talks by agreement and to enforce contractual obligations. We refer to an act preceding the formation of the negotiated contract as a precontractual act. The Turkish Code of Obligations does not devote a specific section concerning negotiations; hence, the parties are greatly interested in organizing this phase and defining the rules to follow and their reciprocal behavior. The parties may form precontractual acts in various forms and any substance. We will limit ourselves to bilateral acts that we will call conventions; thus, unilateral actions such as the letter of intent sent by one of the parties to start negotiations will not be addressed in this article. Therefore, we intend to examine bilateral precontractual agreements, and their mandatory effect shall be the criterion. First, we will deal with preparatory contracts that create a mandatory effect for at least one of the parties. Subsequently, we will analyze alternative precontractual conventions devoid of such an effect.

Keywords
Precontractual phase, negotiations, letter of intent, memorandum of understanding, gentlemen's agreement

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Extended Summary

The precontractual phase is a gray area, difficult to define, and governed by freedom of contract. The parties can organize their talks by mutual agreements and impose contractual obligations even in precontractual periods. The presence of preparatory conventions would be apparent when these documents show the mutual and concordant wills of the two parties. Preparatory conventions consist of stipulations to prepare a subsequent contract. Precontractual negotiations are not explicitly addressed in the Turkish Code of Obligations; therefore, the parties should keenly be interested in organizing this phase and defining the rules to follow and their reciprocal behavior. The precontractual documents may be established by the parties in various formats and contents. We will limit ourselves to bilateral acts, and as a result, unilateral actions such as the letter of intent sent by one of the parties to start the talks would not be addressed in this article.

There can be many classifications for precontractual documents. We choose to classify preparatory conventions concerning their mandatory effect.

The parties to a contract of negotiation agree to coordinate the proceedings of the talks. Consequently, it facilitates the conventional organization of the precontractual phase's structure. The content of a negotiation contract pertains to the precontractual process and not the subsequent main contract. This means that these contracts contain only important provisions for the precontractual phase, such as the duties of each person involved, duration and conditions of negotiations, important dates, and distribution of costs. It could also contain more specific commitments such as non-disclosure, best effort, or exclusivity clauses.

Only the precontract is considered a precontractual agreement following the Code of Obligations. By mutual agreement or unilaterally entering into a preliminary contract, the involved parties commit to finalizing the main contract. However, the precontract is distinguished from other precontractual documents in several content and form-related respects. Indeed, the obligations generated by the precontract are legitimate contractual obligations.

The framework contract is a contract by which the parties lay down the main rules and conditions that will govern the subsequent contracts referred to as application or performance contracts. It is a common instrument utilized when the involved parties enter into a long-term relationship during which they execute multiple contracts bearing a striking resemblance in terms of content. The core of the content is in the framework contract, that is, the minimum content of the subsequent application contracts. The parties' consensus regarding the fundamental aspects of their future performance contracts signifies not only the preparatory nature of the framework

contract but also its obligatory effect, as the parties can no longer retreat from the agreed-upon points.

The preferential agreement is an agreement whereby one party grants the other priority in negotiations should it enter into a specific contract. In other words, one party gives the other the right of first refusal on negotiations. The preferential agreement does not oblige the conclusion of a contract; the obligation exists only for the negotiations for its conclusion.

The preparatory documents without a mandatory effect are the memorandum of understanding, meeting minutes, and gentlemen's agreements.

The memorandum of understanding can also be called heads of agreement or memorandum of agreement. This means that the parties prepare a document on the points of agreement at any given time in their negotiations. Thus, they refrain from revisiting the same points, which shows the current state of their consensus. The existence of such a document would not infringe upon the parties' freedom not to contract. In principle, this agreement does not constitute an obligation-generating act and therefore has no contractual effect.

Meanwhile, meeting minutes are reports of the meetings during the negotiations. One can easily see the discussion points of each meeting, which facilitates parallel meetings of groups with different authorities.

By a gentlemen's agreement, the parties deliberately put themselves outside the law. In other words, the commitments are not legally enforceable; the parties solely pledge their honor for the execution, and the binding force exists only morally. They do not entail any legal obligations. The parties trust the honor of the co-contractor rather than the legal sanction. There is a risk if one of the parties fails to conduct themselves "gentlemanly"; however, it would be a calculated risk for the other party.

I. Introduction

Quand les parties sont en voie de préparer un contrat elles sont en phase précontractuelle or cette phase est très floue. C'est une zone grise, difficile à cerner et gouvernée par la liberté contractuelle. Les parties qui entrent en négociation en vue de conclure un contrat sont libres de former un contrat et même de changer d'idée et ne pas le former. C'est une zone qui n'est pas régie comme telle par le code des obligations ce qui rend plus difficile à concrétiser les obligations ou les droits découlant de cette période même si on décide ils existent. C'est aussi une zone sous la domination du principe de la bonne foi faute de toute autre disposition positive. Toutefois les parties sont aussi libres d'organiser leurs pourparlers conventionnellement et s'imposer autres devoirs contractuels même en période précontractuelle.

En fait, il est possible de voir plusieurs documents précontractuels préparés par les parties pendant cette période. Même s'il est très difficile de dresser une liste exhaustive de ces documents on pourrait essayer de les regrouper selon différents critères tel que le nombre des parties, leur effet obligatoire, leur validité qui s'étend ou non au-delà des pourparlers ou leur objet et but. On pourrait facilement constater que la seule limite est l'imagination des parties en ce qui concerne la dénomination et le contenu de ces documents précontractuels face à la liberté contractuelle. Il faut aussi préciser que la plupart de ces documents présentent un caractère hybride puisque les critères sont interchangeables et ne s'excluent pas les uns les autres. Ainsi les classifications ou dénominations qu'on fait restent la plupart du temps dans l'arbitraire[1] et changent d'après les auteurs et leurs points de vue[2]. C'est la raison pour laquelle on doit plutôt s'intéresser au contenu des documents sans tenir compte de leur dénomination suivant l'art. 19 CO[3]. Pourtant on pourrait constater que quand ces documents présentent une manifestation des volontés réciproques et concordantes des deux parties on serait en présence des conventions préparatoires qu'on va essayer de traiter en détails ci-dessous. Par convention préparatoire nous entendons un acte bilatéral qui vise la conclusion d'un contrat que nous allons appeler le « contrat principal » ou le « contrat ultérieur ».

Les conventions préparatoires sont bien entendu des actes qui ont pour objet la préparation d'un contrat ultérieur. Ils peuvent aussi avoir pour objet l'organisation de la phase précontractuelle qui s'avère très importante surtout quand une des parties rompt les pourparlers d'une manière inattendue. Puisque le Code des Obligations turc ne consacre pas une section spécifique aux pourparlers[4] à la différence des

1 Nicolas Kuonen, *La Responsabilité Précontractuelle* (Schultess 2007), 257.

2 Dans la pratique les termes letter of intent, memorandum of understanding et term sheet sont utilisés d'une manière interchangeable. Cf, Ismail G Esin, Birleşme ve Devralmalar (1ere éd, On iki Levha 2020), 60.

3 Esin, 61.

4 Les dispositions relatives à la phase précontractuelle se trouvent plutôt dispersées dans le CO. On pourrait citer à titre d'exemple les dispositions concernant les vices de consentement (CO art. 30 et s.) ainsi que le cas d'impossibilité de l'objet du contrat (CO art. 27). Cf. également Pierre Tercier, Pascal Pichonnaz, Murat Develioğlu, *Borçlar Hukuku Genel*

Codes allemands (BGB §241, §311)[5] et français (CCfr art. 1112 et suivants)[6] les parties ont grand intérêt à organiser cette phase et définir les règles à suivre et leurs comportements réciproques.

La seule convention préparatoire envisagée par le Code est l'avant-contrat[7] qui se trouve à l'art. 29 CO. Cela n'empêche pas les parties sous l'empire de la liberté contractuelle d'imaginer d'autres moyens pendant la période précontractuelle pour ainsi aboutir à la conclusion d'un contrat principal ultérieur. Comme on a exprimé ci-dessus les parties peuvent former des actes précontractuels sous des formes et avec des contenus très variés. Nous allons nous limiter aux actes bilatéraux préparatoires, par conséquent, les actes unilatéraux tels que la lettre d'intention[8] envoyée par l'une des parties avec l'intention de débuter les pourparlers ne seraient pas traités dans cet article.

Ainsi nous envisageons une étude sur les conventions précontractuelles. Nous allons faire une classification concernant leur effet obligatoire. Dans un premier temps, nous traiterons les contrats préparatoires qui créent un effet obligatoire pour au moins une des parties, et ensuite nous examinerons les actes préparatoires qui sont munis d'un tel effet.

Hükümler (2e éd. On iki Levha 2020), 211 ; Ahmet M. Kılıçoğlu, *Borçlar Hukuku Genel Hükümler* (26e éd. Turhan Kitabevi 2022), 124 ; M. Kemal Oğuzman et M. Turgut Öz, *Borçlar Hukuku Genel Hükümler* (C. 1, 20e éd. Vedat Kitapçılık 2022), 81.

5 Le BGB a subi une réforme importante qui est entrée en vigueur le 1er Janvier 2002 avec laquelle plusieurs institutions jurisprudentielles ont trouvé leur chemin d'entrée dans le code dont l'une est la *culpa in contrahendo*. A la suite de cette réforme la relation précontractuelle est considérée comme un rapport générateur d'obligations accessoires et la non-conformité à ces obligations engendrerait une responsabilité contractuelle où la victime aurait droit à demander une indemnité même pour ses dommages-intérêts positifs. A propos de la réforme et la codification de la responsabilité précontractuelle voir Claude Witz, 'Pourquoi la réforme et pourquoi s'y intéresser en France' in Claude Witz et Filippo Ranieri (éds), *La Réforme du Droit Allemand des Obligations Colloque du 31 Mai 2002 et nouveaux aspects* (Société de Législation Comparée 2004) 11, 15 ; Winfried-Thomas Schneider, 'La Codification d'Institutions Prétoriennes' in Claude Witz et Filippo Ranieri (éds), *La Réforme du Droit Allemand des Obligations Colloque du 31 Mai 2002 et nouveaux aspects* (Société de Législation Comparée 2004) 39, 41.

6 Le Code Civil français a subi une réforme par l'ordonnance no 2016-131 du 10 Février 2016. Cette réforme, comme en Allemagne, fut l'occasion de la codification de la phase précontractuelle qui jusque-là n'était qu'une institution de la jurisprudence. On pourrait quand-même constater que le texte adopté du Code Civil reflète plus ou moins les solutions jurisprudentielles en exigeant la bonne foi dans les pourparlers mais aussi en excluant toute possibilité d'indemniser le gain espéré de la conclusion du contrat négocié. Ainsi le législateur consacre la jurisprudence Manoukian (Cour de Cassation Chambre commerciale du 26 Novembre 2003) et ne permet que l'indemnisation des dommages-intérêts négatifs. Clément François 'Présentation des articles 1112 à 1112-2 de la nouvelle sous-section 1 « Les négociations »' in *La réforme du droit des contrats présentée par l'IEJ de Paris 1*, https://iej.univ-paris1.fr/openaccess/reforme-contrats/titre3/stitre1/chap2/sect1/ssect1-negociations/ consulté le 2 Juillet 2023.
La perte d'une chance d'obtenir les avantages du contrat non conclu est expressément exclue par la modification de l'art. 1112 par l'art. 3 de la Loi no 2018-287 du 20 avril 2018.

7 L'art. 22 de l'ancien CO s'intitulait « la promesse de contracter » conformément à son origine suisse (art. 22 CO suisse). Pourtant avec la réforme du CO qui est entrée en vigueur le 1er Juillet 2012 l'intitulé de l'art. 29 qui correspond à l'ancien article 22 CO est modifié et le législateur a opté pour le terme de l'« avant-contrat ». On pourrait aussi utiliser le terme « précontrat ». La doctrine suisse utilise plutôt le terme précontrat tandis que la doctrine française préfère celui de l'avant-contrat. Quand même il faut souligner que ces termes sont identiques et sont utilisés d'une manière interchangeable. Cf. par exemple Pierre Tercier et Pascal Pichonnaz, *Le Droit des Obligations* (6e éd. complétée et mise à jour, Schultess Editions Romandes 2019), 142 ; Marcel Rehfous, 'La Formation du Contrat et L'Avant-contrat en matière immobilière' (1965) *Semaine Judiciaire*, 305 et s. ; François Terré, Philippe Simler et Yves Lequette, *Droit Civil Les Obligations* (8e éd. Dalloz 2002), 188. Voir aussi Necip Kocayusufpaşaoğlu, *Türk Medeni Hukukunda Gayrimenkul Satış Vaadi* (Sulhi Garan Matbaası 1959), 45 note 28.

8 Par la lettre d'intention nous entendons un document unilatéral manifestant une volonté à entrer dans les négociations. Pour les auteurs qui considèrent les lettres d'intention comme des actes bilatéraux voir Pelin Işıntan, *Sözleşme Müzakereleri* (Galatasaray Üniversitesi Sosyal Bilimler Enstitüsü thèse de doctorat non-publiée 2009), 64 et suivants. Cf également Zeynep Damla Taşkın, *Sözleşmenin Kurulması* (On iki Levha, 2020), 109 et suivants; Tuğçe Oral, 'Niyet Mektubu' in (2016) *TAAD* 7 (28) 145, 147. Esin, considère la lettre d'intention comme un contrat de négociation. Voir Esin, 62.

II. La Classification des Conventions Préparatoires

A. Les Contrats Préparatoires

1. Le contrat de négociation

Le contrat de négociation est un contrat par lequel les parties s'engagent à organiser le déroulement des pourparlers[9]. Il sert donc, à l'organisation conventionnelle de la phase précontractuelle. Même si ces contrats appartiennent à la phase précontractuelle, ce sont des vrais contrats avec des obligations contractuelles à respecter pour chacune des parties et ainsi ils donnent un caractère contractuel, même partiel, aux pourparlers. Le contenu d'un contrat de négociation n'est pas relatif au contrat principal ultérieur mais relatif au processus précontractuel, cela veut dire que ces contrats ne contiennent que des dispositions importantes pour la phase précontractuelle.

La planification de la phase précontractuelle s'avère surtout importante quand on envisage un long processus de négociation qui peut devenir assez complexe. Ainsi les parties pourraient dès le début préparer un contrat dans lequel elles détermineraient leur but et le cadre général des pourparlers en fixant par exemple les devoirs de chaque personne impliquée, la durée et les conditions de négociation, les dates importantes, la répartition des coûts et des frais ; elles pourraient même décider sur les sanctions par exemple sous forme de clause pénale au cas où l'une d'elles ne respecterait pas ce qui a été convenu. On pourrait aussi imaginer que les parties conviendraient sur des engagements plus spécifiques tels que des obligations de non-divulgation (ou de confidentialité) ou encore elles vont insérer des clauses de meilleurs efforts (*best effort*), des clauses d'exclusivité des négociations ainsi que des clauses exclusives ou limitatives de responsabilité précontractuelle[10]. Ces obligations peuvent être réciproques ou unilatérales. On a précisé auparavant que la période précontractuelle est floue et l'absence dans le CO d'une section relative aux pourparlers se fait sentir dans le cas où une des parties rompt les pourparlers d'une manière intempestive ou brutale. En concluant un contrat de négociation les parties essaient de tracer un cadre dans lequel elles auraient de vraies obligations contractuelles en vue de travailler sérieusement pour préparer le contrat ultérieur.

On constate bien que ce contrat contient des instructions relatives au déroulement des pourparlers et les parties sont obligées à le respecter. Bien entendu cette obligation

9 Pour une définition similaire cf. Kuonen, 264. Il y a quand-même certains auteurs qui considèrent ces documents comme des contrats "normaux" et les classifient sous le titre de Heads of Agreement. Voir Louis Péloquin et Christopher K. Assié, 'La Lettre d'Intention' in *Revue Juridique Thémis* (2006) I (40) 175, 178. Ralph B. Lake et Ugo Draetta, à leur part, classifient ces documents comme des « framework letter of intent ». Voir Lake et Draetta, *Letters of intent and other precontractual documents* (2e éd, Butterworths 1994) 15. Marchand, à son tour, les appelle « l'accord-cadre de négociation » et accepte leur caractère contractuel. Voir Sylvain Marchand*, Clauses Contractuelles – Du bon usage de la liberté contractuelle* (Helbing Lichtenhahn 2008), 51.

10 Pour un examen des différents types de clauses insérables dans un contrat de négociation et l'effet du non-respect à ces clauses voir Işıntan, 116 et suivants ; Esin, 73 et suivants, Marchand, 50 et suivants.

n'irait pas au-delà des pourparlers, les parties ne s'engagent point à conclure le contrat ultérieur à cette étape mais elles s'engagent à le négocier sérieusement[11]. La partie qui ne respecte pas cet engagement serait en violation du contrat et devrait accepter les conséquences soit sa responsabilité contractuelle. Ainsi, elle devrait payer les dommages-intérêts positifs au lieu de seul dommages-intérêts négatifs comme dans le régime « normal » de responsabilité *culpa in contrahendo*[12].

2. Les avant-contrats (précontrats)

L'avant-contrat est le seul contrat précontractuel prévu dans le Code des Obligations. L'art. 29 CO s'intitule « l'avant-contrat [13]» et dispose que « *Les conventions relatives à passer un contrat futur sont valables* ». On pourrait remettre en question la nécessité des avant-contrats tant que tous les éléments essentiels du contrat projeté devraient être déjà contenus dans l'avant-contrat. Les parties quand même peuvent avoir des raisons diverses pour passer ainsi deux contrats séparés et en fait la pratique de passer des avant-contrats est assez répandue surtout en matière de la vente immobilière même si l'avant-contrat n'est pas seulement prévu pour ce type de contrat. En fait il est possible de conclure des avant-contrats pour tout type de contrat pourvu que ce dernier soit un contrat générateur d'obligations[14].

En quoi l'avant-contrat est un contrat préparatoire ? Les parties qui concluent un avant-contrat s'engagent unilatéralement ou réciproquement à conclure le contrat principal. Alors, il est clair que l'avant-contrat précède le contrat principal. Pourtant l'avant-contrat se distingue des autres documents précontractuels par plusieurs points relatifs à la forme et au contenu[15].

En ce qui concerne la forme, la validité de l'avant-contrat dépend de la forme du contrat principal si la validité de ce dernier est subordonnée à l'observation d'une

11 Necip Kocayusufpaşaoğlu, *Borçlar Hukukuna Giriş, Hukuki İşlem, Sözleşme* (Borçlar Hukuku Genel Bölüm C.1, 4e éd, Istanbul 2008), 169 ; Gökhan Antalya, *Borçlar Hukuku Genel Hükümler* (C. V/1,1, 2ème éd, Seçkin 2019), 232.

12 Kocayusufpaşaoğlu, 170 ; Esin, 74. Quand même il faut préciser que les dommages-intérêts positifs dans ce cas ne correspondent pas à la conclusion du contrat principal. Cela veut dire que la partie lésée ne pourrait point demander que le contrat principal soit conclu à titre de réparation. Elle ne pourrait demander que les coûts et frais qu'elle a subi pendant la période précontractuelle comme par exemple les frais de voyage, la rémunération des avocats etc. Voir Esin, 75. L'objectif est de remettre le patrimoine de la partie lésée dans la position avant la violation du contrat. Dans ce cas le contenu des dommages-intérêts se ressemblent aux dommages-intérêts négatifs sauf que le dommage subi dans ce cas correspond à une perte éprouvée c'est dire *damnum emergens* au lieu d'un gain manqué (*lucrum cessans*). Cf. Mehmet Serkan Ergüne, *Olumsuz Zarar* (Beta 2008), 61. Pourtant les parties peuvent organiser ce point dans leur contrat et prévoir un régime d'indemnité spécial en insérant une clause pénale ou une clause qui limite la responsabilité.

13 Pour la terminologie voir note 7 ci-dessus.

14 Kocayusufpaşaoğlu, 100; Gül Doğan, *Ön Sözleşme (Sözleşme Yapma Vaadi)* (Yeditepe Üniversitesi 2006), 52; Hasan Ayrancı, *Ön Sözleşme* (Yetkin, 2006), 44; Selahattin Sulhi Tekinay, Sermet Akman et al., *Tekinay Borçlar Hukuku Genel Hükümler* (7e éd, Filiz Kitabevi 1993), 142; Oğuzman et Öz, 195; Haluk Nomer, *Borçlar Hukuku Genel Hükümler*, (17e éd. Beta 2020), 56; Mehmet Serkan Ergüne, Ali Suphi Kurşun, 'TBK m. 29' in Turgut Öz, Faruk Acar et al. (eds), *İstanbul Şerhi Türk Borçlar Kanunu* (C. 1 (Madde 1-82), Vedat Kitapçılık 2019), 500; Fikret Eren, Borçlar Hukuku Genel Hükümler (26e éd. Yetkin 2021), 358; Antalya, 437.

15 Ergüne et Kurşun, 513 – 514 ; Eren, 361; Antalya, 231.

certaine forme prévue par la loi d'après l'art. 29/al. 2 CO[16]. Cela veut dire que pour constater la présence d'un avant-contrat il faut que les parties respectent la forme du contrat principal tandis que les autres documents précontractuels ne nécessitent aucune forme de validité.

Ensuite, en ce qui concerne le contenu de l'avant-contrat, il faut constater qu'il doit couvrir tous les points objectivement et subjectivement essentiels du contrat principal ce qui met la notion des avant-contrats au cœur des discussions[17] en droit turc car dans un système basé sur la tradition pour le transfert de propriété la nécessité de passer deux contrats séparés (un avant et un après) avec presque les mêmes dispositions est assez curieuse. Il faut aussi préciser que l'avant-contrat comprend une obligation de conclure le contrat principal[18]. On peut même se demander si les pourparlers prennent fin avec la conclusion de l'avant-contrat car par sa conclusion cette obligation de conclure le contrat principal devient tout à fait une obligation contractuelle dont l'inexécution pourrait engendrer une action en dommages-intérêts aussi bien qu'une action en exécution en nature où la conclusion du contrat principal pourrait être exigée par le juge[19]. Donc, il est évident que les obligations générées par l'avant-contrat sont des véritables obligations contractuelles et on n'est plus dans le domaine de la responsabilité précontractuelle. En concluant un avant-contrat, on dirait que les parties mettent fin à leur liberté contractuelle de ne pas former un contrat et créent conventionnellement une obligation de former le contrat ultérieur. Il faut alors constater que l'avant-contrat se distingue des autres documents précontractuels comme la *punctation* ou l'accord de principe dans le sens qu'il ne serait plus possible pour une partie de refuser de conclure le contrat principal sans engendrer sa responsabilité contractuelle[20].

3. Le contrat-cadre

Le contrat-cadre est un contrat par lequel les parties fixent les principales règles et conditions qui régiront les contrats ultérieurs dits des contrats d'application ou des

16 Le seul cas à part est l'avant-contrat en matière de la vente immobilière. Tant que ce contrat est soumis à la forme authentique l'autorité autorisée (les notaires) est différente que l'autorité du contrat principal de la vente (l'officier du registre foncier). Cf. Kocayusufpaşaoğlu, *Satış Vaadi*, 118. Voir par exemple Cour de Cassation Turque 3ème Chambre Civile, 4609/2407, 16.03.2022 (hukukturk.com consulté le 30 Septembre 2023).
Pourtant avec la dernière modification faite à la Loi no 1512 concernant les Notaires dorénavant il est devenu possible de passer l'acte authentique de vente immobilière chez les notaires. Cette modification qui est entrée en vigeur le 1er Janvier 2023 efface presque toute différence entre l'avant-contrat et le contrat principal en matière de la vente immobilière.

17 Cf. Kocayusufpaşaoğlu, 101 et suivants ; Ayrancı, 123 et suivants ; Doğan, 137 et suivants ; Nomer, 57 et suivants. Cf surtout İsmet Sungurbey, *Kişisel Hakların Tapu Kütüğüne Şerhi* (Sermet Matbaası 1963), 10 et suivants qui soutient l'inutilité des avant-contrats en droit turc.

18 Kılıçoğlu, 356 ; Oğuzman et Öz, 195 ; Nomer, 57 ; Ergüne et Kurşun, 522 ; Eren, 360 ; Antalya, 229.

19 Voir dans ce sens Cour de Cassation Turque 7ème Chambre Civile, 1194/3462, 16.05.2022 ; Cour de Cassation Turque 7ème Chambre Civile, 1004/337, 13.09.2021 ; Cour de Cassation Turque 14ème Chambre Civile, 17/937, 15.02.2021 ; Cour de Cassation Turque 14ème Chambre Civile, 130/979, 17.02.2021 (hukukturk.com consulté le 30 Septembre 2023).

20 Işıntan, 95.

contrats d'exécution[21]. Il est un instrument souvent utilisé quand les parties entrent dans une relation de longue durée pendant laquelle elles passeront plusieurs contrats avec un contenu plus ou moins similaire. Le noyau du contenu se trouve dans le contrat-cadre, c'est le contenu minimum des contrats d'application[22]. L'application la plus répandue des contrats-cadres en droit turc est dans le domaine du droit bancaire où on conclue souvent un contrat-cadre de crédit bancaire dans lequel les parties fixent déjà la durée, le taux d'intérêt et les sûretés. On les rencontre aussi dans le domaine des contrats de franchise ou des contrats de vente exclusive[23]. Les parties déterminent dès le début de leur relation contractuelle certains de leurs droits et obligations ainsi que par exemple des clauses compromissoires, la répartition des coûts et des frais, le lieu de livraison, les modalités de paiement etc. de sorte qu'elles n'auront plus besoin d'en revenir chaque fois qu'elles vont passer des contrats d'application[24]. Cela implique que le contrat-cadre envisage forcément une relation d'obligation perpétuelle voire un contrat principal de durée[25]. Si les parties ne visent que créer un seul contrat principal à la fin des pourparlers on ne serait pas en présence d'un contrat-cadre mais plutôt d'un contrat de négociation ou d'un *framework letter of intent* qui encadre la période des pourparlers. La différence entre un contrat de négociation et un contrat-cadre se montre dans le fait que le contrat de négociation ne comprend que des clauses relatives à la période précontractuelle tandis que les dispositions du contrat-cadre forment en fait une fraction du contenu des contrats d'exécution.

Le fait que les parties se mettent d'accord sur le noyau de leurs contrats d'exécution futurs indique le caractère préparatoire du contrat-cadre. Cependant sa force obligatoire ne se présente pas aussi nettement. A notre avis, l'effet obligatoire de ces documents vient du fait que les parties ne peuvent plus remettre en question les points déterminés du contrat-cadre. C'est dire si les parties passent des contrats ultérieurs d'exécution ils doivent respecter le contenu du contrat-cadre. Outre ces points on peut se demander si le contrat-cadre est un contrat générateur d'obligation dans le sens de forcer les parties à passer les contrats ultérieurs d'exécution. C'est une question dont la réponse est controversée mais plutôt négative. Le contrat-cadre fixe les termes d'un contrat éventuel entre les parties mais il ne crée pas l'obligation

21 Nami Barlas, 'Çerçeve Sözleşme Kavramı ve Çerçeve Sözleşmenin Özellikleri' in *Makalelerim* (C.1, Vedat Kitapçılık 2008) 89, 91; Kocayusufpaşaoğlu, 112; Doğan, 109; Kuonen, 262. Le Code Civil français a introduit une définition dans son article 1111 après la réforme de 2016 qui se lit comme «*Le contrat cadre est un accord par lequel les parties conviennent des caractéristiques générales de leurs relations contractuelles futures. Des contrats d'application en précisent les modalités d'exécution.* ».

22 Barlas, 95.

23 Hayriye Şen Doğramacı, 'Çerçeve Sözleşme Kavramı, Çerçeve Sözleşmelerin Amacı ve Ekonomik Fonksiyonu' (2022) *Selçuk Üniversitesi Hukuk Fakültesi Dergisi* 3 (30) 1043, 1045; Kocayusufpaşaoğlu, 113.

24 Ayrancı, 108.

25 Barlas, 99; Şen Doğramacı, 1045; Kocayusufpaşaoğlu, 112; Doğan, 110; Ayrancı, 110; Ergüne et Kurşun, 512; Antalya, 230. Pour un avis contraire cf. Barış Demirsatan, *Türk Borçlar Kanunu Çerçevesinde Sözleşmenin Haksız Olarak Sona Erdirilmesi* (2e éd. On iki Levha 2021), 68 note 3. L'auteur est d'avis que le contrat-cadre ne peut être caractérisé comme un contrat de durée par le fait que le contrat-cadre ne fait naître aucune prestation principale.

d'en conclure un[26]. Cela veut dire que si les parties finalement décideraient de passer un contrat d'application, les conditions du contrat-cadre devraient être respectées mais elles ne seraient pas obligées de passer un tel contrat. Alors on peut dire que le contrat-cadre a un effet obligatoire en ce qui concerne le contenu des contrats ultérieurs et non pas un effet obligatoire en ce qui concerne leur conclusion[27]. Bien entendu rien n'empêche les parties à intégrer dans leur contrat-cadre une obligation de conclure certains contrats dans le cadre dessiné mais dans ce cas on serait le plus souvent en présence d'une promesse de contracter ou un avant-contrat[28].

4. Le pacte de préférence

Le pacte de préférence est une convention par laquelle une partie offre la priorité des négociations à l'autre dans le cas où elle déciderait de conclure un contrat déterminé[29]. Ainsi, la partie qui offre la priorité doit s'abstenir à entrer en négociations parallèles avec les tiers avant d'avoir proposé à son contractant. Le pacte de préférence comme tel n'oblige pas à conclure un contrat, l'obligation n'existe que pour les négociations dans le but de sa conclusion[30]. Dans ce sens, le pacte impose à une des parties une obligation de négocier mais cette obligation est soumise à une condition potestative[31]. Le pacte de préférence présente généralement une obligation unilatérale mais rien n'empêche les parties à créer un pacte synallagmatique. Les deux parties peuvent ainsi s'engager réciproquement ou bien le bénéficiaire du privilège pourrait s'engager à payer une somme d'argent comme contre-prestation. L'existence d'un tel pacte entraine dans une manière l'exclusivité des négociations car les négociations parallèles seraient en échec si le bénéficiaire décide d'user de son privilège. Pourtant il est possible de mener des négociations parallèles pour le débiteur sous condition d'informer les parties de l'existence d'un tel pacte pour ne pas engager sa responsabilité *culpa in contrahendo* en invoquant la confiance chez les autres envers la conclusion du contrat[32]. Le fait que le débiteur du pacte entame les négociations ou conclut le contrat projeté avec un tiers sans l'avoir proposé d'abord au bénéficiaire du pacte engagerait sa responsabilité contractuelle envers son co-

26 Barlas, 98; Doğan, 109; Kocayusufpaşaoğlu, 112; Marchand, 55; Antalya, 230. Voir contra Şen Doğramacı, 1047. Pourtant, il est possible que certains contrat-cadres prévoient des obligations unilatérales comme par exemple dans le cas du contrat-cadre de la vente de bière ou des stations-service. Cf. Doğan, 111 note 309.

27 Işıntan, 105. Si les parties voudraient modifier le contenu plus tard, elles doivent modifier conventionnellement leur contrat-cadre soit en rédigeant un avenant. Cf. Tercier et Pichonnaz, 146.

28 Barlas, 105 ; Kuonen, 263.

29 Cf. Kuonen qui définit le pacte de préférence comme un « *contrat par lequel une partie s'engage envers l'autre à ne pas conclure avec un tiers un contrat déterminé avant de lui en avoir proposé la conclusion* ». Kuonen, 271.

30 Kuonen, 272.

31 Kuonen, 272.

32 Lake et Draetta, 123. Dans ce cas, la responsabilité nait envers les parties qui entre en négociations parallèles mais qui ne connaissent pas l'existence d'un pacte de préférence avec un tiers. Le comportement de la partie qui s'abstient à divulguer le pacte de préférence et qui continue à mener des négociations parallèles serait contraire à la bonne foi et alors naitrait sa responsabilité *culpa in contrahendo*.

contractant[33]. En d'autres termes si le débiteur du pacte de préférence ne respecte pas la position privilégiée de l'autre partie et conclue un contrat avec un tiers sans donner l'option des négociations au bénéficiaire du pacte, cela engendrait sa responsabilité contractuelle dans le cadre de l'art. 112 CO et elle devrait payer des dommages-intérêts positifs. Quand même vu les difficultés de preuve de ces dommages il serait préférable d'insérer une clause pénale dans le pacte[34].

Le pacte de préférence pourrait être conclu indépendamment mais il peut aussi être inclu en tant qu'une clause dans un autre document précontractuel comme par exemple dans un contrat de négociation ou un accord de principe. Dans un tel cas, même si le document précontractuel serait dépourvu d'un effet obligatoire cette clause quand même lierait les parties[35].

Le pacte de préférence se distingue d'un avant-contrat par l'absence d'une obligation de contracter. Il faut aussi le distinguer d'un droit d'option ou de préemption par l'absence d'un droit formateur. En plus, il faut remarquer que la vente à un tiers est une condition pour le droit de préemption tandis qu'elle constituerait déjà une violation pour le pacte de préférence[36].

B. Les Actes Préparatoires avec Effet Non-obligatoire

1. Accord de principe

Les parties, à un point donné des négociations, peuvent décider de dresser un bilan de leur relation précontractuelle et préparer un document avec tous les points sur lesquels elles sont en accord et même les points sur lesquels elles ne le sont pas[37]. Cela leur montrerait à quel stade des pourparlers elles se trouvent et combien elles ont accompli. Ainsi, elles évitent de revenir toujours sur les mêmes problèmes ou les mêmes points. D'un point de vue pratique, elles éviteraient aussi de savoir tous les détails discutés jusqu'à ce temps par cœur et cela peut se montrer important surtout si on est en présence d'un contrat éventuel de plusieurs pages et plusieurs mois de négociations[38].

33 Terré, Simler et Lequette, 196.

34 Işıntan, 100.

35 Işıntan, 99.

36 Kuonen, 272.

37 Ces documents prennent des noms différents comme *Memorandum of understanding, Heads of agreement ou Memorandum of agreement* ou bien encore protocole d'accord. Comme on a cité auparavant on s'intéresse plutôt au contenu des documents et non seulement leurs dénominations pour décider de leurs sorts et qualités juridiques. Pour les différentes classifications des documents que nous appelons des accords de principe voir les divers auteurs cités par Ralph Schlosser, 'Les lettres d'intention: portée et sanctions des accords précontractuels' in *Responsabilité Civile et Assurance : Etudes en l'honneur de Baptiste Rusconi* (Editions Bis et Ter 2000) 345, 347. Cf. aussi Marchand, 52.

38 Marcel Fontaine et Filip de Ly, *Droit des Contrats Internationaux, Analyse et rédaction des clauses* (Bruylant 2003) 7 ; Lake et Draetta, 16 ; Işıntan, 78.

La présence d'un tel document ne limiterait point en ce qui concerne la liberté des parties à ne pas contracter. Un accord de principe, en principe, n'est pas un acte générateur d'obligations ; il est dépourvu d'effet contractuel. Nul n'est obligé de conclure le contrat anticipé et la volonté des parties de s'engager fait encore défaut car les parties ne voudraient pas conclure un contrat sans trouver un accord aussi sur les autres points de négociations[39]. La seule obligation à cette étape pourrait être une obligation tacite de négocier sur ces points réservés dans le sens que la partie qui revient toujours sur les mêmes points et remet constamment en cause les achèvements des négociations pourrait engendrer sa responsabilité précontractuelle[40]. L'accord de principe peut aussi jouer un rôle probatoire et constate l'état des négociations aussi bien qu'un rôle interprétatif du contrat dans le futur[41]. Pourtant il est tout à fait possible pour les parties d'exclure l'accord de principe dans l'interprétation du contrat conclu en vertu de la liberté contractuelle[42].

Cela dit, une question importante concernant le droit turc se présente : Dans un système où un accord sur les éléments essentiels du contrat est suffisant pour conclure le contrat, si on constate que les parties dans leur accord de principe sont convenues sur les éléments essentiels du contrat négocié est-ce qu'on pourrait constater que le contrat est déjà conclu même si le contrat ne contient pas encore tous les éléments nécessaires vu les points secondaires ? Comme l'art. 2 CO prévoit que « *si les parties se sont mises d'accord sur tous les points essentiels… le contrat est réputé conclu* » la réponse à cette question risque d'être affirmative. Le CO dans son art. 2 institue une présomption relative à la conclusion du contrat selon laquelle l'accord sur les points essentiels est suffisant[43,44]. Si une partie considère un point secondaire comme subjectivement essentiel, c'est-à-dire si ce point constitue un élément *sine quoi non* pour elle et par conséquence elle n'accepterait pas la conclusion du contrat négocié sans se mettre d'accord sur ce point, elle est tenue de le faire savoir à l'autre partie

39 Kocayusufpaşaoğlu, 111.

40 Schlosser. 360.

41 Kocayusufpaşaoğlu, 111; Özgür Güvenç, *Sözleşmenin Kurulmasında İrade Açıklamalarının Yorumu* (Adalet 2021), 329 – 330.

42 On appelle ce type de clause comme la clause d'accord complet (la clause des quatre coins ou four corners clause) ainsi que *merger clause, integration clause, entire agreement* clause. Kuonen, 274 – 275.

43 Pourtant il faut souligner que les éléments essentiels (*essentialia negotii*) sont des éléments qui déterminent la typologie d'un contrat. Cf. Eren, 273 ; Erden Kuntalp, *Karışık Muhtevalı Akit* (2e éd, BTHAE 2013), 80 ; Tercier, Pichonnaz et Develioğlu, 199 ; Antalya, 61; Doruk Gönen, *Borçlar Hukuku Genel Hükümler* (Filiz Kitabevi 2021), 19. Pour une intérprêtation plus moderne voir Rona Serozan, 'TBK m. 2' in Turgut Öz, Faruk Acar et al. (eds), *İstanbul Şerhi Türk Borçlar Kanunu* (C. 1 (Madde 1-82), Vedat Kitapçılık 2019), 75; Caner Taşatan, *Sözleşmenin Kurulması* (On iki Levha 2021), 191; Güvenç, 264. Dès qu'on se trouve devant un contrat innommé créé par les besoins économiques on ne pourrait plus constater ses éléments objectivement essentiels mais plutôt on voudrait voir une entité qui conserve un sens. Cf. Kocayusufpaşaoğlu, 175; Kuonen, 295; Güvenç, 265 et suivants; Taşatan, 193 et suivants.

44 Il faut souligner que l'approche allemande est différente. Le BGB §154 qui traite de la notion de la *punctation* dans le sens d'un accord écrit prévoit qu'un contrat ne serait pas réputé conclu sans l'accord des parties sur tous les éléments et seul un accord partiel ne suffirait pas à lier les parties même si cet accord est écrit. Ce qui diffère cette approche de celle du droit turc ou suisse est qu'en cas de doute le texte écrit ne serait pas considéré comme un contrat liant les parties. Par conséquence on pourrait dire que BGB §154 est un article interprétatif qui résout l'absence d'un accord complet entre les parties d'une manière négative et ce n'est plus une question de preuve à la différence de l'art. 2 CO. Işıntan, 86; Taşatan, 227. Kuonen est de l'avis que ce concept est superfétatoire et ne résout aucune question. Voir Kuonen, 299 – 300.

durant les négociations et ces points doivent aussi constituer le sujet de l'accord des parties[45].

Dans un tel cas, les parties qui se mettent d'accord sur les éléments essentiels pourraient se trouver dans une situation qu'elles n'avaient point envisagée. Toutefois, si l'une des parties pourrait évoquer qu'elle ne voulait pas être engagée avant l'accord sur des éléments secondaires, c'est à elle de mettre en évidence qu'ils étaient subjectivement essentiels et ainsi elle peut empêcher l'application de l'art. 2/al. 1 CO et la conclusion du contrat[46].

La meilleure solution pour éviter toute controverse est d'insérer une clause comme « sous bénéfice d'inventaire », « subject to contract », « sans engagements contractuels », « document non contractuel » dans l'accord de principe afin de souligner le fait que ce document précontractuel est dépourvu de tout effet obligatoire et que les parties n'entendent pas encore s'engager juridiquement[47].

2. Meeting minutes

Ce sont en fait des procès-verbaux des réunions que font les parties pendant les négociations. Ainsi on peut suivre facilement l'ordre du jour de chaque réunion et les résultats des réunions précédentes. En plus, ces procès-verbaux favorisent les négociations en parallèle par plusieurs groupes de compétence différentes. Chaque équipe rédigerait un compte rendu de sa séance de travail. Ces documents ne contenant que des constats temporaires, il n'est pas question qu'ils créent des engagements juridiques à proprement parler même si les deux parties sont d'accord sur leur contenu[48].

3. Les engagements d'honneur (Gentlemen's agreements)

Les engagements d'honneur sont des accords controversés et très discutés. Ils engendrent plutôt des engagements d'un point de vue éthique et moral mais non

45 Dans le cas où son co-contractant est au courant de l'importance de ce point pour l'autre partie le contrat ne serait pas conclu car il y aurait un désaccord entre les volontés. Si l'importance de ce point objectivement accessoire n'est pas évidente pour le co-contractant on serait en présence d'un désaccord latent et le contrat serait réputé conclu par le biais du principe de la confiance. Kuonen, 296. Voir aussi Taşatan, 228 et suivants.

46 Toutefois il faut aussi se tenir compte de l'art. 2/al.3 CO qui réserve les dispositions relatives à la forme des contrats. Selon cette disposition le simple accord des volontés sur les éléments essentiels ne suffirait pas pour la conclusion du contrat lorsque la loi impose une forme spéciale. Dans un cas pareil l'accord de principe serait dépourvu de tout effet contractuel à moins qu'il ne respecte ladite forme. Dans la plupart des cas l'accord de principe est fait par écrit, alors si la forme imposée pour le contrat visé est la forme authentique il est plus facile à dire que cet acte n'est qu'un accord de principe même si les parties sont convenues sur tous les points objectivement et subjectivement essentiels tandis qu'il s'avère très difficile de constater le même résultat si la forme imposée est la forme écrite simple. Kocayusufpaşaoğlu, 179; Işıntan, 87.

47 La force obligatoire de ces clauses est admise en droit anglais mais pour le droit américain seule la présence d'une telle clause n'est pas suffisante si elle n'est pas en ligne avec le texte complet du contrat. Voir Lake et Draetta, 94 et suivants. En ce qui concerne le droit turc et le droit suisse, il est possible d'exclure la volonté de se lier par un document contractuel en insérant ce type de clause sous l'empire de la liberté des volontés. Işıntan, 69; Marchand, 54.

48 Işıntan, 88.

pas juridique. Même sans sanction juridique, les engagements d'honneur jouent un rôle au moins probatoire concernant la relation précontractuelle entre les parties. Mais la portée des engagements d'honneur va au-delà de leur rôle probatoire et la phase précontractuelle. Ce sont des accords fréquemment utilisés dans les rapports commerciaux aussi bien que les rapports diplomatiques et familiaux[49]. Nous n'entamons ici que l'utilisation dans le domaine précontractuel.

Par un engagement d'honneur les parties se mettent délibérément en dehors du droit[50]. C'est dire les engagements ne sont pas contraignants devant la loi, les parties ne s'engagent que sur leur honneur pour l'exécution et la force obligatoire n'existe que moralement[51]. On se met en dehors de la sphère juridique et les engagements entamés par les parties ne sont pas des obligations au sens technique du terme. Pourtant pour la plupart des dirigeants des entreprises commerciales la crainte d'une sanction juridique ne se présente pas en premier lieu quand il s'agit de l'inexécution des accords. Pour eux, établir des relations commerciales solides vient avant d'établir des engagements juridiquement obligatoires, or les relations commerciales se concrétisent d'après les usages commerciaux relatifs à un secteur commercial. Quelquefois la sanction sociale et commerciale d'une inexécution s'avère plus lourde qu'une sanction juridique car personne ne voudra entrer en relation commerciale avec quelqu'un qui manque de loyauté. En d'autres termes, la pression économique de ses paires serait plus efficace sur une partie que la voie d'exécution forcée[52].

Dans ces conditions le premier motif pour conclure des engagements d'honneur se montre comme l'exercice d'une pression économique sur l'autre partie. L'exclusion de toute règle étatique pourrait se présenter comme un autre motif, ainsi les parties se mettent en dehors du droit et s'écartent des systèmes juridiques déterminés. Finalement, si les parties voudraient cacher l'objet de leur accord parce qu'il est contestable devant la loi, en d'autres termes illicites, elles peuvent opter de conclure un engagement d'honneur plutôt que de former un contrat qui serait nul devant l'art. 27 CO. On rencontre souvent des engagements pareils pour les ententes cartellaires[53].

49 Les engagements d'honneur sont utilisés dans divers domaines : Entre le Japon et Etats-Unis en 1907 pour réduire la vague d'immigration des japonais au Etats-Unis dans le droit public international ; depuis des années 1930 entre la banque centrale suisse et les autres banques dans le domaine du droit bancaire ; en droit des assurances surtout pour les relations de réassurances etc. Pour la définition et champs d'applications multiples cf. Etienne Poltier, 'Les gentlemen's agreements à participation publique' (1987) *Revue de Droit suisse* 106 (3) 367, 369 : Eric Dirix, 'Le « Gentlemen's Agreement » dans la théorie du droit et la pratique contemporaine' (1999) Revue de Droit international et de Droit comparé 76 (3) 223, 235 et s.; Willem Grosheide 'The Gentlemen's Agreement in legal theory and in modern practice – The Dutch civil law perspective' in Ewoud Hondius (éd) *Netherland's Reports to the XVth International Congress of Comparative Law* (Intersentia 1998), 91, 108; Kuonen, 301 ; Schlosser, 348 ; Doğan, 84; Ayrancı, 95; Kocayusufpaşaoğlu, 111; Işıntan, 88 et suivants. Pour une utilisation entre les associations et les municipalités voir Ergüne et Kurşun, 514 note 63.

50 Oğuzman et Öz soulignent l'abscence de l'*animus contrahendi*. Voir Oğuzman et Öz, 43 note 33.

51 Ergüne et Kurşun, 514 ; on dit que c'est le domaine du *soft law*. Cf. Poltier, 372.

52 Kuonen, 301.

53 Kuonen, 301; Poltier, 379; Ayrancı, 95.

La question qui se présente est de savoir si les parties pourraient volontairement porter en dehors du droit un accord qui serait sinon sujet de l'ordre juridique[54]. Sous l'empire du principe de la liberté contractuelle la capacité pour les parties de créer un accord dépourvu d'un effet juridique semble tout à fait possible. Quand même il peut y avoir certaines limites surtout pour protéger la partie faible qui perdrait dans cette hypothèse son couvert juridique. Un engagement d'honneur dont la seule intention est d'éviter la protection juridique d'une partie ou de commettre une fraude à la loi ne serait pas accepté comme valable en tenant compte de l'art. 2/al. 2 CC. Tant que selon cet article *l'abus de droit manifeste n'est pas protégé par la loi* la partie qui entend voler la protection juridique de l'autre n'aboutirait pas à ses fins[55]. Encore, faut-il que l'objet de l'accord relève de la libre disposition des parties. Outre l'art. 26 et 27 CO qui règlent la liberté contractuelle, l'ordre public et la politique juridique ne laissent pas certaines matières dans la sphère de la libre disposition des parties. Ainsi, en matière de droit de la famille, du droit de travail ou de la protection des consommateurs on est obligé d'utiliser la juridiction étatique en cas de litige. A notre avis, un engagement d'honneur qui rend la protection juridique inefficace en ces matières en mettant les parties en dehors du droit ne serait pas permis et doit être considéré comme nul en raison d'incompatibilité avec l'ordre public. Pourtant, rien n'empêche les parties à suivre ce but illégal créé par cet engagement nul jusqu'à ce que les autorités publiques interviennent d'office ou par l'avis de la partie lésée par cet engagement. S'il faut animer on pourrait donner l'exemple des accords contre la concurrence. En droit turc, tout accord qui vise à empêcher, perturber ou restreindre directement ou indirectement la concurrence sur le marché des biens ou des services est réputé illégal et interdit par l'art. 4 de La Loi sur La Protection de la Concurrence[56]. De même les accords portant sur l'abus de la position dominante sur le marché sont interdits par l'art. 6 de ladite loi. Cela dit, rien n'empêche les parties à les conclure sous forme de l'engagement d'honneur. Tels accords faits par les parties seraient nuls devant ces dispositions impératives et les prestations ne seraient pas exigibles (art. 56). La sanction, à part la nullité de l'accord, serait pécuniaire sous forme d'une peine administrative selon l'art. 16. C'est dire que les parties ne sont pas intouchables même si elles veulent se mettre en dehors du droit[57].

En ce qui concerne l'effet juridique des engagements d'honneur, comme tout autre document précontractuel, le critère déterminant se trouve dans la volonté des parties sans tenir au titre du document (art. 19 CO). Par principe on peut admettre que les parties en créant un engagement d'honneur ne veulent point s'engager juridiquement

54 Kocayusupaşaoğlu, 112.

55 Işıntan, 98.

56 Loi no. 4054, Journal Officiel 13.12.1994/22140.

57 Voir aussi Conseil d'Etat Turc 13ème Chambre, 288/3791, 13.12.2012; Conseil d'Etat Turc 13ème Chambre, 2624/4608, 16.12.2015 (legalbank.net consulté le 29 Septembre 2023).

et elles veulent créer plutôt un rapport de complaisance[58]. En ce faisant, les parties se confient à l'honneur du co-contractant plutôt que la sanction juridique. Le cas où l'une des parties ne se comporte pas comme un « gentleman » présente un risque mais ce serait plutôt un risque calculé pour l'autre partie.

En cas de doute, il faut admettre que sauf la preuve contraire on est en présence d'un contrat à proprement parler dans des situations où on peut constater des engagements par les parties. En d'autres termes, on ne pourrait pas présumer que la volonté des parties est de se placer en dehors du droit même si la liberté contractuelle leur présente cette option surtout concernant les relations commerciales. Bien qu'il soit important d'honorer la parole donnée, il est difficile d'imaginer qu'un directeur d'une entreprise qui va investir quelques millions d'Euros dans une affaire se contenterait d'un accord purement moral. Les parties doivent expressément déclarer leur volonté de démunir leur accord d'effet juridique[59]. Une fois de plus l'interprétation des volontés des parties sous la lumière du principe de la confiance nous amènera une solution en tenant compte des termes utilisés par les parties ainsi que les usages commerciaux et les conditions sous lesquelles l'accord est accompli[60].

III. En guise de conclusion

La phase précontractuelle est dominée par le principe de la liberté des volontés or cette liberté est la raison pour laquelle on constate le caractère flou de cette phase. Tant que les parties sont libres de commencer et organiser le contenu de leurs pourparlers il est très difficile de cerner les bornes de ce processus d'une manière générale. Ce caractère se présente dans le cas où les parties décident de rédiger des documents précontractuels. L'examen de ces documents montre une multitude d'approche et de dénomination ainsi que de contenu. Nous avons précisé ci-dessus que les classifications ou dénominations qu'on fait pour ces documents restent la plupart du temps dans l'arbitraire et changent d'après les auteurs et leurs points de vue.

Nous avons montré que même dans la période précontractuelle les parties peuvent conclure des conventions qui visent la conclusion du contrat négocié. Certaines de ces conventions préparatoires tout en appartenant à la phase précontractuelle pourraient engendrer des obligations et devenir de vrais « contrats » tandis que les autres ne présentent pas un effet obligatoire. Ainsi, une fois de plus, les parties décident par leur volonté le caractère de ces documents. Face à un document précontractuel, ce qui s'avère important et déterminant est son contenu. En l'absence de toute disposition

58 Kuonen, 302. Pour une approche différente en droit français cf. Terré, Simler et Lequette, 66. Voir comme exemple de jurisprudence Cour de Cassation Civile, Chambre Commerciale, 23 Janvier 2007, 05-13.189, publié au bulletin (https://www.legifrance.gouv.fr/juri/id/JURITEXT000017626520/ consulté le 29 Septembre 2023).

59 Dirix, 238. Cf. ég. en droit anglais Rose&Frank Co. v. J.R. Crompton Ltd. [1923] 2 KB 261, [1925] AC 445.

60 Grosheide, 113; Poltier, 372; Işıntan, 92.

légale concernant cette phase, l'art. 19 CO et les principes concernant l'interprétation des volontés se montrent quand même comme notre fil directeur pour déterminer le type et le caractère de ces documents.

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RESEARCH ARTICLE

Taxation of Crypto Assets: The Example of U.S. Federal Income Tax

Muhammet Durdu[1], **Ümit Süleyman Üstün**[2]

Abstract

Crypto assets are one of the important milestones of digitalization. They have created paramount problems related to tax systems. The United States, which was one of the first countries where these assets became widespread, gained experience with the regulations it introduced. Observing these experiences and making inferences for similar regulations to be made in Türkiye is the main objective of this article. Judicial decisions and doctrinal studies in US law on the subject are examined, and the activities of the US Internal Revenue Service are explained. It should be said that although the United States began regulations roughly ten years ago, there is no undisputed solution for the taxation of crypto assets in the country. Still, some inferences could be made from the United States experience. One of the main results reached is that tax regulations regarding crypto assets should not impose heavy burdens and financial duties on taxpayers. It has been concluded that laying a withholding responsibility on intermediary institutions such as crypto asset exchanges or a transaction tax with a small percentage is an important tool in ensuring tax compliance. Consulting experienced crypto asset users and intermediary institutions will be a crucial step while conducting a regulatory impact analysis.

Keywords

Crypto assets, digital money, income tax, IRS, Coinbase case

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Introduction

Taxation is one of the areas most affected by digitalization because tax systems depend upon the taxation of economic systems consisting of tangible assets or services and are based on the 20th century and earlier economic and technological systems. With digitalization, the proliferation of gains and wealth derived from abstract and digital assets hinders the implementation of fair taxation with these current outdated tax systems. As the taxation systems grounded in the tangible world have all their elements shaped accordingly, attempting to incorporate intangible things into the system is unnatural, resembles a patchwork and fails to secure justice. In this regard, all the nations in the world need substantial reforms in their tax systems. Already there is ongoing work under the supervision of the OECD, named Base Erosion and Profit Shifting, which aims for a common solution worldwide in this direction[1].

Crypto assets, starting with Bitcoin, have multiplied the tax problems caused by digitalization because many crypto asset systems, especially Bitcoin, aim to be used as money in essence. Money is one of the main building blocks in the economic and tax systems. All transactions and tax settlements in the economy have been made by using money as a unit of account and means of payment. Thanks to Bitcoin or a similar decentralized crypto asset replacing national fiat currencies, it is not difficult to foresee that such a radical change in money could fundamentally alter the entire tax system. One shouldn't pass by without mentioning that such a possibility is remote, but the related discussions have already begun.

In addition to crypto assets aiming to be money, there are other crypto systems trying to fulfill various objectives. Each of these systems, ranging from those resembling stocks to those used only in virtual games, can lead to different tax issues. One of the leading countries in the taxation of all these crypto assets is the United States (U.S.). The Internal Revenue Service (IRS), which is the U.S. Federal Tax Authority, issued its first administrative guidance regarding income tax issues related to Bitcoin and other "virtual currencies" in 2014[2]. Since then, despite being considered insufficient by some, it has continued its efforts towards the taxation of such assets.

In this study, considering its status as one of the initial states of taxing crypto assets, the taxation of crypto assets will be examined in the framework of the U.S. Federal Income Tax. Alongside the concept of crypto assets, it will be attempted to provide conceptual clarity by discussing the terms electronic money, virtual money, digital money, and cryptocurrencies which are used for similar digital or electronic assets. An overview of the U.S. federal income tax system will be presented, and it will be explained how crypto assets are incorporated into the system. Some inferences will be made for the Turkish tax system from the U.S. implementation.

1 OECD, 'International collaboration to end tax avoidance' (*OECD BEPS,* 4 September 2022), < https://www.oecd.org/tax/beps/> accessed 20 August 2023.

2 IRS, *'Notice 2014-21',* [2014] Washington US

I. Crypto Assets and Its Counterparts

The term "crypto asset" does not have historical origins or an immense doctrine which is established on it. Thus, when looking at the doctrine, it is difficult to find a clear answer regarding what it is, its functions, and its attributes. There are different definitions of crypto assets which could misguide anyone who wants to learn about them. It is commonly used as an umbrella term that refers to digital tokens that are minted on and exchanged through distributed ledger systems with blockchain technology[3]. Before the concept of crypto assets, we were used to encountering terms like electronic money, virtual money, digital money, and cryptocurrency more frequently. However, we see that governments prefer the term 'crypto asset' in their regulations recently[4]. It will be beneficial to clarify these concepts to prevent confusion.

A. Electronic Money (E-Money)

It could be said that e-money has more history than others. In fact, e-money is the digital form of the current fiat and bank money system. Today e-money systems, which have been appearing in different forms since the 1960s, are more common than paper and coin money. First of all, interbank markets converted to an electronic system. Later on, electronic money systems, which initially began with prepaid cards, continued with various devices and have become predominantly used over the Internet nowadays[5]. Due to being a part of the existing monetary structure based on the sovereignty of nation-states, it is subject to prevailing regulations[6].

B. Virtual Currency / Digital Currency

With the advancement of digitalization, various units of account and/or payment instruments have emerged to facilitate transactions in numerous virtual environments. Units like the virtual gold found in games such as the World of Warcraft is an example

3 Apolline Blandin, and others, 'Global Crypto asset Regulatory Landscape Study' (Cambridge Centre for Alternative Finance 2019) 15.

4 For instance, the Central Bank of the Republic of Türkiye used the term 'crypto asset' in the regulation titled 'Regulation on the Non-Usage of Crypto Assets in Payments,' which was issued in April 2021 (Official Journal: 31456). Furthermore, in May 2021, 'crypto asset service providers' were added to the list of obligated parties in the Regulation on Measures Regarding the Prevention of Money Laundering and the Financing of Terrorism (Official Journal: 31471). The term 'crypto asset' is also used in EU Directives. E.g.: Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Markets in Crypto-assets, and amending Directive (EU) 2019/1937. The international institution Financial Stability Board uses the term 'crypto asset' in its advisory decisions to countries and defines this concept as follows: It is a privately issued digital asset, usually based on encryption, distributed ledger, or similar technology. Q.v.: Financial Stability Board, 'Crypto-assets and Global "Stablecoins"', (Financial Stability Board, 2022). Mexico and Hong Kong have used the term 'virtual asset'. Q.v.: Blandin and others (n 3) 114.

5 Jack Weatherford, *The History of Money,* (Crown Publishers 1997) 233-240; European Central Bank, 'Report on Electronic Money' (European Central Bank 1998) 7, 8.

6 In Türkiye, the electronic money issuers are regulated by Law No. 6493 on Payment and Securities Settlement Systems, Payment Services, and Electronic Money Institutions.

of these instruments[7]. In addition, some entrepreneurs have designed monetary systems and units of their own, intended for daily use. Private monetary systems like Alipay and M-Pesa, often used on online shopping websites, serve as examples of these[8]. Alongside e-money, which is a part of the current monetary structure, the emergence of independent monetary systems with their own units and administrators has revealed that the concept of e-money does not encompass them. In other words, the fundamental distinct point of these systems from e-money is their independent nature from national fiat currencies[9]. These types of monetary systems have been coined as virtual currency or digital currency. Cryptocurrencies, thanks to their encryption techniques, have gained features such as decentralization, irreversibility of transactions, cybersecurity, and pseudo-anonymity, setting them apart from digital and virtual currencies. However, digital or virtual currency terms could also be wielded for cryptocurrencies[10].

In the beginning, it was observed that states used the term "virtual currency" more often for all these systems not connected to the fiat money system[11]. However, as mentioned above, in today's world, the concept of a "crypto asset" is more widespread. In recent times, we have witnessed the term "central bank digital currency" being used to refer to the fiat digital currencies that central banks plan to issue using encryption techniques. Ultimately, the concepts of virtual currency and digital currency can be used interchangeably and the distinction between them is not clear.

Digital or virtual currencies are classified based on their connection to the real world. The first group consists of closed system currencies. In these systems, the currency is only used in a virtual environment, not bought or sold with national currencies, and not used for real-world payments. Some virtual currencies used in video games are examples of these currencies. The second group of currencies is primarily designed for use in virtual environments, but they can also be bought, sold, and used for payments in the real world through using national currencies. These are also referred to as hybrid systems. Finally, there are currencies that are created with the sole purpose of being used for real-world payments. In such classifications, many cryptocurrencies like Bitcoin and centralized systems like E-Gold fall into this category. Currencies in this category are referred to as open system digital/virtual currencies[12].

7 Jens Holm and Erkki Mäkinen, 'The Value of Currency in World of Warcraft' [2018] Journal of Internet Social Networking & Virtual Communities 1, 13.

8 David LEE Kuo Chuen and Ernie G.S. Teo, 'Emergence of FinTech and the LASIC principles' Winter (2015) The Journal of Financial Perspectives 24, 31

9 P. Carl. Mullan, *A History of Digital Currency in the United States New Technology in an Unregulated Market,* (Springer Nature 2016) 6.

10 Suhail Abboushi, 'Global Virtual Currency–Brief Overview' 19 *6* (2017) Journal of Applied Business & Economics 10, 18; Max Kubát, 'Virtual Currency Bitcoin in the Scope of Money Definition and Store of Value' 30 (2015) Procedia Economics and Finance 409, 416.

11 Blandin and others (n 3) 12.

12 David Chaikin, 'The Rise of Virtual Currencies, Tax Evasion and Money Laundering', 20 *4* (2013) 352, 354; United

C. Cryptocurrencies

Decentralized cryptocurrencies like Bitcoin and Ethereum have been named as cryptocurrencies due to the encryption techniques they wield. Cryptocurrencies, which could be considered a subcategory of virtual or digital currencies, have gained advantages over other digital or virtual currencies due to these techniques. These advantages include the irreversibility of transactions, mobility, anonymity, enhanced systemic cybersecurity, and the elimination of the need for intermediaries[13].

There are various perspectives on why cryptocurrencies emerged and their intended purposes. In 2009, Bitcoin emerged as the pioneer of cryptocurrencies. In addition to those who claim that Bitcoin serves as a hedge against inflation, there are also those who emphasize its potential as a decentralized global currency, a means of reducing reliance on traditional financial systems and intermediaries, and a way to empower individuals with more control over their financial transactions. The multifaceted nature of cryptocurrencies has led to a range of interpretations about their origins and goals[14]. Moreover, there are numerous speculations regarding the identity of Satoshi Nakamoto, the founder of Bitcoin[15]. In this study, we will not delve into the details of these debates. However, it's worth noting that the individual or individuals known as Satoshi Nakamoto, who is said to have developed the Bitcoin system and later left it, pioneered subsequent cryptocurrencies and paved the way for a new era in digital technologies. Through the software they created, a non-inflationary currency was established, ensuring that everyone could spend their Bitcoins only once. Moreover, this achievement was made without the need for any intermediary institutions such as banks or central banks. With the adoption of Bitcoin, digital systems like blockchain are even being considered for use by central banks, the architects and overseers of the existing monetary system, in their own central bank digital currencies. Indeed, the emergence and impact of cryptocurrencies have been significant in reshaping the landscape of finance and technology.

D. Crypto Asset

Certainly, one of the most important aspects of national sovereignty is the authority to issue currency. Based on this authority, states mint their official currency to serve as the unit of account and medium of exchange within their countries. This allows them to exert significant influence on the economic structure of their nations and

States Government Accountability Office, 'Virtual Economies an Currencies Additional IRS Guidance Could Reduce Tax Compliance Risks' (Report to the Committee on Finance, U.S. Senate 2013) 4, 5.

13 IRS, 'Rev. Rul. 2019-24' (IRS 2019) <https://www.irs.gov/pub/irs-drop/rr-19-24.pdf> accessed 08.10.2023.

14 Sangyup Choi and Junhyeok Shin, 'Bitcoin: An inflation hedge but not a safe haven' [2022] Finance Research Letters 1, 8; Benjamin M Blau and Todd G. Griffith and Ryan J. Whitby, 'Inflation and Bitcoin: A descriptive time-series analysis' [2021] Economics Letters 1, 5.

15 Jens Ducree, 'Satoshi Nakamoto and the Origins of Bitcoin – The Profile of a 1-in-a-Billion Genius' (arxiv 2022) < https://arxiv.org/abs/2206.10257> accessed 20.05.2023.

generate seigniorage income. Therefore, the power to issue currency is not something that states easily relinquish.

The emergence and widespread use of cryptocurrencies are not necessarily aligned with the interests of nation-states. If a digital/virtual/cryptocurrency like Bitcoin were to achieve broad acceptance and usage in place of the fiat currency issued by a nation state, it could undermine the significance of state currency issuance. In such a scenario, an obsolete currency wouldn't generate seigniorage income nor have an impact on the nation's economic structure. Thus, if an alternative form of currency gains widespread usage, the authority of nation states to issue their own currency could lose its importance. In other words, the rise of cryptocurrencies has led to discussions and considerations about the potential disruption they could cause to the traditional financial and monetary systems, including the role of nation-states in currency issuance and control.

Governments are cautious about the potential shift in the status quo where their own issued fiat currency is the sole legal tender within their countries. This caution has led to the avoidance of labelling payment instruments that operate on cryptosystems as "cryptocurrency." This is because if widely adopted, such crypto payment systems could challenge the exclusive control that nation states have over their currency issuance and management. Therefore, they have begun to wield the "crypto asset" term for these "currencies"[16]. Additionally, certain entities operating within cryptosystems do not inherently claim to be currencies. Some resemble securities, others resemble commodities, and some are merely tokens used within virtual games. This situation further supports the term "crypto asset" for classification.

By avoiding the term "cryptocurrency," governments may aim to differentiate between the technology or payment mechanisms that underlie various cryptocurrencies and the sovereign power they have in issuing and regulating traditional currency. This distinction helps governments maintain authority over their national monetary systems and monetary policies, while also acknowledging the technological advancements and innovations brought by blockchain and crypto-related systems. The relationship between cryptocurrencies, national currencies, and the regulatory environment is complex and continues to evolve as governments and regulatory bodies grapple with

16 In a publication where it defined cryptocurrencies, the Bank of England noted that "cryptocurrency" and "crypto-assets" mean the same thing, but the term "cryptocurrency" is more common in the general public. Nevertheless, it continued to use the concept of "crypto-assets." Q.v.: Bank of England, 'What are cryptoassets (cryptocurrencies)?' (Bank of England 2020) < https://www.bankofengland.co.uk/knowledgebank/what-are-cryptocurrencies> accessed 13.03.2023; Türkiye has prohibited the use of crypto assets as a means of payment through a regulation issued in May 2021 (Regulation on the Non-Use of Crypto Assets in Payments). Besides Türkiye, numerous countries are imposing varying degrees of bans on the utilization of crypto assets within their territories. Some countries are prohibiting their use as a means of payment, others are preventing the establishment of exchanges for crypto asset trading, and some are even banning nearly all transactions related to crypto assets, similar to China. For an up-to-date list of these countries, please refer to: Euronews, 'Bitcoin ban: These are the countries where crypto is restricted or illegal' (euronews.next 2022) < https://www.euronews.com/next/2022/08/25/bitcoin-ban-these-are-the-countries-where-crypto-is-restricted-or-illegal2> accessed 20.06.2023.

the implications of these new financial technologies.

Countries can define cryptosystems in various ways for different purposes. They can subject them to anti-money laundering regulations, treating them as if they were currency. However, when it comes to taxation, they can categorize them as property or assets. One country that follows this approach is the U.S. The U.S. Internal Revenue Service (IRS) defined crypto assets as property in a guidance issued in 2014. Additionally, the regulatory bodies overseeing commodity markets, capital markets, and the institution, aiming to prevent money laundering in the U.S., classify these assets in different ways specific to their respective areas[17].

While it might seem that the government treats these assets differently based on its convenience in various areas, the situation isn't quite as straightforward. This is because certain crypto assets can be considered to be currency, some to be securities, and some others might exhibit characteristics like commodities. Consequently, the relevant regulatory bodies create regulations to oversee the crypto assets that fall within their respective areas. The differentiation among crypto assets stems from their diverse nature, leading to tailored regulatory approaches within distinct areas of financial oversight.

II. The US Federal Income Tax System

The United States is a federal nation with a central federal government alongside 50 individual states. Throughout the country, both the federal government and the respective state governments hold taxation authority. The power to tax is shared between the federal and state governments, allowing for a division of tax responsibilities between them[18].

Unlike many European countries and Türkiye, the most significant source of revenue for the federal government in the U.S. is income tax. In the year 2021, approximately 50.5% of all federal government revenues (around 2 trillion dollars) are derived from income tax[19]. In fact, when considering the taxes collected through withholding, which is treated as a separate tax and collected using the pay-as-you-earn method from wage earners, this percentage rises to around 80%[20]. Income tax is a progressive tax ranging from 10% to 37%, applicable to all U.S. citizens. In the U.S. federal income tax system, unless explicitly exempted by law, all incomes are

17 TIGTA, 'The Internal Revenue Service Can Improve Taxpayer Compliance for Virtual Currency Transactions' (TIGTA 2020) <https://www.tigta.gov/sites/default/files/reports/2023-01/202030066fr.pdf> accessed 08.10.2023.

18 The White House, 'Our Government' (The White House 2022) https://www.whitehouse.gov/about-the-white-house/our-government/ accessed 03.05.2023.

19 Molly F Sherlock and Donald J Marples, 'Overview of the Federal Tax System in 2022' (Congressional Research Service 2022).

20 IRS, '2021 Data Book' (Internal Revenue Service 2022) <https://www.irs.gov/pub/irs-prior/p55b--2022.pdf> accessed 08.10.2023.

subject to taxation under a single tax base, even if they are not specifically mentioned in the examples listed in the law[21]. In 1955, a case defined the concept of income, and it was established that any tax falling within this definition would be subject to income tax. According to this case, the definition of income in the U.S. federal income tax system is undeniable accession to wealth, clearly realized, and over which the taxpayers have complete dominion[22].

When all income meeting the criteria is added together, the individual who is a U.S. citizen finds his gross income. Taxation is not conducted on this income. Taxpayers calculate their adjusted gross income by deducting various expenses from the gross income, such as contributions to individual retirement accounts and student loan interest. In addition, personal tax exemptions are subtracted to arrive at the taxable base on which the tax rate is applied[23]. From this taxable base, the amount of tax to be paid is determined using a progressive tax rate schedule. The amount of tax payable can further decrease with tax reductions, which are known as tax credits. There are even certain credits that can zero out the tax liability and result in a refund to the taxpayer[24].

In order to support individual capital, nearly everything owned for personal use and investment purposes, as well as specific dividend incomes, are subject to taxation at rates lower than regular income tax rates[25]. This tax, known as capital gains tax, also includes progressive rates of 0%, 15%, and 20%. To be subject to these rates, capital assets falling under this category must be sold after being held for more than a year. If such capital assets are sold within a year, they are subject to regular tax rates[26].

21 IRS, 'Publication 525 (2021), Taxable and Nontaxable Income' (IRS.GOV 2021) <https://www.irs.gov/publications/p525> accessed 06.05.2023; US Internal Revenue Code Subtitle A Chapter 1 Subchapter B Part I § 61 states that: Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1)Compensation for services, including fees, commissions, fringe benefits, and similar items;
(2)Gross income derived from business;
(3)Gains derived from dealings in property;
(4)Interest;
(5)Rents;
(6)Royalties;
(7)Dividends;
(8)Annuities;
(9)Income from life insurance and endowment contracts;
(10)Pensions;
(11)Income from discharge of indebtedness;
(12)Distributive share of partnership gross income;
(13)Income in respect of a decedent; and
(14)Income from an interest in an estate or trust.

22 *Commissioner of Internal Revenue v. Glenshaw Glass Co.* [1955] U.S. Supreme Court [1955] 348 U.S. 426.

23 Brian Roach, *Taxes in the United States: History, Fairness, and Current Political Issues,* (A GDAE Teaching Module on Social and Environmental Issues in Economics 2010) 4, 5.

24 Molly F. Sherlock and Donald J.Marples (n 19) 8.

25 IRS, 'Topic No. 409 Capital Gains and Losses' (IRS.GOV 2022) <https://www.irs.gov/taxtopics/tc409#:~:text=Capital%20Gain%20Tax%20Rates,or%20qualifying%20widow(er).> accessed 25.05.2023.

26 Molly F. Sherlock and Donald J.Marples (n 19) 3, 4.

Due to being the primary source of income for the United States, federal income tax is subject to significant policy changes, resulting in a substantial and intricate body of laws and regulations[27]. We refrain from delving into the complexities of the system since doing so would go beyond the scope of this study. In the following parts, we will touch upon specific taxation regimes within the U.S. federal income tax system as relevant.

III. The Taxation of Crypto Assets in the U.S. Federal Income Tax System

As a leader in the process of digitalization, the U.S. has been at the forefront of various digital transformations, ranging from electronic money to cryptocurrencies. Some digital currencies with a centralized structure, having their own unit of account without using cryptographic techniques, first emerged in the U.S.[28]. After the emergence of Bitcoin, one of the first countries where its legal and illegal usage proliferated was also the US. In the initial years of Bitcoin, it was revealed that many illicit activities on an internet site named Silk Road were conducted using Bitcoin for payments in the U.S. The Silk Road site, which operated on the dark web, was shut down by the FBI in 2012, and its founder was arrested[29].

In the U.S., due to the widespread use of cryptocurrencies in comparison to other countries, it has been necessary to address the issues posed by these assets. One of these issues is the risk for crypto assets to replace tax havens. Indeed, it is argued that crypto assets possess more attributes than traditional tax havens. According to this opinion, while tax havens could grant taxpayers such as tax avoidance (or minimal payment) and anonymity, crypto assets go further by eliminating intermediaries as well. Institutions like banks, acting as intermediaries, enabled individuals to engage in tax evasion by facilitating transfers to tax havens. Governments could exert pressure or enter agreements with these institutions to prevent tax evasion by taxpayers and tax havens. However, cryptocurrencies remove this option. Individuals can engage in crypto asset trading solely through internet connectivity without the need for intermediaries, using personal digital wallets. As a result, crypto assets have the potential to hinder governments' efforts to combat tax havens[30]. Indeed, there is evidence suggesting that crypto assets have been used for the purpose of tax evasion[31].

27 Brian Roach (n 23); Tax Foundation, *Income Tax Illustrated A Visual Guide to Income in America and How It Is Taxed* (Tax Foundation 2015) 1.

28 Ali Sunyaev, *Internet Computing* (Springer 2020) 271, 272.

29 Edgar G. Sanchez, 'The 21st Century's Money Laundering and Tax Havens', 28 *1* (2017), University of Florida Journal of Law and Public Policy 167, 182.

30 Omri Marian, 'Are Cryptocurrencies Super Tax Havens?' 112 (2013) Mich. L. Rev. First Impressions 38, 40; Anthony Freeman, 'Bitcoin: The Ultimate Offshore Bank Account?' (Economics and Liberty 2011) < https://economicsandliberty.wordpress.com/2011/08/23/bitcoin-the-ultimate-offshore-bank-account/ > Accessed 12.04.2023; Benjamin Molloy, 'Taxing the Blockchain: How Cryptocurrencies Thwart International Tax Policy' 20 (2019) Oregon Review of International Law 623, 631-635; Edgar G. Sanchez (n 29) 189.

31 Eleazar David Melendez, 'Bitcoin Celebrated As Way To Avoid Taxes' (HUFFPOST 2013) < https://www.huffpost.com/entry/bitcoin-taxes_n_3093182 > accessed 22.05.2023; Ron Dorit and Adi Shamir, 'Quantitative analysis of the full

It is noted that the saying "death and taxes are certain" has become an exaggeration in terms of taxes due to the advent of crypto assets[32].

Cryptosystems, while offering the opportunity to evade government oversight after their establishment, still face the challenge of finding a suitable environment during their creation. It is observed that certain states, which used to function as tax havens, have shifted from being tax havens to providing favorable conditions for entrepreneurs developing cryptosystems after developed countries achieved success in combating them. These states, which once facilitated individuals' income and wealth storage through centralized intermediary institutions like banks, now aim to facilitate the creation of decentralized crypto systems to continue aiding tax evasion. Entrepreneurs looking to establish cryptosystems face numerous regulations in developed countries, while tax havens grant them both freedom and support. The options available to developed countries against such developments are limited. Cryptocurrency systems, even if established by specific individuals or entities in tax havens, can be utilized by people worldwide through the Internet. Although stringent measures like cutting off Internet connectivity with relevant regions could prevent misuse, their implementation is challenging. Therefore, before establishing cryptosystems, it is recommended that the individuals who want to create a cryptosystem must be responsible for adhering to a legal framework under the supervision of an international coordination consisting of states around the world[33].

A .The Classification of Crypto Assets

Determining what an asset is holds vital importance in establishing a tax regime. Therefore, before outlining how crypto assets will be taxed, it's essential to determine how they are classified. As one of the first countries where crypto assets gained widespread use, the U.S. has brought these assets under the scrutiny of its relevant institutions. Each institution has made distinct definitions pertaining to crypto assets within its own domain.

In the U.S., the Financial Crimes Enforcement Network (FinCEN), responsible for combating money laundering, subjects crypto asset exchanges to anti-money laundering obligations. The Securities and Exchange Commission (SEC), a capital markets authority, regulates them under securities regulations. CFTC, the regulatory body overseeing commodity markets, considers crypto assets as commodities and supervises their issuance and trading in accordance with its own regulations[34]. In its

bitcoin transaction graph' (International Conference on Financial Cryptography and Data Security Springer 2013).

32 Nika Antonikova, 'Real Taxes on Virtual Currencies: What Does the I.R.S. Say' 34 *3* (2015) Virginia Tax Review 433, 434.

33 Omri Marian, 'Blockchain Havens and the Need for Their Internationally-Coordinated Regulation' 20 *4* (2019) North Carolina Journal of Law & Technology 529.

34 Roland Weekley, 'The Problematic Tax Treatment of Cryptocurrencies' 17 (2018) Florida State University Business Review 109, 138-144.

2014 guidance, the IRS used the term "virtual currencies" to refer to crypto assets and indicated that they could be used as a form of payment or investment. Additionally, the IRS recognized their potential use as a medium of exchange, store of value, and unit of account. However, it categorized them as "property," ultimately classifying them as capital assets. Crypto assets that are only used within the virtual platform and not converted into fiat currencies were not included within the scope of the guidance[35]. However, it is argued that this decision does not align with the nature of crypto assets. According to this perspective, crypto assets have more of a characteristic of "divisibility" than traditional currencies. Moreover, their classification as "property" would impose an increased tax burden on taxpayers due to each crypto asset transaction forming a separate taxable event. This would burden taxpayers and steer them toward viewing crypto assets as long-term capital investments rather than currencies. To address these challenges, there was an attempt in the US Congress to introduce legislation that would recognize crypto assets as currencies. However, this proposal was not accepted[36]. Therefore, crypto assets have to be considered as property for tax purposes.

There have been varying definitions of crypto assets by judicial authorities as well. For instance, in a court ruling related to capital markets law in 2013, it was stated that Bitcoin is a currency with the only deficit of narrow usage[37]. In other cases, Bitcoin has been identified as a means of payment[38]. In another ruling, the assumption that Bitcoin is a currency has been rejected. According to this decision, Bitcoin, which has a volatile value mostly, is not controlled by a central administrator, lacks physical presence, and far from being a currency-like entity[39].

All these variations indicate that there is still a long way to go in reaching a consensus on the nature of crypto assets. Within legal doctrine as well, there are differing opinions regarding the nature of these assets[40]. The reason behind this lies in the decentralized, anonymous, and irreversible nature of crypto assets conflicting with established frameworks. These new digital technologies, which the current systems may not fully recognize, can lead to diverse regulations and definitions in various domains. Eventually, there could be a consensus reached within the legal framework concerning crypto assets. However, until then, it's evident that a fundamental reform is needed for these assets, given the complexities they present. For now, in the U.S., crypto assets are recognized as a property for income taxation thanks to the IRS guidance.

35 IRS (n 2).

36 Roland Weekley (n 34) 112, 125.

37 *Sec. & Exch. Comm'n v. Shavers,* [2013] United States District Court EASTERN DISTRICT OF TEXAS SHERMAN DIVISION [2013] CASE NO. 4:13-CV-416.

38 *United States of America v. Ross William Ulbricht,* [2014] United States District Court, S.D. New York. [2014] 31 F. Supp. 3d 540; *United States of America, v. Anthony R. Murgio,* [2016] United States District Court, S.D. New York [2016] 209 F. Supp. 3d 698.

39 *Florida v. Espinoza,* [2016] Florida Circuit Court [2016] F-14-2923.

40 Ed Howden, 'The Crypto-Currency Conundrum: Regulating an Uncertain Future' 29 *4* (2015) Emory International Law Review 741, 761-769.

B. Taxation of Crypto Assets

In the context of the U.S. federal income tax law, the fundamental regulations concerning the taxation of crypto assets are established by the IRS, which is the federal income tax authority. In addition, the Treasury Inspector General for Tax Administration (TIGTA), operating under the U.S. Department of the Treasury, is responsible for overseeing the IRS's efforts in the field of crypto asset taxation and reporting.

The IRS has provided its views on the taxation of crypto assets through two administrative notifications issued in 2014 and 2019, as well as a Frequently Asked Questions (FAQ) page that has been periodically updated. While these administrative notifications are not legally binding for taxpayers, they do reflect the stance of the tax administration, implying that the implementation is likely to follow these guidelines. It's not difficult to anticipate that crypto asset users who do not comply with the rules outlined in these guidelines may need to seek their rights in court[41]. Regulations do not encompass closed system crypto assets that are valid only in the virtual platforms and have no connection to the real world[42].

According to these regulations, taxpayers will include the crypto assets in their total income at acquisition or invoice time. Fair value, if the crypto asset is traded on an exchange and the transactions on this exchange are determined stably and reasonably based on market supply and demand, is the equivalent value in dollars on that exchange. For those not traded on an exchange, opinions from experts or the value of consideration received in crypto assets (money, goods, or services) will be taken into account. If a taxpayer includes a crypto asset in their total income at its value on the date of acquisition and later sells it at a profit or loss, the later transaction will also be separately included in their taxable base. If crypto assets are held for more than one year and a profit is realized upon sale, they will be subject to capital gain tax and taxed at lower rates[43].

Taxpayers engaged in mining[44] must add the crypto assets they obtain from mining, at their fair value on the acquisition date, to their total income. New crypto assets with economic value resulting from airdrops[45] or hard forks[46] are also included in the

41 For types of regulations in U.S. law and their levels of enforceability, please refer to: Andrea Kramer, 'The Legal Effect of IRS Pronouncements on Virtual Currency' (JDSUPRA 2020) < https://www.jdsupra.com/legalnews/the-legal-effect-of-irs-pronouncements-25516/ > accessed 26.05.2023.

42 IRS (n 2); Aleksandra Bal, 'Stateless Virtual Money in the Tax System' [2013] European Taxation 351, 355.

43 IRS (n 2); IRS 'Frequently Asked Questions on Virtual Currency Transactions' (IRS.GOV 2022) < https://www.irs.gov/individuals/international-taxpayers/frequently-asked-questions-on-virtual-currency-transactions > accessed 19.05.2023.

44 Mining refers to the process in which individuals using computers or computer-like systems assist the functioning of crypto systems and are rewarded with crypto assets generated by the system automatically. The term "mining" is used because the newly generated crypto assets are akin to being "mined" as they enter the market for the first time.

45 Airdrop, in short, is the free distribution of a crypto asset to individuals who meet certain criteria, typically for promotional or reward purposes.

46 Forking, in short, refers to a change in the underlying structure of a crypto system. In a hard fork, a new crypto chain is

income tax base. However, the tax consequences of crypto assets obtained through staking[47] continue to remain uncertain[48]. Crypto assets paid as wages or salary will be subject to withholding tax according to general rules. The withholding tax should be applied when making payments with crypto assets to taxpayers who do not provide a tax identification number and if it is deemed necessary by the IRS[49].

If all the same types of crypto assets are sold, there is no issue. However, if only a portion of the same type of assets is sold, the question arises as to which acquisition prices should be subtracted from the sale prices to calculate the profit. Different techniques exist for accounting the inflow and outflow of goods in taxpayers' inventories[50]. In this regard, the IRS has granted taxpayers the right to choose[51]. This situation has provided taxpayers with the opportunity to manipulate the taxes they will pay. For instance, a taxpayer can calculate their profit based on a high purchase price when selling a cryptocurrency. As a result, their reported profit and the corresponding tax liability would appear lower. In legal doctrine, it has been suggested to use the average value of cryptocurrency holdings of the same type acquired at different times as the cost basis in sales. This approach aims to achieve a fairer tax outcome[52].

The regulations issued by the IRS regarding crypto assets have been criticized by users. This is because classifying crypto assets as property has resulted in significantly increased tax burdens on them. Users are now required to keep track of each individual crypto asset they acquire and sell. The situation is even more challenging for businesses engaged in crypto asset transactions. They must calculate the transaction costs for numerous small transactions, determine the resulting profits, and pay the necessary taxes accordingly[53]. The situation of crypto asset miners has become more burdensome than that of traditional miners. While traditional miners achieve income as soon as they sell the extracted minerals, crypto asset miners are considered to have earned income as soon as they acquire the crypto asset, and if they make a profit when they sell it later, they are treated as having earned income again[54]. TIGTA has also indicated the need for additional guidelines in this matter[55].

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created, resulting in new crypto assets. In a soft fork, only the system's operational structure changes.

47 Staking is a refined consensus mechanism as opposed to mining. It involves participants who hold crypto assets in the system dedicating those assets to the operation of the system and, in return, earning new crypto assets of the same type.

48 Shehan Chandrasekera, 'IRS May Not Tax Passive Income From Holding Crypto Right Away' (Forbes 2022) < https://www.forbes.com/sites/shehanchandrasekera/2022/02/03/irs-may-not-tax-passive-income-from-holding-crypto-right-away/?sh=6f5e336f799e > accessed 26.05.2023.

49 IRS (n 2); IRS (n 13).

50 Ahmad Khalid Khan and Syed Mohammad Faisal and Omar Abdullah Al Aboud, 'An Analysis of Optimal Inventory Accounting Models - Pros and Cons' 6 *3* (2018) European Journal of Accounting, Auditing and Finance Research 65, 66.

51 IRS (n 43).

52 Adam Chodorow, 'Rethinking Basis in the Age of Virtual Currencies' 36 *3* (2017) 371, 372-375

53 Roland Weekley (n 34) 110; Nika Antonikova (n 32) 436.

54 Benjamin W. Akins and Jennifer L. Chapman and Jason M. Gordon, 'A Whole New World: Income Tax Considerations of the Bitcoin Economy' 12 *1* (2014) Pittsburgh Tax Review 25, 43.

55 TIGTA, 'As the Use of Virtual Currencies in Taxable Transactions Becomes More Common, Additional Actions Are Needed

Even though the IRS issued its first administrative ruling regarding crypto assets in 2014, it has stated that those who did not declare crypto asset transactions before this date cannot escape tax penalties. However, it has also been added that taxpayers who can reasonably explain their failure to report can be exempted from these penalties[56]. This matter might seem contrary to the principle of non-retroactivity of laws. However, in this specific case, the issue involves not a law but rather a regulation like directive issued by the IRS. These directives serve as interpretive tools for the IRS, and taxpayers are not obligated to comply with them. Nevertheless, since the IRS applies the tax laws according to its own interpretation, those who do not adhere to these interpretations may need to address the disputes through resolution methods. The IRS's rationale in this situation is rooted in the broad definition of income in the U.S., where virtually all forms of earnings are subject to income tax. As a result, the IRS believes that taxpayers should declare gains obtained through crypto assets right from the start.

TIGTA, despite the IRS's issuance of the initial administrative ruling in 2014, found the efforts made regarding the taxation of crypto assets inadequate. TIGTA expressed that there is insufficient evidence to support the existence of a program that could ensure adequate coordination and identify potential tax non-compliance issues related to the taxation of crypto assets. While the IRS has clarified that miners' income is subject to taxation, the methods for taxing mining pools remain uncertain. Third-party reporting requirements have not been structured to present crypto asset transactions as a separate statistic. Although the IRS generally acknowledges these criticisms, it has indicated that it lacks sufficient budget and has other priorities to address[57].

C. Information Reporting Obligations Regarding Crypto Assets

Taxpayers will be willing to voluntarily file their tax returns as long as they are aware that the tax authority has obtained information about their tax-related activities from a third source[58]. This reality becomes even more pronounced in the case of crypto assets. This is because taxpayers who buy and sell crypto assets without being subject to any intermediary institution, such as a cryptocurrency exchange, make it very difficult for tax authorities to detect these activities. In the context of taxing crypto assets, tax authorities, especially cryptocurrency exchanges and other intermediary institutions, play a vital role in helping to identify these activities. Otherwise, expecting a taxpayer who is confident that their activities are not being monitored by

to Ensure Taxpayer Compliance' (TIGTA 2016) <https://www.oversight.gov/sites/default/files/oig-reports/201630083fr.pdf> accessed 08.10.2023.

56 IRS (n 2).

57 TIGTA (n 55) 7, 10, 12.

58 United States Government Accountability Office, (n 12) 9.

tax authorities to voluntarily file a tax return would be overly optimistic[59].

Considering this reality, the IRS has introduced reporting obligations for payment processors and those making payments with crypto assets in its regulations. When an individual or entity makes a payment of $600 or more with crypto assets to a U.S. taxpayer, this information must be reported to the IRS by including it on the relevant form. Third-party payment processors are required to report to the IRS when they facilitate crypto payments of 200 or more units or a total value of $20,000 to a taxpayer. The value of crypto assets will be calculated based on their fair market value at the time of the transaction[60]. TIGTA suggests that entities with reporting obligations such as third-party payment processors should provide information related to crypto assets in a separate file. This requirement would allow the IRS to collect data on crypto assets in a more transparent manner, enabling more effective taxation[61].

In 2016, the IRS expressed concerns about the lack of tax compliance regarding income generated from crypto assets. As a result, the IRS requested transaction data from Coinbase, which is the largest cryptocurrency exchange in the United States, for individuals involved in transactions from 2013 to 2016. However, Coinbase declined to provide this information. Subsequently, the matter was taken to the United States District Court for the Northern District of California. The court highlighted that between 2013 and 2016, approximately 14,000 individuals conducted transactions of $20,000 or more on Coinbase. Surprisingly, during the same period, only 900 individuals reported crypto-related income. This indicated a significant discrepancy and raised serious doubts about tax compliance. Consequently, the court ruled that the necessary information of individuals who conducted transactions of $20,000 or more during the specified period must be given for taxation purposes to the IRS[62].

In response, crypto asset users have viewed the IRS's approach of obtaining such data as a violation of their privacy[63]. According to tax expert Daniel Winters, the decision is misguided. He argues that the IRS lacks sufficient evidence to obtain crypto asset users' data. In 2015, when taxpayer information was similarly requested from the Swiss bank UBS, tangible evidence of $1.2 billion in unpaid taxes from

59 Omri Marian, 'A Conceptual Framework for the Regulation of Cryptocurrencies' 82 (2015) University of Chicago Law Review Dialogue 53, 64; Aleksandra Bal, 'Should Virtual Currency Be Subject to Income Tax?' (SSRN 2014) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2438451 > accessed 27.05.2023.

60 IRS (n 2).

61 TIGTA (n 55) 12.

62 *United States v. Coinbase Inc.,* [2017] United States District Court Northern District of California [2017] 17-cv-01431-JSC.

63 According to the opposing view, the Court has struck a balance between the enforcement of taxation authority and taxpayers' privacy by ruling that only tax-related information of taxpayers engaging in transactions above a certain threshold should be provided to the IRS. Q.v.: Mollie T. Adams and William A. Bailey, 'Emerging Cryptocurrencies and IRS Summons Power: Striking the Proper Balance between IRS Audit Authority and Taxpayer Privacy' 19 *1* (2021) The ATA Journal of Legal Tax Research 61.

US taxpayers' accounts was provided. In contrast, in the Coinbase case, taxpayer information was obtained without such concrete evidence of tax evasion. Instead of taking this route, Winters suggests that the IRS could achieve tax compliance naturally by changing the classification of crypto assets from property to foreign currency under the US federal income tax system. This change would automatically lead to tax compliance[64].

Based on the information obtained, the IRS has sent notices to taxpayers suspected of engaging in crypto asset transactions. Taxpayers who receive these notices are required to declare any income earned from crypto asset transactions that they haven't previously file. Additionally, the question of whether taxpayers have engaged in crypto asset transactions has been added to the standard forms that taxpayers commonly respond to[65]. According to the data from 2018, informative letters were sent to 10,000 taxpayers to notify them about their tax obligations related to crypto assets[66].

These efforts were deemed insufficient, and legal regulations continued to be pursued to ensure tax compliance with crypto asset transactions. Under the regulation that was enacted on November 15, 2021, all institutions that facilitate crypto asset transactions, such as exchanges and digital wallet providers, are subject to the same reporting requirements as traditional brokerage firms. With this regulation, the IRS will have access to the data of crypto asset transactions conducted through domestic brokerage firms in the US. As a result, the IRS's ability to act against those who earn income from crypto assets but fail to report it has been significantly strengthened. It is anticipated that this regulation will lead to the collection of an additional $28 billion in tax revenue[67].

D. Alternative Proposals in the Doctrine

In the US tax law doctrine, alternative tax regimes have been proposed in relation to crypto assets. One of these proposals aims to ensure tax compliance with crypto assets. According to this proposal, tax-paying sellers or service providers who accept payments in crypto assets should be held responsible for obtaining the identity of the person making the crypto asset payment. These taxpayers should be obligated to collect a special tax from those who prefer to make anonymous payments. Individuals who want to make payments with crypto assets should be exempt from this special tax if they disclose their identity directly to the seller or through the application they

64 Austin Elliott, 'Collection of Cryptocurrency Customer-Information: Tax Enforcement Mechanism or Invasion of Privacy?' 16 (2017-18) Duke Law & Technology Review 1, 12, 13, 16.

65 Mark A. Luscombe, 'IRS Getting Serious about Virtual Currencies' 97 *12* (2019) 3, 4.

66 TIGTA (n 17) 22.

67 Tom Geraghty and Kali McGuire, 'Infrastructure bill, including crypto "broker" rules, becomes law', (DLA PIPER 2021) < https://www.dlapiper.com/en/us/insights/publications/2021/11/infrastructure-bill-including-crypto-broker-rules-becomes-law/ > accessed 18.05.2023.

use. The tax imposed on crypto asset payments should be high enough to incentivize individuals to disclose their identities. As a result, individuals would be encouraged to disclose their crypto asset holdings, leading them to pay the applicable taxes associated with these assets[68].

Another proposal suggests treating crypto assets similarly to gift "miles" earned from expenses like airplane tickets or travel. In the US federal income tax system, these miles, though debated within the doctrine, are not generally considered taxable until they are converted into dollars[69]. Just as miles are not generally considered taxable until they are converted into dollars, the same principle could be applied to crypto assets. Income and inclusion in the tax base would occur when the crypto asset is converted into dollars[70]. Freeing crypto assets from taxation until they are converted to dollars would make things easier for both taxpayers and tax authorities and would also not discourage the use of crypto assets[71].

In addition, taxing crypto assets in a manner like foreign currencies until they are converted into dollars would bring advantages for both the IRS and taxpayers. U.S. income taxpayers are not burdened with tax responsibilities for each transaction they conduct with foreign currencies abroad. Instead, an individual is only subject to taxation if they have gained more than $200 in profit during the transition from U.S. dollars to foreign currency and back. The $200 portion is exempt from taxation. This way, taxpayers are relieved from the obligation of keeping records and paying taxes for each transaction they make. In fact, initially, foreign currencies were treated as "personal property" under US income tax law and went through the same burdensome tax regime that crypto assets currently face. However, due to contrary judicial precedents and the significant burden it placed on both taxpayers and the IRS, a tax reform was implemented in 1986, resulting in the current treatment of foreign currencies[72].

Conclusion

Over the years, the increasing presence of cryptocurrencies, which initially started as a tool used solely on the dark web, has begun to influence every aspect of life, thanks to the innovative information technologies at its core. As a result, projects

68 Omri Marian (n 59) 65.

69 Jeffrey A. Mankin and Jeffrey J. Jewell, 'Frequent Flyer Miles as Company Scrip: Implications on Taxation' 7 *1* (2015) Business Studies Journal 14.

70 *Charley v. Commissioner IRS* [1996] United States Court of Appeals, Ninth Circuit. [1996] No. 94-70043; "Casino chips" are taxed in a manner similar to airline miles. It has been suggested that a similar method could be applied to the taxation of crypto assets. "Casino chips" or "casino tokens" are payment instruments often used in casinos, and they are not immediately taxed when acquired. Taxation usually occurs when these chips or tokens are converted into cash or used. Similarly, crypto assets could potentially be subject to taxation when they are earned or spent, following a similar logic. This approach suggests that crypto assets should be taxed only when they are acquired or spent, rather than immediately upon receipt. Qv.: Nika Antonikova (n 32) 444, 449.

71 Roland Weekley (n 34) 132.

72 Nika Antonikova (n 32) 450.

in this field have provided significant gains to investors, payments have started to be made through crypto systems without being subject to public oversight, and new sources of income have emerged. All these factors have given rise to taxation challenges, exacerbating the issues that the digital economy has brought to tax systems in general. Being one of the first countries where these assets gained widespread use, the U.S. has been a leader in regulatory efforts and has implemented substantial tax regulations in this area. For countries like Türkiye that have yet to establish tax regulations in this field, it's possible to gain empirical evidence from the U.S.

While the regulatory measures introduced by the IRS have garnered more criticism than support, they have also provided valuable insights into ensuring tax compliance for individuals engaging in crypto asset transactions. The IRS's classification of crypto assets as property has resulted in a substantial burden of formal tax obligations for taxpayers, hindering voluntary tax compliance. In response, the IRS obtained crypto asset transaction information from the largest cryptocurrency exchange market and sent letters to taxpayers regarding their tax obligations.

However, relying solely on information from one exchange market was deemed insufficient. Therefore, in November 2021, a legal obligation for all crypto asset intermediaries to provide information was enacted. This move indicates the intent to address unreported crypto asset transactions using third-party data. Nevertheless, the current IRS practice requires taxpayers to record and report even the smallest transactions as taxable events, making tax compliance challenging. Instead, implementing measures that reduce formal obligations related to crypto asset transactions would encourage voluntary tax compliance. If individuals feel compelled to comply with taxes, they might consider refraining from engaging in crypto asset transactions, potentially stifling innovation in this evolving field.

From the perspective of U.S. law, treating crypto assets as foreign currency would be beneficial for both taxpayers and the IRS. In this scenario, individuals would only be required to report transactions when they exchange dollars for crypto assets and when they convert crypto assets back to dollars. Transactions conducted using crypto assets would fall outside the scope of the tax system. Only gains exceeding $200 would need to be reported on tax returns. In fact, foreign currencies were initially treated as property under U.S. law, but due to legal and practical challenges, the current system was adopted in 1986.

By adopting a similar approach for crypto assets, both taxpayers and the IRS would find the tax compliance process simplified. This approach would lessen the formal tax obligations associated with every crypto asset transaction, which in turn could encourage voluntary tax compliance. It's worth noting that foreign currency transactions under this model would serve as a precedent for the treatment of crypto

assets, allowing for smoother integration into the existing tax framework.

The income tax treatment applied to crypto assets in the U.S. could be a precedent for tax regulations that may be implemented in Türkiye. As seen in the U.S., burdening taxpayers who engage in crypto asset transactions with excessive formal obligations can make voluntary tax compliance more challenging. Assigning responsibilities to institutions facilitating crypto asset transactions would reinforce the Revenue Administration of Türkiye for taxation purposes. While it is known that the Ministry of Treasury and Finance in Türkiye obtains certain information from cryptocurrency exchanges, it is essential that this information is acquired in a consistent and tax-appropriate manner.

Taking the U.S. approach a step further, these intermediaries could potentially be assigned not only the responsibility of providing information but also the duty of withholding taxes as tax agents. However, the principle of tax neutrality requires that the applied tax rates should not necessitate significant changes in individuals' investment strategies and general lifestyle habits. The imposed tax could take the form of a withholding of income tax or a low-rate transaction tax similar to the Banking and Insurance Transactions Tax, depending on the transaction volume. Before implementing any regulation, seeking input from experienced crypto asset users and intermediary institutions will be a crucial step while conducting a regulatory impact analysis.

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RESEARCH ARTICLE

Das Gesetz zur Änderung des Gesetzes über die Regulierung des elektronischen Geschäftsverkehrs: Neue Regeln für (neue) Akteure im elektronischen Geschäftsverkehr in der Türkei

The Act Amending the Act on the Regulation of Electronic Commerce: New Rules for (New) Players in Electronic Commerce in Türkiye

Mesut Serdar Çekin*

Zusammenfassung

Rasante Entwicklungen im Bereich des E-Commerce haben den türkischen Gesetzgeber veranlasst, das bereits bestehende Gesetz über die Regulierung des elektronischen Geschäftsverkehrs einer umfassenden Reform zu unterziehen. Dabei wurde das bestehende Gesetz nicht wesentlich geändert. Stattdessen wurden neue Akteure definiert und diesen neue Pflichten auferlegt, die sich nach deren Netto-Transaktionsvolumen richten. Es handelt sich dabei insbesondere um große Online-Plattformen, auf denen der elektronische Geschäftsverkehr stattfindet. Ausgesprochenes Ziel des Gesetzgebers ist es dabei, die Bildung von Monopolen in diesem Sektor zu verhindern und insbesondere kleineren Unternehmen den Marktzugang zu erleichtern. In diesem Zusammenhang wurden unlautere Geschäftspraktiken im B2B-Verhältnis definiert. Darüber hinaus müssen die neuen Akteure, die als Anbieter von Vermittlungsdiensten im elektronischen Geschäftsverkehr und Anbieter von Diensten des elektronischen Geschäftsverkehrs bezeichnet wurden, zahlreiche Einschränkungen hinsichtlich ihrer Geschäftstätigkeit beachten. Dabei geht es insbesondere um das Anbieten eigener Waren auf den Online-Plattformen, um das Anbieten von finanziellen Dienstleistungen sowie von Zustelldiensten. Ebenfalls von großer Bedeutung ist die Einführung einer Lizenzpflicht für die Ausübung der Tätigkeiten im Bereich des elektronischen Geschäftsverkehrs. Um die Einhaltung dieser Pflichten besser überwachen zu können, wurde das türkische Handelsministerium mit einigen Zuständigkeiten ermächtigt. Ebenfalls zur besseren Kontrolle dient die Einführung eines Elektronischen Handelsinformationssystems (ETBIS). Schließlich wurden neue Sanktionsmechanismen eingeführt, die gerade die effektive Durchsetzung der Pflichten bezwecken. Ziel des vorliegenden Beitrags besteht darin, die neuen Regelungen darzustellen.

Schlüsselwörter

Elektronischer Geschäftsverkehr Anbieter von Vermittlungsdiensten im elektronischen Geschäftsverkehr, Anbieter von Diensten des elektronischen Geschäftsverkehrs, Elektronisches Handelsinformationssystem, Lizenz

Abstract

The rapid development in e-commerce has prompted a Turkish legislator to subject the existing law on its regulation to a comprehensive reform. In the process, the existing law was not substantially altered. Instead, the reform identified new players and imposed new obligations on them based on the net transaction volume. In particular, these players refer to large-scale online platforms on which e-commerce occurs. The express aim of the legislator is to prevent the formation of monopolies in this sector in general and to facilitate market access for small companies in particular. In this context, unfair business practices in B2B relationships have been defined. In addition, the new players, who were designated as e-business intermediary service providers and e-business service providers, must observe numerous restrictions with regard to business activities. In particular, this change is concerned with offers of goods, financial transactions, and

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delivery services on the online platforms. Another aspect of importance is the introduction of a licensing obligation for the exercise of e-commerce activities. To better monitor compliance with these obligations, the Turkish Ministry of Commerce has been empowered with certain responsibilities. The introduction of an Electronic Trade Information System also serves to improve monitoring. Finally, new sanction mechanisms have been introduced with the aim of effectively enforcing the obligations. The objective of this study is to present these new regulations.

Keywords
Electronic commerce, Providers of electronic commerce intermediation services, Providers of electronic commerce services, Electronic Trading Information System, License

Extended Summary

In recent years, the share of e-commerce in total business transactions has increased very rapidly in Turkey. New players have entered the market, and new business models and product groups have been introduced. Moreover, the number of players has increased by 88% in one year. This rapid development in the market has prompted a Turkish legislator to substantially reform the Turkish E-commerce Regulation Law No. 6563 of 2014.

A key issue is the asymmetry in market power between e-commerce intermediary service providers and e-commerce service providers. The reason underlying this notion is that the majority of service providers are micro or small enterprises, whose bargaining power against e-commerce marketplace operators is extremely low. Intermediary services are deemed to abuse this asymmetry of power by prioritizing goods or services, refusing to offer or making data transfer difficult, forcing service providers to provide certain goods or services, paying out purchase price sums to service providers at a later time, or forcing service providers to participate in sales promotion. Other examples include downgrading in the ranking or recommendation system and the restriction, suspension, or termination of services offered to e-commerce service providers. Furthermore, service intermediaries should gain advantage by evaluating customer data in terms of logistics and payment services. The increasing dependence of service providers and consumers can lead to the deterioration of the competitive environment in the medium term; monopolization and, thus, to higher prices; decreases in the quality and diversity of products offered, standardization of services; and decline in investment and production potential and innovation.

Based on these premises, the law firstly defines e-commerce intermediary service providers followed e-commerce service providers. It also specifies the environments in which e-commerce occurs. The catalogue of obligations is linked to net transaction volume; thus, this term is also explained. Another important term is economic unit.

With regard to the liability of providers of intermediary services, the Act introduces a notice-and-take-down procedure with regard to unlawful content. In addition, it

presents a special form of the procedure in relation to the infringement of intellectual property rights. As such, e-commerce intermediary service providers must establish, maintain access to, and effectively manage an information system to comply with their obligations under the Act.

The Act also proposes a general definition of unfair commercial practices followed by an exemplary list of specific cases, whereby these are not enumerative. According to this definition, acts of intermediary service providers toward service providers, which significantly disrupt the business of the latter, restrict their ability to make reasonable decisions, or force them to make a particular decision and could result in them becoming party to a business relationship to which they would not normally be a party, are unfair.

With regard to the obligations of providers of intermediary services in e-commerce as well as providers of e-commerce services, the law differentiates according to net transaction volume. Specifically, general provisions are firstly provided, which apply to all players. This aspect specifically concerns the case in which these operators are prohibited from offering the sale or the arrangement of sale of goods that bear their trademarks or those of persons with whom they are economically connected or for whom they have the right to use the trademark on the e-commerce marketplaces in which they offer intermediary services. This change is followed by obligations for intermediary service providers and e-commerce service providers whose net transaction volume exceeds TL 10 billion within a calendar year. This part is mainly concerned with purpose restrictions on the use of data obtained by intermediary services during individual transactions on their respective platforms. Further restrictions on promotional activities will be imposed on intermediary service providers and e-commerce service providers, whose net transaction volume in a calendar year exceeds TL 30 billion and number of transactions excluding cancellations and returns exceeds 100,000. Finally, providers of intermediary and e-commerce services whose net transaction volume in a calendar year exceeds TL 60 billion and number of transactions without cancellations and returns exceeds 100,000 are no longer allowed to offer certain financial services and parcel and delivery services.

Furthermore, the Act stipulates a licensing obligation, which exponentially increases with the increase in the net transaction volume of the players.

Finally, with regard to sanctions, the Act envisages a graduated approach. The Ministry will be authorized to impose fines of up to TL 40 million and to block certain contents.

I. Einführung

In der türkischen Wirtschaft spielt E-Commerce eine wichtige Rolle. So hat sich der Anteil des elektronischen Geschäftsverkehrs an dem gesamten Handelsvolumen von 9,8 % im Jahr 2019 auf 17,7 % im Jahr 2021 erhöht. Mit diesem Anstieg des Anteils haben neue Akteure den Markt betreten. Gleichzeitig wurden neue Geschäftsmodelle sowie neue Produktgruppen eingeführt. Die Anzahl der Akteure auf diesem Markt hat sich von 256.861 im Jahr 2020 auf 484.347 im darauffolgenden Jahr erhöht, was einem Anstieg von 88 % entspricht. Diese rasanten Entwicklungen auf dem Markt haben den türkischen Gesetzgeber dazu veranlasst, das türkische Gesetz über die Regulierung des elektronischen Geschäftsverkehrs mit der Nr. 6563[1] aus dem Jahr 2014 einer wesentlichen Reform zu unterziehen[2].

Obwohl das Gesetzvorhaben sehr umstritten war, finden sich leider sehr wenige akademische Beiträge zu diesem Thema. Ziel des folgenden Beitrags besteht darin, einen ersten Überblick über die wesentlichen Änderungen zu vermitteln, die durch das Gesetz zur Änderung des Gesetzes über die Regulierung des elektronischen Geschäftsverkehrs[3], welches am 7.8.2022 im türkischen amtlichen Gesetzesblatt veröffentlicht wurde, erfolgt sind.

II. Allgemeine Ziele der Gesetzesnovelle

Die Gesetzesbegründung geht zunächst auf die ökonomischen Rahmenbedingungen im türkischen E-Commerce Sektor ein. Darin heißt es, dass der Anteil des elektronischen Handels am Gesamthandelsvolumen stetig wächst und im Markt sich neue Geschäftsmodelle etablieren. Diese Entwicklungen bringen aber auch neue Probleme mit sich. Zunächst geht es um die Asymmetrie hinsichtlich der Marktmacht zwischen den Akteuren im E-Commerce Sektor. Gemeint ist insbesondere das Machtgefälle zwischen den Anbietern von Vermittlungsdiensten für den elektronischen Geschäftsverkehr und den Anbietern von Diensten des elektronischen Geschäftsverkehrs. Bei Letzteren handelt es sich nämlich meistens um Mikro- bzw. Kleinunternehmen, deren Verhandlungsmacht gegen die Betreiber des E-Commerce Marktplatzes sehr gering ist. Der Missbrauch dieser Marktmacht durch die Anbieter von Vermittlungsdiensten für den elektronischen Geschäftsverkehr soll in verschiedenen Dimensionen auftreten: Auferlegung einseitig festgelegter oder unklarer Vertragsbestimmungen; die Stellung eigener Waren oder Dienste in den Vordergrund; Erschwerung bzw. Nichtzulassung der Möglichkeit zur Datenübertragung; Erzwingung der Dienstanbieter, bestimmte

1 Amtliches Gesetzesblatt Nr. 5.11.2014/29166.

2 Entwurf und Kommissionsbericht zur Änderung des Gesetzes über die Regulierung des Geschäftsverkehrs („Gesetzesbegründung") unter: <https://www5.tbmm.gov.tr/sirasayi/donem27/yil01/ss345.pdfz Zugriff am 18 Oktober 2023, 8.

3 Amtliches Gesetzesblatt Nr. 7.8.2022/31889.

Waren oder Dienstleistungen bereitzustellen; verspätete Auszahlung der Kaufbeträge an die Dienstleister; Erzwingung des Anbietens von Waren oder Dienstleistungen im Rahmen von Rabattaktionen; Verlangen von Gebühren, obwohl es an einer Dienstleistung seitens des Vermittlungsdienstes fehlt; Herabstufung in der Rangliste oder im Empfehlungssystem, Einschränkung, Aussetzung oder Beendigung der angebotenen Dienste gegenüber den Anbietern von Diensten des elektronischen Geschäftsverkehrs[4].

Diese unlauteren Praktiken werden ermöglicht durch eine Konzentration in den E-Commerce Märkten, die auf intensive Werbekampagnen sowie aggressive Wachstumsstrategien basieren. Große Anbieter von Vermittlungsdiensten für den elektronischen Geschäftsverkehr stärken ihre Marktpositionen immer weiter, in dem sie ihre Netzwerkeffekte und Größenvorteile zu ihren Gunsten ausnutzen. Verstärkt wird dieser Trend durch die Verhandlungsmacht dieser Akteure sowie ihre Fähigkeit, die Präferenzen der Verbraucher zu bestimmen. Durch diese Kontrolle über die Dienstleister kann neuen Anbietern von Vermittlungsdiensten der Eintritt in den elektronischen Geschäftsverkehr erschwert werden. Desweiteren sollen Vermittlungsdienste durch Auswertung der Kundendaten in den Bereichen Logistik und Zahlungsdienste Vorteile erlangen. Die zunehmende Abhängigkeit von Dienstanbietern und Verbrauchern kann mittelfristig zu einer Verschlechterung des Wettbewerbsumfelds, zu einer Monopolisierung und damit zu höheren Preisen, zu einem Rückgang der Qualität und der Vielfalt der angebotenen Produkte, zu einem Rückgang des Investitions- und Produktionspotenzials, zu einer Vereinheitlichung der Dienstleistungen und zu einem Rückgang der Innovation führen. Hinzu kommt der Umstand, dass Anbieter von Vermittlungsdiensten im elektronischen Geschäftsverkehr mit ihren eigenen Waren und Dienstleistungen auf ihren Marktplätzen werben können, was wettbewerbswidrige Auswirkungen auf andere Anbieter von Dienstleistungen für den elektronischen Handel in diesem Sektor haben soll[5].

Die oben genannten Punkte haben den türkischen Gesetzgeber veranlasst, das bereits vorhandene Gesetz über den elektronischen Geschäftsverkehr Nr. 6563 aus dem Jahr 2014 einer umfangreichen Reform im Hinblick auf online Marktplätze zu unterziehen. Dabei wird Bezug genommen auf die Verordnung (EU) 2019/1150 des europäischen Parlaments und des Rates vom 20. Juni 2019 zur Förderung von Fairness und Transparenz für gewerbliche Nutzer von Online Vermittlungsdiensten (P2B-Verordnung) sowie die Verordnung (EU) 2022/2065 des europäischen Parlaments und des Rates vom 19. Oktober 2022 über einen Binnenmarkt für digitale Dienste und zur Änderung der Richtlinie 2000/31/EG (DSA) und die Verordnung (EU) 2022/1925 vom 14. September 2022 über bestreitbare und faire Märkte im digitalen Sektor und

4 Gesetzesbegründung, 8.

5 Gesetzesbegründung, 8 ff.

zur Änderung der Richtlinien (EU) 2019/1937 und (EU) 2020/1828 (DMA), welche damals zum Teil noch als Vorschläge vorlagen.

III. Systematik des türkischen Gesetzes über die Regulierung des elektronischen Geschäftsverkehrs

Gemäß Art. 1 Abs. 1 besteht das Ziel des Gesetzes über die Regulierung des elektronischen Geschäftsverkehrs darin, die Grundsätze und Verfahren des elektronischen Geschäftsverkehrs zu regeln. Dabei soll das Gesetz insbesondere die kommerzielle Kommunikation, die Pflichten der Dienstleister sowie der Dienstvermittler, Verträge, die über elektronische Kommunikationsmittel geschlossen werden, Informationspflichten im elektronischen Geschäftsverkehr und Sanktionen umfassen. Gemäß Abs. 3 werden daneben zahlreiche Dienste, die ebenfalls im Wege der elektronischen Kommunikationsmittel angeboten werden, vom Anwendungsbereich ausgenommen wie etwa Reiseveranstalter, Finanzdienstleister, elektronische Zahlungsdienstanbieter. Sodann widmet sich das Gesetz den einzelnen Definitionen, die im Weiteren näher dargestellt werden.

Wichtige Bestandteile des Gesetzes sind darüber hinaus die Informationspflichten der Anbieter von Diensten und Dienstleistungen im elektronischen Geschäftsverkehr, Modalitäten der Bestellungsvorgänge, Grundsätze der elektronischen Kommunikation und insbesondere Transparenzpflichten. Das Gesetz widmet sich ebenfalls Themen wie die Voraussetzungen für das Verschicken von kommerziellen elektronischen Nachrichten, den Inhalt solcher Nachrichten sowie den Widerspruchsrechten der Empfänger solcher Nachrichten.

Das Verhältnis zwischen dem Anbieter von Vermittlungsdiensten für den elektronischen Geschäftsverkehr und dem Anbieter von Diensten des elektronischen Geschäftsverkehrs, insbesondere die Haftung des Ersteren wegen rechtswidriger Inhalte wird in Art. 9 des Gesetzes geregelt. Darin wird zunächst der Grundsatz der Haftungsfreistellung für rechtswidrige Inhalte zugunsten der Anbieter von Vermittlungsdiensten für den elektronischen Geschäftsverkehr aufgestellt. Wichtige Ausnahmen von diesem Grundsatz der Haftungsfreistellung wurden jedoch durch die Gesetzesnovelle eingeführt, welche im Folgenden näher dargestellt werden sollen.

Das Gesetz behandelt sodann die Ermächtigungen des türkischen Handelsministeriums. Dem folgen die Vorschriften über Sanktionen, die ebenfalls durch die Gesetzesnovelle eine erhebliche Ausweitung erfahren haben.

Den „regulären" Vorschriften folgen sodann die sog. „Zusatzvorschriften", die den Kern der Gesetzesreform bilden. Darin werden insbesondere unlautere Geschäftspraktiken im elektronischen Geschäftsverkehr definiert, Pflichten der

Anbieter von Vermittlungsdiensten für den elektronischen Geschäftsverkehr sowie Pflichten der Anbieter von Diensten des elektronischen Geschäftsverkehrs und schließlich für bestimmte Marktakteure die Pflicht einer Lizenz für den elektronischen Geschäftsverkehr eingeführt.

Damit wird bereits ersichtlich, dass das Gesetz sich nicht wie etwa DMA oder DSA ausschließlich auf digitale Plattformen beschränkt, sondern jegliche Arten des elektronischen Geschäftsverkehrs umfasst. Daneben werden aber besondere Pflichten für Betreiber von großen online Marktplätzen eingeführt, wobei das Gesetz nach dem Umsatz der jeweiligen Marktakteure differenziert. Dieser differenzierte Pflichtenkatalog erinnert jedoch stark an DSA sowie DMA. Darüber hinaus werden aber auch Regelungen aus der P2B-Verordnung teilweise berücksichtigt. Die Gesetzesreform ist daher eine Mischung aus DMA, DSA sowie der P2B-Verordnung. Das Besondere liegt jedoch darin, dass die einzelnen Pflichten in anderen Zusammenhängen geregelt werden, so dass eine unmittelbare Übertragung der dort geltenden Grundsätze nicht ohne weiteres möglich sein wird.

IV. Neue Definitionen

Die Gesetzesnovelle beinhaltet zahlreiche neue Definitionen, die für das Verständnis der neuen Pflichten von erheblicher Bedeutung sind. Denn anders als DMA oder DSA sowie P2B-Verordnung knüpft das Gesetz nicht an bestimmte Tätigkeiten an, um die Pflichten der Akteure zu bestimmen. Vielmehr wird unmittelbar an den Akteuren angeknüpft, mit deren Qualifikation dann die entsprechenden Pflichten einhergehen[6].

Allen voran wird in diesem Zusammenhang der Begriff des Anbieters von Vermittlungsdiensten für den elektronischen Geschäftsverkehr in Art. 2 Abs. 1 lif. f) definiert als „*Anbieter*[7] *von Vermittlungsdiensten, der es den Anbietern von Diensten des elektronischen Geschäftsverkehrs ermöglicht, einen Vertrag zu schließen oder eine Bestellung für die Lieferung von Waren oder Dienstleistungen auf dem Marktplatz des elektronischen Geschäftsverkehrs aufzugeben*“. Damit zählen insbesondere große Handelsplattformen wie Amazon, Trendyol oder Hepsiburada zu dieser Kategorie. Wichtig ist dabei, dass Geschäfte auf elektronischem Wege ermöglicht werden. Damit scheiden also insbesondere Social Media Plattformen, die gerade nicht zur Vermittlung von Transaktionen dienen, aus dem Anwendungsbereich aus[8]. Ein weiterer Akteur in diesem Zusammenhang ist der Anbieter von Dienstleistungen im elektronischen Geschäftsverkehr, welcher in Art. 2 Abs. 1 lit. g) definiert wird als

6 Vgl. hierzu Kerem Cem Sanlı, ‚Elektronik Ticaretin Düzenlenmesi Hakkında Kanun‘da 7416 Sayılı Kanun ile Yapılan Değişikliklerin Rekabet Politikası Açısından Değerlendirilmesi I: Kanun’daki Temel Kavramlar ve Haksız Ticari Uygulamalar‘ (2023) 21(245) Legal Hukuk Dergisi, 1709, 1718 ff.

7 Aus Gründen der besseren Lesbarkeit wird im Folgenden auf die gleichzeitige Verwendung weiblicher und männlicher Sprachformen verzichtet.

8 Sanli ebd. 1719.

„*ein Dienstleistungsanbieter, der einen Vertrag über die Lieferung von Waren oder Dienstleistungen auf dem Marktplatz des elektronischen Geschäftsverkehrs oder in seiner eigenen elektronischen Geschäftsumgebung abschließt oder einen Auftrag dafür erhält*".

Weitere Definitionen betreffen die Umgebungen, in denen der elektronische Handel stattfindet. Danach wird eine elektronische Geschäftsumgebung in Art. 2 Abs. 1 lit. ğ) definiert als „*Plattformen wie Websites, mobile Websites oder mobile Anwendungen, auf denen Aktivitäten des elektronischen Geschäftsverkehrs durchgeführt werden*". Darüber hinaus wird der Marktplatz für den elektronischen Handel in lit. h) definiert als „die Umgebung des elektronischen Geschäftsverkehrs, in der der Anbieter von Vermittlungsdiensten für den elektronischen Geschäftsverkehr Vermittlungsdienste anbietet".

Um die Einhaltung der Pflichten zu überwachen sowie das Verfahren der Lizenzierung zu verwalten, wird darüber hinaus ein elektronisches Handelsinformationssystem (ETBIS) eingeführt, welches unter lit. ı) definiert wird als „*das vom Ministerium geschaffene Informationssystem zur Registrierung von Dienstleistern und Vermittlern des elektronischen Geschäftsverkehrs, zur Sammlung von Daten über den elektronischen Geschäftsverkehr, zur Verarbeitung dieser Daten und zur Erstellung statistischer Informationen sowie zur Ermöglichung der Registrierung und Meldung gemäß diesem Gesetz*". Aus dieser Definition wird bereits ersichtlich, dass Anbieter von Vermittlungsdiensten für den elektronischen Geschäftsverkehr sowie Anbieter von Diensten des elektronischen Geschäftsverkehrs laufende Informationen an das Handelsministerium übermitteln müssen.

Auch wenn das Gesetz nicht unmittelbar an die Tätigkeit anknüpft, gibt es ein differenziertes Pflichtenkatalog, welches an den Transaktionsvolumen der Akteure anknüpft. Um diesen zu bestimmen, wird der Begriff des Netto-Transaktionsvolumens unter lit. i) definiert. Danach ist der Netto-Transaktionsvolumen „*für die Anbieter von Vermittlungsdiensten für den elektronischen Geschäftsverkehr die Summe der Endwerte der Rechnungen oder Rechnungsersatzdokumente, die für die Verträge und Bestellungen ausgestellt werden müssen, die in einem bestimmten Zeitraum über die Marktplätze des elektronischen Geschäftsverkehrs, auf denen er Vermittlungsdienste erbringt, abgeschlossen werden mit Ausnahme von Stornierungen und Erstattungen; für die Anbieter von Diensten des elektronischen Geschäftsverkehrs die Summe der Endwerte der Rechnungen oder Rechnungsersatzdokumente, die für die in einem bestimmten Zeitraum über die eigenen elektronischen Handelsumgebungen, die nicht die Merkmale eines Marktplatzes für den elektronischen Handel aufweisen, geschlossenen Verträge und erteilten Aufträge ausgestellt werden müssen mit Ausnahme von Stornierungen und Erstattungen*". Ebenfalls wichtig ist schließlich

der Begriff der wirtschaftlichen Einheit[9], wonach unmittelbare sowie mittelbare Kontroll- und Beherrschungsverhältnisse Pflichten auslösen können. Nach Art. 2 lit. j) wird wirtschaftliche Einheit angenommen in folgenden Fällen: „*Eine Person besitzt direkt oder indirekt mindestens fünfundzwanzig Prozent der Anteile oder die Mehrheit der Stimmrechte an einer Handelsgesellschaft oder einen Anteil, der geeignet ist, Entscheidungen zur Leitung der Gesellschaft zu treffen; sie hat Recht, die Anzahl der Mitglieder zu wählen, die die Mehrheit der satzungsgemäßen Beschlussfassung im Leitungsorgan bilden, sie besitzt die Möglichkeit, zusätzlich zu seinen eigenen Stimmrechten die Mehrheit der Stimmrechte allein oder zusammen mit anderen Aktionären auf der Grundlage eines Vertrags zu bilden, sie besitzt die Kontrolle einer Handelsgesellschaft aufgrund einer vertraglichen Vereinbarung oder durch die Beziehungen zwischen allen mit dieser Person verbundenen Handelsgesellschaften und den zu dieser Person gehörenden Unternehmen oder die Leitung mehrerer Handelsgesellschaften durch dieselbe(n) Person(en), unabhängig davon, ob sie Gesellschafter sind oder nicht*“.

V. Haftung der Anbieter von Vermittlungsdiensten für den elektronischen Geschäftsverkehr

Die revidierte Fassung des Art. 9 beinhaltet die Grundsätze für die Haftung von Anbietern von Vermittlungsdiensten im elektronischen Geschäftsverkehr. Nach dessen Abs. 1 gilt der allgemeine Grundsatz, dass Anbieter von Vermittlungsdiensten im elektronischen Geschäftsverkehr nicht verantwortlich sind für den rechtswidrigen Inhalt bzw. dem Produkt sowie der Dienstleistung, die Gegenstand des Inhalts sind, welcher vom Anbieter von Diensten des elektronischen Geschäftsverkehrs angeboten wird. Dieser Grundsatz erfährt in den folgenden Absätzen zwei wichtige Ausnahmen.

Die erste Ausnahme in Abs. 2 betrifft den Umstand, dass der Anbieter von Vermittlungsdiensten für den elektronischen Geschäftsverkehr Kenntnis von dem rechtswidrigen Inhalt erlangt. In diesem Fall ist der Anbieter nämlich verpflichtet, diesen „ohne Verzögerung“ zu entfernen sowie den rechtswidrigen Inhalt den zuständigen öffentlichen Stellen bzw. Behörden mitzuteilen. Es handelt sich also um einen klassischen Fall des sog. „notice and take down“-Prinzips.

Eine besondere Form des notice and take down-Prinzips wird darüber hinaus in Abs. 3 vorgesehen, die die Verletzung von Immaterialgüterrechten zum Gegenstand hat. Der Grund für diese besondere Vorschrift besteht ausweislich der Gesetzesbegründung[10] in den negativen Folgen, die von unter Verletzung von Immaterialgüterrechten angebotenen Produkten und Dienstleistungen aus Sicht der Produktsicherheit und eines fairen Wettbewerbs resultieren. Demnach muss der Anbieter von Vermittlungsdiensten

9 Hierzu ausführlich: Sanli ebd. 1723 ff.

10 Gesetzesbegründung 12.

für den elektronischen Geschäftsverkehr ein Produkt des Anbieters von Diensten des elektronischen Geschäftsverkehrs sperren, wenn eine Beschwerde des Rechtsinhabers vorliegt, die sich auf Informationen und Dokumente über die Verletzung von Rechten an geistigem und gewerblichem Eigentum stützt. Auf die Beschwerde und die Sperrung hin muss der Anbieter von Vermittlungsdiensten sowohl den Rechtsinhaber als auch den Dienstanbieter über den Vorgang der Sperre benachrichtigen. Kann der Anbieter von Diensten des elektronischen Geschäftsverkehrs im Wege des Widerspruchs dagegen beweisen, dass die Beschwerde des Rechtsinhabers nicht der Wahrheit entspricht bzw. eine Rechtswidrigkeit nicht vorliegt, so muss der Anbieter von Vermittlungsdiensten die Sperre bezüglich des Produkts bzw. der Dienstleistung wieder aufheben. In der Beschwerde und dem Widerspruch sind die eindeutigen Identitäts- und Adressangaben der betroffenen Personen, Informationen über das beanstandete Produkt, die Gründe für die Sperrung des Produkts oder die Notwendigkeit seiner Veröffentlichung enthalten sein. Das Recht der Betroffenen, sich gemäß den allgemeinen Bestimmungen an Gerichts- und Verwaltungsbehörden zu wenden, bleibt vorbehalten.

Ausweislich der Gesetzesbegründung trifft die Anbieter von Vermittlungsdiensten für den elektronischen Geschäftsverkehr die Pflicht, ein Informationssystem aufzubauen, den Zugang zu diesem System aufrechtzuerhalten sowie dieses effektiv zu verwalten, um ihren Verpflichtungen aus diesem Gesetz zu entsprechen[11].

VI. Unlautere Geschäftspraktiken im elektronischen Geschäftsverkehr

Das Gesetz definiert unter Zusatzartikel 1 unlautere Geschäftspraktiken[12]. Dabei handelt es sich in Abs. 1 um eine allgemeine Definition, der dann eine beispielhafte Aufzählung von bestimmten Fällen folgt, wobei diese nicht enumerativ sind. Der Grund für eine besondere Regelung unlauterer Geschäftspraktiken besteht nach der Gesetzesbegründung in der asymmetrischen Verhandlungsmacht von Anbietern von Vermittlungsdiensten des elektronischen Geschäftsverkehrs gegenüber den Anbietern von Dienstleistungen im elektronischen Geschäftsverkehr[13]. Diese Macht soll zu Abhängigkeitsverhältnissen führen, was wiederum zur Entstehung unlauterer Geschäftspraktiken auf den Marktplätzen führen kann, wodurch die Präferenzen der Akteure im Ökosystem eingeschränkt werden und negative Folgen für die Verbraucher auftreten können. Um sicherzustellen, dass die Anbieter von Dienstleistungen des elektronischen Geschäftsverkehrs auf mehrseitig strukturierten Marktplätzen des elektronischen Geschäftsverkehrs ihre Entscheidungen frei treffen können und diesen keine Verträge erzwungen werden, bedarf es einer Regelung für unlautere Geschäftspraktiken im elektronischen Geschäftsverkehr[14].

11 Gesetzesbegründung 12.

12 Hierzu ausführlich mit kritischen Anmerkungen: Sanli ebd. s. 1729 und insbesondere 1732 ff.

13 Gesetzesbegründung, 13.

14 Kritisch zu der Frage, ob die vorgesehenen Maßnahmen tatsächlich in der Lage sind, die Bildung von Monopolen auf

Parallel zu den Verbraucherschutzvorschriften bestimmt demnach Abs. 1 im Allgemein, welche Handlungen unlautere Geschäftspraktiken darstellen können. Danach sind Handlungen der Anbieter von Vermittlungsdiensten gegenüber den Anbietern von Diensten, welche die Geschäftstätigkeit des Letzteren erheblich stören, seine Fähigkeit, vernünftige Entscheidungen zu treffen, einschränken oder ihn zu einer bestimmten Entscheidung zwingen und dazu führen, dass er Partei in einer Geschäftsbeziehung wird, in der er normalerweise nicht Partei wäre, unlauter.

Der allgemeinen Definition folgen dann besondere Fälle, die in der türkischen Praxis oft beanstandet wurden. Es handelt sich dabei zunächst nach Abs. 2 lit. a) um den Fall, dass der Vermittler die als Gegenleistung für den Verkauf von Waren oder Dienstleistungen erhaltene Zahlung nicht innerhalb von fünf Geschäftstagen an den Dienstleister auszahlt, nach dem der Verkaufspreis in die Verfügungsgewalt des Vermittlers gelangt und die Bestellung den Käufer erreicht. In der Praxis sind nämlich Fälle anzutreffen, in denen die Anbieter von Vermittlungsdiensten im elektronischen Geschäftsverkehr die Konten der Anbieter von Diensten im elektronischen Geschäftsverkehr für einen Monat „sperren" und erst nach dieser Zeit die volle Auszahlung des jeweils vom Käufer geleisteten Betrags vornehmen. Eine solche Praxis wird nun mit dem Gesetz eindeutig als unlauter bezeichnet.

Im türkischen E-Commerce Sektor sind Rabattaktionen sehr verbreitet. Dabei können Anbieter von Vermittlungsdiensten im elektronischen Geschäftsverkehr ihre Macht dazu nutzen, die einzelnen Dienstanbieter zur Teilnahme an diesen Rabattaktionen zu zwingen, um die Attraktivität ihres eigenen Marktplatzes zu erhöhen. Solche Praktiken werden nach lit. b) als unlauter bezeichnet, wenn Anbieter von Dienstleistungen im elektronischen Geschäftsverkehr gezwungen werden, Waren oder Dienstleistungen im Rahmen von Rabattaktionen zu verkaufen, insbesondere dann, wenn sich Vermittlungsdienste das Recht vorbehalten, einseitige Änderungen des Verkaufspreises vorzunehmen.

Einen weiteren Fall regelt lit. c), wonach die Unterlassung, einen schriftlichen oder elektronischen Vertrag abzuschließen, in der die Bedingungen der Geschäftsbeziehung mit dem Anbieter von Dienstleistungen des elektronischen Geschäftsverkehrs festgehalten werden, unlauter sind. Dieser Vertrag muss darüber hinaus klar, verständlich und für den Anbieter von Dienstleistungen des elektronischen Geschäftsverkehrs leicht zugänglich sein. Damit sollen Beweisprobleme zulasten der Anbieter von Diensten im elektronischen Geschäftsverkehr verhindert werden.

Ein weiterer Fall, der das Verhältnis zwischen den Anbietern von Vermittlungsdiensten und den Anbietern von Diensten im elektronischen

dem Markt zu verhindern: Sanli, ‚Elektronik Ticaretin Düzenlenmesi Hakkında Kanun'da 7214 Sayılı Kanun ile Yapılan Değişikliklerin Rekabet Politikası Açısından Değerlendirilmesi II: Tekelleşme Kontrolüne İlişkin Düzenlemeler' (2023) 21(247) Legal Hukuk Dergisi 2453, 2459 ff.

Geschäftsverkehr betrifft, sind rückwirkende oder einseitige Änderungen der Bestimmungen der Vermittlungsvereinbarung zum Nachteil des Anbieters von Diensten des elektronischen Geschäftsverkehrs oder Aufnahme von Bestimmungen, die dies ermöglichen, in die Vermittlungsvereinbarung gemäß lit. ç).

Darüber hinaus gilt es als unlauter, wenn die Anbieter von Vermittlungsdiensten Gebühren erheben, obwohl keine Dienstleistungen gegenüber den Anbietern von Diensten erbracht wurden oder die Art der erbrachten Dienstleistung und die Höhe oder der Satz der Gebühr in der Vermittlungsvereinbarung nicht festgelegt sind.

Schließlich gilt eine Handlung der Anbieter von Vermittlungsdiensten als unlauter, wenn der Anbieter von Diensten des elektronischen Geschäftsverkehrs in der Rangliste oder im Empfehlungssystem herabgestuft wird, der Dienst eingeschränkt, ausgesetzt oder eingestellt wird, obwohl für diese Maßnahmen keine objektiven Kriterien in der Vermittlungsvereinbarung enthalten sind. Dies gilt auch für den Fall, dass allein aufgrund eines Antrags bei öffentlichen Einrichtungen oder Justizbehörden die entsprechenden Dienste eingeschränkt, ausgesetzt oder eingestellt werden.

Aus der Gesamtschau der einzelnen Bestimmungen kann festgestellt werden, dass in das vertragliche Verhältnis zwischen den Anbietern von Vermittlungsdiensten und den Anbietern von Diensten im elektronischen Geschäftsverkehr zugunsten der Letzteren eingegriffen wird. Demnach muss ein Vertrag in Schriftform oder im elektronischen Wege abgeschlossen werden. Mithin handelt es sich um einen Vertragszwang. Auch der Inhalt des jeweiligen Vertrags ist von diesem Eingriff betroffen, wie die einzelnen Bestimmungen dies eindeutig belegen.

VII. Pflichten der Anbieter von Vermittlungsdiensten für den elektronischen Geschäftsverkehr

Kernstück der Gesetzesreform sind die Pflichten der Anbieter von Vermittlungsdiensten für den elektronischen Geschäftsverkehr, denen ähnlich wie im DSA ein gestufter Pflichtenkatalog zugrunde liegt.

A. Allgemeine Pflichten für alle Anbieter von Vermittlungsdiensten für den elektronischen Geschäftsverkehr

Zunächst sind in Zusatzartikel 2 Abs. 1 Pflichten aufgelistet, die unabhängig von ihrer Größe für alle Vermittlungsdienste gelten. Diesen wird zunächst untersagt, auf den Marktplätzen des elektronischen Geschäftsverkehrs, auf denen sie Vermittlungsdienste anbieten, Waren zum Verkauf anbieten oder deren Verkauf zu vermitteln, die mit ihren eigenen Marken oder der Marke der Personen, mit denen sie wirtschaftlich verbunden sind oder für die sie das Recht haben, die Marke zu benutzen, versehen

sind. Dieses Verbot gilt allerdings nicht für die Waren von Personen, die mehr als die Hälfte ihrer gesamten Verkaufserlöse aus Verkäufen außerhalb des elektronischen Geschäftsverkehrs erzielen. Ausweislich der Gesetzesbegründung sollen nämlich manche Vermittlungsdienste sich direkt mit Produzenten in Verbindung setzen und unter Ausnutzung ihrer Marktmacht die Anbieter von Diensten in den Hintergrund drängen. Außerdem sollen diese Vermittlungsdienste durch Datenanalysen ihre eigenen Produkte gegenüber anderen Produkten anderer Anbieter in den Vordergrund stellen[15]. Mit diesem Verbot soll dieser Praxis entgegengewirkt werden.

Desweiteren ist es den Vermittlungsdiensten sowie den Anbietern von Diensten im elektronischen Geschäftsverkehr untersagt, mit eingetragenen Marken auf Online-Suchmaschinen Marketing- und Werbemaßnahmen zu betreiben, welche den Hauptgegenstand der Eintragung beim elektronischen Handelsinformationssystem (ETBIS) bilden, ohne zuvor die ausdrückliche Einwilligung des Rechteinhabers einzuholen. Damit soll insbesondere den Fällen vorgebeugt werden, in denen einige Vermittlungsdienste durch Werbemaßnahmen mit bekannten Marken auf Online-Suchmaschinen ohne Kenntnis der Markeninhaber sich einen Vorteil verschaffen und somit den Verkehr auf ihren Marktplätzen zu Lasten anderer Marktteilnehmer manipulieren[16].

Um mehr Transparenz auf den Online-Plattformen zu ermöglichen, sollen Anbieter von Vermittlungsdiensten außerdem Informationen, die ihnen von den Anbietern von Diensten im elektronischen Geschäftsverkehr über sich selbst übermittelt wurden, anhand der Dokumente, die ihnen von diesen übermittelt wurden, sowie anhand anderer öffentlich zugänglicher Quellen staatlicher Institutionen verifizieren.

B. Pflichten der Anbieter von Vermittlungsdiensten im elektronischen Geschäftsverkehr, deren Nettotransaktionsvolumen in einem Kalenderjahr zehn Milliarden TL übersteigen

Zusätzlich zu den unter Abs. 1 aufgelisteten Pflichten müssen Anbieter von Vermittlungsdiensten, deren Nettotransaktionsvolumen in einem Kalenderjahr 10 Milliarden TL übersteigen, weitere in Abs. 2 aufgelistete Pflichten beachten. Dabei geht es vor allem um die Zweckbeschränkungen bei der Nutzung von Daten, die die Vermittlungsdienste bei den einzelnen Transaktionen auf ihren jeweiligen Plattformen erlangen. Diesbezüglich erinnert das Gesetz an die Datennutzungsbeschränkungen im Rahmen des DMA. Danach dürfen Vermittlungsdienste die von den Dienstanbietern und Käufern erlangten Daten nur zum Zwecke der Ausführung ihrer Vermittlungsdienste nutzen. Sie dürfen diese Daten insbesondere nicht zu Wettbewerbszwecken mit anderen Anbietern von Diensten auf ihren eigenen Plattformen oder sonstigen elektronischen

15 Gesetzbegründung 15.

16 Gesetzesbegründung 15.

Geschäftsumgebungen verwenden. Damit soll insbesondere verhindert werden, dass die „Datenherrschaft"[17] der Vermittlungsdienste zu Wettbewerbsverzerrungen führt. Dieser Ansatz zur Stärkung des Wettbewerbs wird verstärkt durch die Möglichkeit zur Datenübertragung. Danach müssen Vermittlungsdienste den Anbietern von Diensten im elektronischen Geschäftsverkehr die Möglichkeit gewähren, die anhand der von diesen getätigten Verkäufen generierten Daten kostenlos auf eine andere Plattform zu übertragen sowie Zugang zu gewähren auf Daten, die anhand der genannten Verkaufsdaten beim Vermittlungsdienst generiert wurden. Insbesondere durch API's sollen Vermittlungsdienste diesen Zugangsanspruch effektiv ausgestalten. Das Recht der Datenübertragbarkeit ist jedoch aus mehreren Gründen problematisch. So ist zunächst festzustellen, dass die Verkaufsdaten personenbezogene Daten Dritter beinhalten. Auf welcher Grundlage sollen diese an einen anderen Vermittlungsdienst übertragen werden? Selbst wenn in dem türkischen E-Commerce-Gesetz eine gesetzliche Erlaubnisnorm erblickt werden kann, so stellt sich die Anschlussfrage, auf welcher Rechtsgrundlage der empfangende Vermittlungsdienst nun die erlangten personenbezogenen Daten verarbeiten darf. Davon unabhängig stellt sich außerdem die Frage, wie weit der Zugangsanspruch des Anbieters von Diensten im elektronischen Geschäftsverkehr reicht. Ausweislich des Gesetzeswortlauts reicht nämlich die bloße Übertragung der sog. „raw data" nicht aus; vielmehr müssen die daraus generierten Daten ebenfalls zur Verfügung gestellt werden. Sobald jedoch darin Geschäftsgeheimnisse zu erblicken sind, was in den meisten Fällen zutreffen dürfte, so müsste unserer Ansicht nach ein Verweigerungsrecht des Vermittlungsdienstes zu bejahen sein. Der Gesetzeswortlaut sieht allerdings ein solches Verweigerungsrecht gerade nicht vor, so dass die Lösung des Problems wohl der Rechtspraxis und insbesondere der Rechtsprechung zu überlassen sein scheint.

Den Vermittlungsdiensten wird es ebenfalls verboten, Zugang zwischen den eigenen elektronischen Handelsumgebungen zu gewähren sowie in diesen Umgebungen füreinander zu werben mit Ausnahme der elektronischen Handelsumgebungen, die im Nettotransaktionsvolumen enthalten sind. Darüber hinaus enthält das Gesetz weitere Transparenzvorschriften hinsichtlich der Beteiligungsstruktur der die Plattform betreibenden Gesellschaften. Schließlich trifft die Anbieter von Vermittlungsdiensten eine Berichtspflicht. Darin müssen sie über die bei ihnen eingegangenen Beschwerden hinsichtlich der rechtswidrigen Inhalte, wie sie mit diesen Beschwerden umgegangen sind und die Ergebnisse dieser Verfahren erläutern und in dem vom Ministerium bestimmten Format an das Ministerium übermitteln.

17 Gesetzesbegründung 15.

C. Pflichten der Anbieter von Vermittlungsdiensten für den elektronischen Geschäftsverkehr, deren Nettotransaktionsvolumen in einem Kalenderjahr 30 Milliarden TL übersteigt und die Zahl der Transaktionen ohne Stornierungen und Rücksendungen über hunderttausend liegt

Zusätzlich zu den bereits genannten Pflichten sieht das Gesetz weitere Pflichten für diejenigen Vermittlungsdienste vor, deren Umsatz 30 Milliarden TL in einem Kalenderjahr übersteigt und die Zahl der Transaktionen über 100.000 liegt.

Der erste Punkt betrifft das Werbebudget von Vermittlungsdiensten. Ausweislich der Gesetzesbegründung[18] führen aggressive Werbestrategien einiger Vermittlungsdienste dazu, dass die Preise für Werbemaßnahmen steigen. Damit wird anderen Marktteilnehmern die Finanzierung von Werbemaßnahmen erschwert. Dasselbe soll für Preisreduzierungen gelten. Insbesondere der Umstand, dass Dienstanbieter im elektronischen Geschäftsverkehr dazu gezwungen werden, unter den marktüblichen Preisen ihre Waren und Dienstleistungen zu verkaufen, soll verhindert werden. Damit soll auch dem destruktiven Wettbewerb vorgebeugt werden. Es ist jedoch fraglich, ob die unten noch aufzuführenden Maßnahmen tatsächlich zweckdienlich sind, ob insbesondere das Gesetz über den elektronischen Handel der richtige Platz ist, um Wettbewerbspolitik zu realisieren[19]. Darüber hinaus stellt sich die Frage nach der Verhältnismäßigkeit der genannten Maßnahmen, da diese den Eindruck erwecken, dass der Gesetzgeber die ihr eingeräumte Ermessensprärogative überschritten hat.

Zunächst wird nach Abs. 3 lit. a) das Werbebudget der Anbieter von Vermittlungsdiensten, deren Netto-Transaktionsvolumen bei 30 Milliarden liegt, auf 2% des genannten Betrags (angepasst für das jeweilige Kalenderjahr durch die Inflationsrate berechnet aufgrund des Verbraucherpreisindexes) beschränkt. Für den Betrag, der die 30 Milliarden Grenze übersteigt, liegt die Beschränkung bei 3/1000. Außerdem dürfen die Vermittlungsdienste ihr Werbebudget nicht auf einmal ausgeben. Vielmehr muss der zulässige Gesamtbetrag durch vier geteilt und vierteljährlich ausgegeben werden. Dieselben Beschränkungen gelten nach denselben Grenzen auch für Werbeaktionen, Prämien, Punkte, Gutscheine und sonstige Möglichkeiten.

Darüber hinaus ist es den Vermittlungsdiensten untersagt, Anbieter von Diensten des elektronischen Geschäftsverkehrt in ihren Geschäftsbeziehungen dahingehend zu beschränken, dass Letztere ihre Produkte auf alternativen Kanälen und zu gleichen oder anderen Preisen vertreiben oder dafür werben. Außerdem dürfen Vermittlungsdienste die Anbieter von Diensten des elektronischen Geschäftsverkehrs nicht dazu zwingen, Waren oder Dienstleistungen von bestimmten Personen zu

18 Gesetzesbegründung, 16.

19 Ausführliche Kritik Kritik bei Sanli, (n6) ebd.

beziehen. Jegliche Klauseln in den Vermittlungsverträgen, die die oben genannten Fälle ermöglichen, sind danach ungültig.

D. Pflichten der Anbieter von Vermittlungsdiensten für den elektronischen Geschäftsverkehr, deren Nettotransaktionsvolumen in einem Kalenderjahr 60 Milliarden TL übersteigt und die Zahl der Transaktionen ohne Stornierungen und Rücksendungen über hunderttausend liegt

Bei den zusätzlichen Pflichten, die den Anbietern von Vermittlungsdiensten mit einem Nettotransaktionsvolumen von über 60 Milliarden TL auferlegt werden, spielt der Finanzsektor zunächst eine wichtige Rolle. Um zu vermeiden, dass große Vermittlungsdienste ihre ohnehin vorhandene Marktmacht auf den Finanzsektor übertragen und somit den Wettbewerb einschränken, wird es diesen untersagt, ihre Leistungen mit bestimmten Finanzdienstleistungen zu verbinden bzw. auf diese zu erstrecken. Demnach ist es den Vermittlungsdiensten auf ihren Plattformen untersagt, Kreditgeschäfte und sonstige finanzielle Dienstleistungen aller Art zugunsten der Gesellschaften anzubieten bzw. zu ermöglichen, mit denen sie wirtschaftlich verbunden sind. Darüber hinaus dürfen sie keine „elektronische Geldleistungen" entgegennehmen, die von einem mit ihnen in wirtschaftlicher Einheit stehenden Unternehmen emittiert wurden. Darüber hinaus dürfen Vermittlungsdienste auch keine Paket- und sonstige Zustellungsdienste anbieten.

Bei Plattformen, auf denen Inserate bezüglich Waren und Dienstleistungen aufgegeben werden, sind ebenfalls Einschränkungen vorgesehen. Stellt nämlich ein Vermittlungsdienst ein elektronisches Umfeld für die Veröffentlichung von Inseraten bezüglich Waren oder Dienstleistungen zur Verfügung, kann sie nicht zugleich die Möglichkeit bieten, in demselben Umfeld einen Vertrag zu schließen oder eine Bestellung für die Lieferung von Waren oder Dienstleistungen aufzugeben. Werden diese Dienstleistungen von ihr selbst oder von Personen, mit denen sie wirtschaftlich verbunden ist, in verschiedenen elektronischen Medien angeboten, kann sie keinen Zugang zwischen diesen Medien gewähren und nicht füreinander werben.

Darüber hinaus enthält Zusatzartikel 2 in den weiteren Absätzen zahlreiche Bestimmungen über den Zeitpunkt der Berechnung entsprechender Schwellenwerte sowie einige Ausnahmen.

VIII. Pflichten der Anbieter von Diensten des elektronischen Geschäftsverkehrs

Das Gesetz regelt in Zusatzartikel 3 die Pflichten der Anbieter von Diensten des elektronischen Geschäftsverkehrs. Dabei wird ebenfalls ein gestuftes Pflichtenkatalog vorgesehen.

Gemäß Zusatzartikel 3 Abs. 1 ist es -wie bereits bei den Vermittlungsdiensten erläutert- den Anbietern von Diensten des elektronischen Geschäftsverkehrs ebenfalls untersagt, mit eingetragenen Marken auf Online-Suchmaschinen Marketing- und Werbemaßnahmen zu betreiben, welche den Hauptgegenstand der Eintragung beim Elektronischen Handelsinformationssystem (ETBIS) bilden, ohne zuvor die ausdrückliche Einwilligung des Rechteinhabers einzuholen.

Darüber hinaus bestimmt Abs. 2 derselben Vorschrift, dass der Pflichtenkatalog für die Vermittlungsdienste ebenfalls für Anbieter von Diensten des elektronischen Geschäftsverkehrs gelten soll, wenn deren Nettotransaktionsvolumen in einem Kalenderjahr über zehn Milliarden türkische Lira beträgt und die Zahl der Transaktionen ohne Stornierungen und Rückgaben über zehn Millionen liegt. Ausgenommen davon sind allerdings das Verbot, eine Zugriffsmöglichkeit zu den ihr gehörenden elektronischen Geschäftsumgebungen anzubieten und in diesen Umgebungen füreinander zu werben. Auch die weiteren Transparenzpflichten bezüglich der gesellschaftlichen Strukturen unterfallen dieser Ausnahme.

Bei Anbietern von Diensten des elektronischen Geschäftsverkehrs, deren Nettotransaktionsvolumen in einem Kalenderjahr über dreißig Milliarden türkische Lira beträgt und die Zahl der Transaktionen ohne Stornierungen und Rückgaben über zehn Millionen liegt, gelten die Beschränkungen bezüglich des Werbebudgets und für Werbeaktionen, Prämien, Punkte, Gutscheine und sonstige Möglichkeiten entsprechend.

Bei Anbietern von Diensten des elektronischen Geschäftsverkehrs, deren Nettotransaktionsvolumen in einem Kalenderjahr über 60 Milliarden türkische Lira beträgt und die Zahl der Transaktionen ohne Stornierungen und Rückgaben über zehn Millionen liegt, gelten zusätzlich die Beschränkungen hinsichtlich des Anbietens finanzieller Dienstleistungen sowie die Verbote bei sog. Inseratsangeboten entsprechend. Dagegen gelten die Beschränkungen bezüglich der Paket- und Zustellungsdienste nicht für die Anbieter von Diensten des elektronischen Geschäftsverkehrs.

IX. Lizenz für den elektronischen Geschäftsverkehr

Ausweislich der Gesetzesbegründung[20] gäbe es im elektronischen Geschäftsverkehr Beispiele von unausgewogenem Wachstum oberhalb bestimmter Schwellenwerte, die zugleich die Bedingungen des freien Marktes negativ beeinträchtigen. Da es sich um einen sehr dynamischen Markt handelt, sollen ex-post Maßnahmen nicht ausreichen, um diesen Entwicklungen vorzubeugen, um insbesondere ein faires und wirksam funktionierendes Wettbewerbsumfeld zu gewährleisten. In diesem

20 Gesetzesbegründung 20.

Zusammenhang führt das Gesetz eine Lizenzpflicht ein. Demnach sind Anbieter von Vermittlungsdiensten für den elektronischen Geschäftsverkehr bei Überschreitung bestimmter, im Gesetz vorgesehener Schwellen verpflichtet, eine Lizenz zu erwerben bzw. diese zu erneuern. Der Gesetzgeber begründet diese Pflicht damit, Unternehmen einer bestimmten Größe im Bereich des elektronischen Handels unter die öffentliche Aufsicht und Kontrolle zu stellen. Die Lizenzierungspraxis soll zugleich Externalitätsproblemen vorbeugen, die zugunsten von Großunternehmen auftreten und vom Markt nicht selbstständig gelöst werden können[21]. Andererseits sollen durch die Befreiung von Anbietern von Vermittlungsdiensten für den elektronischen Handel unterhalb der festgelegten Schwellenwerte von der Lizenzvergabe für den elektronischen Handel die Wettbewerbsbedingungen auf dem Markt verbessert und ein Beitrag zu einem ausgewogenen und gesunden Wachstum und zur Entwicklung des elektronischen Handels geleistet werden. Ob diese Begründungen tatsächlich zutreffen, ist zweifelhaft. Jedenfalls müssen Unternehmen bei Überschreitung der Schwellenwerte beim Handelsministerium eine Lizenz beantragen, deren einzige Voraussetzung in dem Nachweis besteht, dass die im Gesetz vorgesehenen Summen gezahlt wurden.

Die Lizenzpflicht richtet sich wiederum nach dem Nettotransaktionsvolumen in einem Kalenderjahr. Übersteigt dieser Betrag die Grenze von 10 Milliarden TL, so beträgt die Lizenzgebühr 3/10000 des Betrags, welche die 10 Milliarden-Grenze überschreitet. Bei einem Nettotransaktionsvolumen von 20 bis 30 Milliarden TL beträgt der Lizenzbetrag zusätzlich zu der bereits erwähnten Summe 5/1000 des Betrags, welcher zwischen 20 und 30 Milliarden TL liegt. Beträgt das Nettotransaktionsvolumen 30-40 Milliarden TL, so beträgt die zusätzliche Lizenzgebühr 1% des Betrags zwischen 30 und 40 Milliarden TL. Bei einem Transaktionsvolumen zwischen 40 und 50 Milliarden TL beträgt die Gebühr zusätzlich 5% für den Betrag zwischen 40 und 50 Milliarden TL. Bei 50-55 Milliarden beträgt die Lizenzsumme 10% der Summe, welche zwischen 50 und 55 Milliarden TL liegt. Zwischen 55 und 60 Milliarden beträgt die Gebühr 15%, bei 60-65 Milliarden beträgt der entsprechende Prozentsatz wiederum 20% und bei über 65 Milliarden beträgt der Prozentsatz schließlich 25%. Damit zeigt sich also, dass die Lizenzgebühr sich im Verhältnis zum Nettotransaktionsvolumen exponentiell erhöht.

X. Sanktionen

Mit der Gesetzesnovelle wurden schließlich die Sanktionen erheblich erhöht. Die Summen berechnen sich zum Teil nach den einzelnen Transaktionen, bei anderen Sanktionstatbeständen wird der Nettoverkaufswert des letzten Kalenderjahres zugrunde gelegt.

21 Gesetzesbegründung 20.

Von besonderer Bedeutung sind jedoch die Sanktionen nach Art. 12 Abs. 3. Danach können Verstöße gegen das Verbot, Finanzdienstleistungen in den in Zusatzart. 2 Abs. 4 genannten Fällen anzubieten, Verstöße gegen die Lizenzpflicht durch Anbieter von Vermittlungsdiensten sowie Anbieter von Diensten des elektronischen Geschäftsverkehrs und Verstöße gegen das Verbot, Post- und Zustellungsdienste anzubieten durch Vermittlungsdienste, mit einem Geldbetrag von 10 Millionen TL geahndet werden. Daneben setzt das Ministerium eine Frist von 60 Tagen, um den rechtswidrigen Zustand zu beseitigen. Ist eine Beseitigung innerhalb der genannten Frist nicht erfolgt, so kann die Behörde eine Summe von 20 Mio. TL als Strafe vorsehen und zugleich eine weitere Frist von 30 Tagen geben. Wird auch diese Frist erfolglos verstrichen, so ahndet das Ministerium das betroffene Unternehmen mit 40 Mio. TL und setzt zugleich eine Frist von 15 Tagen zur Beseitigung der rechtswidrigen Lage. Zugleich informiert das Ministerium das betroffene Unternehmen darüber, dass nach Ablauf der genannten Frist der entsprechende Inhalt entfernt und/oder der Zugang zu der entsprechenden Website gesperrt wird. In dieser Phase können nur noch bereits eingegangene Geschäfte abgewickelt und keine neuen Aufträge angenommen werden.

Wird der Verstoß trotz der Verhängung der in Absatz 1 genannten Geldbußen nicht innerhalb der vom Ministerium gesetzten Frist abgestellt oder wird derselbe Verstoß innerhalb eines Jahres ab dem Datum des Bußgeldbescheids wiederholt, wird eine Geldbuße in doppelter Höhe der vorherigen Geldbuße verhängt. Werden Handlungen, die Gegenstand der in Absatz 1 genannten Verfahren bilden, mit der Absicht der Irreführung des Ministeriums vorgenommen, so wird die zehnfache Summe des genannten Bußgeldbetrags vorgesehen. Da die genannten Summen sehr hoch sein können, sieht das Gesetz schließlich unter Abs. 6 eine Höchstsummenbegrenzung zugunsten der Anbieter von Vermittlungsdiensten sowie Anbieter von Diensten des elektronischen Geschäftsverkehrs, die die Schwellenwerte von 60 Milliarden TL nicht überschreiten. Diese Summenbegrenzung gilt allerdings nicht in den Fällen der Irreführung des Ministeriums.

XI. Ausblick

Innerhalb von sechs Monaten ab dem Inkrafttreten des Änderungsgesetzes müssen alle Vermittlungsverträge bzw. Plattformverträge zwischen den Anbietern von Vermittlungsdiensten und den Anbietern von Diensten des elektronischen Geschäftsverkehrs den gesetzlichen Anforderungen angepasst werden. Darüber hinaus sind ab dem 1. Januar 2024 bestimmte Verbote zulasten der Anbieter von Vermittlungsdienste im elektronischen Geschäftsverkehr anwendbar. Die Lizenzierungs- und damit einhergehende Zahlungspflicht muss zum 1. Januar 2025 erfüllt sein.

Ob die genannten Maßnahmen tatsächlich die avisierten Wirkungen zeigen werden, ist nicht ohne Zweifel. Das Gesetz war darüber hinaus kurz nach der Verabschiedung bereits Gegenstand eines abstrakten Normenkontrollverfahrens vor dem türkischen Verfassungsgericht. Das Gericht hat jedoch die Maßnahmen mit eindeutiger Mehrheit als verfassungsgemäß bestätigt[22]. Eine auf das Gesetz basierende Verordnung des türkischen Handelsministeriums vom 29.12.2022 betreffend die Anbieter von Vermittlungsdiensten und Anbieter von Diensten des elektronischen Geschäftsverkehrs[23] ist ebenfalls Gegenstand einer Normenkontrollklage vor dem türkischen Verwaltungsgerichtshof, welches am 10. Mai 2023 per einstweilige Verfügung die Vollstreckung bestimmter Artikel der Verordnung ausgesetzt hat. Es ist also ersichtlich, dass das Gesetz sehr umstritten war und weiterhin bleiben wird. Nach der Entscheidung des Verfassungsgerichts ist jedoch relativ klar, dass keine wesentlichen Änderungen mehr zu erwarten sind und die Akteure auf dem Markt in Gestalt der Anbieter von Vermittlungsdiensten sowie Anbieter von Diensten des elektronischen Geschäftsverkehrs innerhalb der Übergangsfristen ihre Praktiken den neuen gesetzlichen Verpflichtungen anpassen müssen.

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RESEARCH ARTICLE

L'influence de la Constitution Belge sur la Loi Constitutionnelle Ottomane

The Influence of the Belgian Constitution on Ottoman Constitutional Law

Mehmet Akad*

Résumé

La Constitution belge de 1831 était une des constitutions qui avait été pris comme un exemple pendant la préparation de La Loi Constitutionnelle ottomane. La raison la plus importante était la prise de l'essence de la Constitution Belge qui avait rassemblé tous les pouvoirs sous la monarchie. Bien qu'inspirée de la Constitution Belge, la Loi Constitutionnelle ottomane portait les différences importantes en comparaison avec le document belge. L'objectif principal de cet article est d'identifier les convergences et les divergences entre les deux textes et de comprendre l'esprit de La Loi Constitutionnelle Ottomane. Pour ce but, on emploie une méthode comparative qui nous permette de voir les différences entre les dispositions de ces deux documents. C'est pour cela, on a particulièrement choisi les dispositions qui prévoient les pouvoirs du Roi, les corps législatif et exécutif, considérant que cette différentiation est évidente entre les trois forces. Quand on compare les dispositions de ces documents, la Loi Constitutionnelle ottomane avait manqué de certaines provisions permettant de construire une harmonie entre le Sultan, le cabinet et le parlement. Plus précisément, contrairement à la Constitution belge, la Loi Constitutionnelle ottomane, ne disposait pas les fondements nécessaires pour limiter les pouvoir du Sultan et s'établir une répartition équilibrée des tâches entre ces trois corps. Par conséquent, on voit que malgré les similitudes entre ces documents, la Loi Constitutionnelle Ottomane manque de certains éléments nécessaires et pour cette raison elle est considérée comme une charte constitutionnelle plutôt qu'une constitution.

Mots-clés

La Constitution Belge de 1831, La Loi Constitutionnelle Ottomane, La Constitution Ottomane de 1876, la responsabilité du chef de l'État, la séparation des pouvoirs

Abstract

The Belgian Constitution of 1831 is one of the constitutions that set an example during the preparation process of Ottoman constitutional law. The most important reason for this was the spirit of the Belgian Constitution, which brought together the monarch, parliament, and executive branch. Despite being inspired by the Belgian Constitution, Ottoman constitutional law was significantly different. The main objective of this study is to identify the similarities and differences between the two documents and to understand the spirit of Ottoman constitutional law. Therefore, to clarify the differences between documents, a comparative method is adopted primarily centered on articles that organize the structure and authority of the monarch and legislative and executive bodies. The main differences can be observed in the relationship among these three bodies. When the necessary provisions are compared, Ottoman constitutional law lacks specific provisions that might allow the development of equitable harmony between the monarch, parliament, and cabinet. More precisely, Ottoman constitutional law did not have the foundations for limiting the sultan's power and creating a balanced division of power among the three bodies. Consequently, despite their similarities, Ottoman constitutional law lacks certain elements that allow it to be called a constitution; therefore, it is instead referred to as a constitutional charter.

Keywords

Belgian Constitution of 1831, Ottoman constitutional law, Ottoman Constitution of 1876, responsibility of the head of state, separation of powers

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Extended Summary

During the Ottoman Empire's long crisis period, many answers sought to end the turmoil that reigned. Especially during the Tanzimat era, reforms were addressed to modernize the empire's political and legal institutions; however, shortly afterward, these measures proved ineffective, and a new search for a solution began. The answer was to build a constitutional regime based on the representation of all ethnic and religious groups in the empire and create an "Ottoman Nation." Contrary to the political and social development of the West, this formula was the work of a limited group of Ottoman elites. After the dethronement of Sultan Abdülaziz and Sultan Murad V, the ascension of Abdülhamid II to the Ottoman throne, with the promise of declaring a constitution, was a turning point.

A draft constitution was prepared by a commission appointed by the Sultan under the presidency of the leader of the constitutionalists and Grand Vizier Midhat Pasha. Various Western constitutions were examined during the preparation process, including the Belgian Constitution of 1831. The features of the 1831 Constitution, which unify the monarch, council of ministers, and legislative body (the Senate and Chambers of Deputies), were the main reasons for this. Despite this superficial resemblance, the Ottoman Constitution of 1876 lacks certain features compared with the Belgian Constitution of 1831. To show the similarities and differences between the documents, articles regulating the head of state, the council of ministers, and the legislative body and their relationships must be examined.

First, it should be noted that the Ottoman Constitution of 1876 was promulgated as the Sultan's benevolence (*ihsan-ı şahane*). This means that the work of a small group of elites originated from the will of the Sultan without democratic principles or mechanisms, as will be shown later. Therefore, in this article, the term "constitutional law" will be used in preference to "constitution" in describing the Ottoman Constitution of 1876.

When the articles concerning the authority of the sultan and the king are compared, it is evident that, in contrast to Ottoman constitutional law, the Belgian Constitution declares that all powers derive from the "nation," whereas the Ottoman document states that all powers belong to the absolute sultan. This is the first sign of the difference between constitutional and an absolute monarchies. Furthermore, while the Belgian Constitution defines the king as "inviolable," the Ottomans add the term "sacred" to this designation. In addition, Article 63 of the Belgian Constitution states that the ministers are responsible for the acts of the king, and Article 64 introduces "countersignature." Although the sultan was inviolable, Ottoman constitutional law did not require a countersignature. When it was read with the sultan's absolute authority, it created an all-competent but irresponsible head of the state. In addition,

in the Ottoman Empire, ministerial responsibility was directed toward the sultan and not the parliament.

Regarding the structure of the legislative body, at first glance, the organization of the legislative bodies appears similar. They consist of two bodies: a senate (Meclis-i Ayan for the Ottomans) and a chamber of deputies (*Meclis-i Mebusan* for the Ottomans). However, despite the structural similarity, the nation elected the two bodies of the Belgian parliament, while the sultan directly appointed the members of the Ottoman Senate for a lifetime. In any case, the powers of parliament regarding legislative proposals were significantly reduced, as stated in Articles 53 and 54 of the Ottoman constitution. As a result, it becomes a "consultative assembly" rather than a parliament. Notably, with the constitutional amendments of 1909, the parliament's legislative powers were reinforced to become closer to the Belgian Constitution of 1831, although this shift had to wait 30 years after tyranny for the proclamation of freedom (*Hürriyetin İlanı*) in 1908.

In conclusion, compared with the Belgian Constitution of 1831, Ottoman constitutional laws lack regulations that balance the powers of the sultan and the executive and legislative bodies. Additionally, the Ottoman parliament was not entitled to monitor the executive branch or propose legislation in a democratic sense, as it was set out in the Belgian Constitution. Therefore, the regime envisaged by the Ottoman constitutional laws was neither democratic nor parliamentary. Instead of limiting the powers of the sultan, the constitution guaranteed his absolute powers, contrary to the understanding of a constitutional monarchy. As a result, despite their articles' superficial similarity, as the work of a group of elites, Ottoman constitutional laws are best seen as a "constitutional charter" rather than a constitution per se.

Introduction

Au XIXème siècle L'Empire Ottoman cherchait une recette, une formule pour réaliser un changement dans son système politique. Les reformes du Tanzimat se sont montrées insuffisantes dans le temps, pour un changement radical dans le pays.[1] D'où l'intelligentsia Ottomane cherchait des solutions satisfaisantes pour l'intégration au système politique Occidental, l'idée d'un régime représentatif se fit jour et rallia des partisans parmi l'élite de l'époque.[2] On croyait qu'un régime constitutionnel représentatif mettra fin à l'anarchie qu'on n'avait pu supprimer, à la débâcle financière, aux nombreux soulèvement des sujets chrétiens. Si les principes de liberté et d'égalité étaient mis sous la sauvegarde d'un Parlement composé des représentants de toutes les races et de toutes les religions, les différentes nationalités qui composaient l'Empire arriveraient se fusionner en une *« nation ottomane »*.[3] On constate que, par cette formule, l'intelligentsia Ottomane essaie d'affranchir le stade de l'Empirisme vers la nation ottomane, pour réaliser la même évolution que l'Occident avait déjà vécu aux XVII et XVIIIème siècles.

L'opposition des nouveaux Ottomans était d'autre part renforcée par la conduite personnelle du Sultan Abdülaziz (1861-1876) qui ne s'intéressait guère aux affaires de l'Etat et vivait isolé dans un luxe que les finances publiques n'arrivaient pas à supporter. A la suite d'une insurrection qu'éclata à Istanbul, celui-ci fut déposé le 30 mars 1876. Les révolutionnaires, formés en un comité de Salut public, firent proclamer à sa place son neveu Murad V. Mais Murad reconnu fou presque tout, aussitôt fut déposé à son tour et remplacé par son frère Abdülhamid (31 août 1876). Le chef au parti constitutionnel Midhat occupait le Grand Vezirat. Il obtint du Sultan la promesse de promulguer tout de suite une constitution, promesse que celui-ci acceptait comme condition de son avènement.[4]

Le 23 décembre 1876, La Constitution ou plus précisément La Loi Constitutionnelle Ottomane était promulguée.[5] Je préfère le terme *« La loi Constitutionnelle »* à la place de *« La Constitution »* pour une raison purement technique du Droit Constitutionnel, car celle qui est promulguée par le Sultan est une *« Charte constitutionnelle »*, un texte qui émane de la volonté d'un monarque, préparé et imposé par un groupe d'élite et en plus, le principe démocratique n'y est pas proclamé.[6] En séparant la charte et

1 Sur ce sujet, voir : Recai Galip Okandan, *Umumi Amme Hukukumuzun Ana Hatları*, (Fakülteler Matbaası 1971) 65.

2 On voit que dès le XIXe siècle, nous cherchons des moyens d'une intégration avec L'Occident. Cette tendance a un caractère épistémologique, et à nos jours, La Turquie a déjà déposé sa demande d'adhésion à La Communauté Européenne.

3 Voir: Niyazi Berkes, *Türkiye'de Çağdaşlaşma* (28th edn, Yapı Kredi Yayınları 2019) 310; Ahmet Talat, *La Constitution Turque du 20 Avril 1924*, (Chamberry 1935) 7-8.

4 Pour plus de détails voir Gülnihal Bozkurt, *Batı Hukukunun Türkiye'de Benimsenmesi* (3rd edn, Türk Tarih Kurumu Yayınları 2020) 52-62.

5 Pour le texte intégral de la Constitution Ottomane de 1876 voir Abdolonyme Ubicini, *Constitution ottomane promulguée le 7 zilhidjé 1293 - 23 décembre 1876 Expliquée et Annotée* (A. Cotillon 1877).

6 Pour plus de détails sur la préparation et la proclamation de la Loi Constitutionnelle Ottomane, voir Bülent Tanör, *Osmanlı-Türk Anayasal Gelişmeleri* (17th edn, Yapı Kredi Yayınları 2008) 121-135.

la constitution, Abadan nous fournit deux points importants ; l'élément de contrainte affectant à la fois la forme et le contenu des textes et au contraire du sens moderne d'une constitution, une charte a été déclarée à la suite d'une volonté d'en haut. Plus important encore, la Constitution Ottomane a été aussi promulguée à la suite d'une volonté du sultan. En outre, comme nous le verrons, dans la pratique, le contenu de la constitution ne sera plus efficace pour limiter les pouvoirs du sultan.[7]

La contradiction sur l'essence de la constitution s'est manifestée au cours d'un débat entre Midhat Pacha et Abdülhamid II pendant préparation du texte. Selon Abdülhamid, la constitution devrait être un texte qui confirmant les pouvoirs du Sultan, c'est à dire un « *absolutisme constitutionnel »,* tandis que l'élite Ottomane*,* dirigé par Midhat Pacha, était favorable à une monarchie constitutionnelle.[8] En vue de préparer une Constitution ou un document constitutionnel l'élite ottomane a pris comme modèle les différentes Constitutions étrangères[9] ainsi que la Constitution Belge de 1831. Dans cette étude, nous allons mettre en œuvre le degré du parallélisme entre quelques institutions de ces deux documents constitutionnels. Pour cela, je vais prendre comme déterminant (pour la matrice de mon travail) les trois institutions principales ; Le Roi et le Sultan, Le Cabinet (comme élément du pouvoir exécutif) et les Chambres (Chambres des Députés et Le Senat). On constate tout de suite que j'ai détaché Le Roi de son associé ; le cabinet qui est l'autre organe du pouvoir exécutif en vue de bien mettre en œuvre le rôle dominant du Sultan dans la loi constitutionnelle Ottomane (Des lors, elle sera représentée par l'abrège LCO dans le texte). Juste ici, je me souviens l'Art. 16 de la Déclaration de 1789 qui disait « *Toute société dans laquelle la garantie des droits n'est pas assurée, ni la séparation des pouvoirs déterminée, n'a point de Constitution.*[10] *»*, une disposition qui définit complètement la situation qui manque chez nous.

I. Les Deux Faces de Monarchie : Absolue et Constitutionnelle

L'Article 3 de la LCO indique que la souveraineté appartient au Sultan ; *« La souveraineté ottomane qui réunit dans le souverain le Califat suprême de l'Islamisme, appartient à l'ainé des princes de la dynastie d'Osman. ».*

Cet article qui posait 1e principe de la souveraineté personnelle indiquait un point très important, à savoir les titres du Sultan : - Il est le souverain de l'Etat Ottoman. - I1

7 Pour les différences entre la constitution et la charte voir, Yavuz Abadan, 'Osmanlı İmparatorluğunda Anayasa Sistemine Geçiş Hareketleri' (1957), 14(1) Ankara Üniversitesi Hukuk Fakültesi Dergisi 7-10, 3-37.

8 Voir, Berkes (n3) 322-324.

9 Berkes (n 3) 339 cite aussi les constitutions Françaises, Allemandes, les lois Grecques, Roumaines, Tunisiennes et Egyptiennes ; voir aussi Odile Moreau, 'Notion et nature de l'État, de l'héritage ottoman aux réformes constitutionnelles modernes' (2013), 110(2) Les Cahiers de L'Orient 117, 126-127.

10 Voir: Conseil Constitutionnel 'Déclaration des Droits de l'Homme et du Citoyen de 1789' <https://www.conseil-constitutionnel.fr/le-bloc-de-constitutionnalite/declaration-des-droits-de-l-homme-et-du-citoyen-de-1789> accessed 27 August 2023.

est le Calife suprême de tous les musulmans. Ces dispositions étaient complétées par les articles suivants. Le Sultan, à titre de Calife Suprême, était déclaré protecteur de la religion musulmane et Padişah(empereur) de tous les Ottomans. Il était irresponsable et sa personne sacrée d'où la première face de la monarchie : ABSOLUE.[11]

Si on examine les dispositions de la Constitution Belge relatives aux pouvoirs du Roi, on constate que ; *« Tous les pouvoirs émanent de la nation. Ils sont exercés de la manière établie par la Constitution. »* (L'Art.25)[12] ; LA MONARCHIE CONSTITUTIONNELLE.[13]

Donc, la différence est très nette entre ces deux documents, au point de vue de la source de la souveraineté ; dans la LCO, le Sultan est le souverain absolu, malgré ce document qui porte les traits essentiels d'une Constitution.

D'où, on peut en tirer deux conclusions ; premièrement, c'est une *« Charte Constitutionnelle »* comme nous avions déjà précisé(supra) et n'a pas la valeur d'une constitution, au sens technique du mot et deuxièmement, le régime établi est loin d'être « démocratique » car, les pouvoirs n'émanent pas de la nation, comme indiquent les dispositions relatives de la Constitution Belge.

Deuxièmement, pour l'origine des pouvoirs du Sultan et du Roi, les deux documents disposent les mêmes principes ; d'après l'article 60 de la Constitution Belge ; *« Les pouvoirs constitutionnels au Roi sont héréditaires dans la descendance directe, naturelle et légitime de S.M. (...) de mâle en mâle, par ordre primogéniture et à l'exclusion perpétuelle des femmes et de leur descendance. ».* Si on se rappelle l'article 3 de la LCO, cité un peu plus haut, on constate que le même principe a été adapté aussi mais avec une formule un peu diffèrent ; Le Roi et Le Sultan obtiennent le pouvoir par une voie *« héréditaire* », *« de mâle en mâle »* et *« par ordre de primogéniture »* … J'ai choisi expressément la terminologie de la Constitution Belge pour montrer le degré de similitude entre les deux textes.

Il faut tout de suite noter que, les pouvoirs du Roi ont une base « constitutionnelle » qui lui donne sa justification juridique, tandis que les pouvoirs du Sultan émane de lui-même, comme détenteur de la souveraineté ottomane. Ces pouvoirs, qui sont inhérents dans la personnalité du Sultan jusqu'à la promulgation de la LCO, ont été indiqués pour la première fois à l'article 7 de la façon suivante ; Il nomme et révoque ses ministres (Art. 65

11 Pour plus de détails sur la nature et régime des libertés de la Constitution de 1876 voir Mehmet Akad, 'L'Evolution du Concept de « Libertés Publiques » Dans Les Constitution Turques et Françaises, Etude Comparative' (1979) 26 (42), Annales de la Faculté de Droit d'Istanbul 355, 360-362.

12 Voir La Constitution Belge et ses lois d'application, (Cabay 1985) 11 ; voir aussi Peter AJ Van Den Berg, 'Liberalism, modern constitutionalism and nation building in the Belgian Constitution of 1831 : a comparative perspective' (2018) 35 Giornale di Storia Costituzionale 49, 53-54.

13 Pour plus de détails voir Yves Lejeune, *Droit Constitutionnel Belge* (2nd edn, Larcier 2014) xxi-xxii ; et aussi Ulrike Müßig, 'L'ouverture du mouvement constitutionnel après 1830 : à la recherche d'un équilibre entre la souveraineté monarchique et la souveraineté populaire' (2011) 79 Revue d'Histoire du Droit 489, 499-500.

de la Constitution Belge), il nomme aux emplois d'administration générale et de relation extérieure (Art. 66), i1 a le droit de battre monnaie(Art. 14), il commande les forces de terre et de mer, déclare la guerre, fait les traités de paix(Art. 68), il sanctionne et promulgue les lois (Art. 69), il a le droit de remettre ou de réduire les peines prononcées par les juges (Art. 73), il a le droit de convoquer et de dissoudre les chambres soit simultanément, soit séparément. L'acte de dissolution contient la convocation des électeurs et le renouvèlement de la Chambre des Députes dans six mois, comme le Sénat est nommé par le Sultan, il est exempt de ces élections (Art. 70 et 71).[14]

On voit que LCO, dans un même article, dispose les pouvoirs du Sultan en résumant les diverses dispositions de la Constitution Belge, avec une remarquable fidélité.

En outre, je dois préciser que, le renouvèlement de la chambre des députés ottomanes (qui est indiqué à 1'Art. 73 de la LCO) dans une durée de six mois, est trop longue par comparaison de la même disposition de la Constitution Belge ; qui prévoit convocation des électeurs dans les quarante jours et des Chambres dans les deux mois (Art. 71 de la Constitution Belge). A mon avis, c'est une des faiblesses de la LCO vis à vis des pouvoirs et de la suprématie du Sultan.

La suprématie du Sultan a la face des deux organes, le pouvoir législatif et le Cabinet des Ministres, est essentielle pour mettre à jour la philosophie de la LCO qui a reconnu ces pouvoirs absolus. Malgré « *le romanticisme constitutionnel*[15]» de l'Elite Ottomane, la LCO, n'était pas suffisant pour s'établir un régime constitutionnel.[16]

Si on aborde la question de la responsabilité de ces deux chefs de l'Etat devant leurs chambres, on remarque un autre aspect de la ressemblance des deux documents. D'abord, nous voulons exposer les dispositions de la Constitution Belge.[17]

L'Article 63 de la Constitution Belge, dispose ; *« La personne du roi est inviolable ; ses ministres sont responsables. ».* Et l'Article 64 complète cette disposition ; *« Aucun acte du Roi ne peut avoir d'effet, s'il n'est contresigné par un ministre, qui, par cela seul, s'en rend responsable. ».* Comme on le voit, la disposition constitutionnelle nous démontre que dans sa forme originale, la Constitution Belge accepte les règles du régime parlementaire classique avec toutes ses dimensions[18], or, La LCO, par son texte date de 1876 se base toujours sur la suprématie du Sultan, avec une tendance loin d'être dit *« parlementaire ».*

14 Bozkurt (n4) 69-70.

15 Pour le terme "romanticisme constitutionnel" voir: Tarık Zafer Tunaya, *Türkiye'de Siyasal Gelişmeler [1876-1938] Kanun-i Esasî ve Meşrutiyet Dönemi* (4th edn, Bilgi Üniversitesi Yayınları 2016) 32.

16 İlber Ortaylı, 'II. Abdülhamid Döneminde Anayasal Rejim Sorunu' (2008) Osmanlı'da Değişim ve Anayasal Rejim Sorunu 243, 244-246.

17 Je dois noter que le texte actuel de la Constitution Belge que je profite pour la comparaison, ne possède pas les dispositions originales de la Constitution modifiées à divers périodes.

18 C. Maes et B. Deseure, ' 'The Nation will always prevail', Representation, participation and contestation in the Belgian Constitution of 1831' (2020) 88 The Legal History Review 495, 529-531.

II. Le Cabinet (Les Ministres)

Dans la gestion des affaires publiques, Le Sultan est assisté par des Ministres. C'est lui qui confère la charge de Grand Vizir (premier Ministre) et celle des Cheikh al-islam (Chancelier des affaires religieuses), aux personnes qui ont sa confiance. La nomination des autres Ministres se fait par l'ordonnance impériale.

Il y a un conseil des Ministres qui se forme sous la présidence du Grand Vizir dont l'autorité comporte toutes les affaires importantes de l'Etat. Le Sultan possède une liberté entière pour le choix de ses Ministres. Il les nomme même ses plus proche, en dehors du Parlement, et sans avoir à rendre compte de son opinion. II peut les rejeter, bien qu'ils aient conservé la confiance de la Chambre et les garder malgré son hostilité. Il en nomme autant qu'il veut (Art. 7, 27, 28 de LCO).

L'obligation du contreseing ministériel pour les actes du Chef de l'Etat n'existe pas, au contraire, les délibérations du Conseil des Ministres, qui présentent une certaine importance, doivent être sanctionnées par le Sultan irresponsable. Ainsi, dépendant de la seule volonté du Sultan, sans solidarité entre eux, les Ministres sont réduits à l'état de simples agents administratifs de celui-ci.[19]

Or, si on examine les dispositions de la Constitution Belge, on rencontre à un schéma tout à fait diffèrent et un système politique bien déterminé par des institutions constitutionnelles. Les articles 63, 64 et 65 sont en témoins ; *« Le Roi nomme et révoque ses ministres (Art. 65) »* « *Aucun acte du Roi ne peut avoir d'effet, s'il n'est contresigné par un ministre, qui, par cela seul, s'en rend responsable* » et dernièrement, *« La personne du Roi est inviolable ; ses ministres sont responsables. »* (Art. 63).[20]

On peut en tirer quelques conclusions importantes ; a) La personne du Roi est inviolable (mais n'est pas sacrée comme celle du Sultan) et ses ministres sont responsables pour toutes ses actes politiques. Cette responsabilité est garantie par le contreseing ministériel.[21] Or, cette institution parlementaire n'est pas acceptée par la LCO, car les ministres ne portent aucune responsabilité politique devant le Parlement, contrairement ses confrères Belges…

b) Le Sultan, comme le Roi, nomme et révoque ses ministres. Mais ce pouvoir du Roi est limité d'après les règles constitutionnelles et la tradition parlementaire. C'est à dire ; Le Roi nomme comme le premier ministre le président du parti politique, gagnant de la dernière élection législative. Pour la révocation, aussi, les mêmes règles du système parlementaire sont valables.

19 Talat (n 3) 9.

20 Paul Harsin, 'Constitution Belge de 1831 et la Responsabilité Ministérielle' (1937) 1 Revue d'Histoire Politique et Constitutionnelle 164, 166-167

21 Brecht Deseure, 'Republican monarchy in the 1830 revolutions: From Lafayette to the Belgian Constitution' (2019) 45 (7) History of European Ideas 992, 1003.

Tandis que le Sultan, avec un pouvoir illimité, exerce ces deux pouvoirs, comme il est le souverain absolu de la nation. Il est certain que cette institution commune des constitutions occidentales est adaptée en dépouillant de son contexte essentiel et perdue toute sa fonction politique.

Pour les révisions dans cette structure, il faut attendre l'année 1908. Après trente ans de dissolution du parlement, qui était appelée «l'époque du despotisme (*İstibdat Dönemi*)», la Proclamation de la liberté (*Hürriyetin İlanı*) dirigée par le Comité Union et Progrès, inaugura la Seconde Monarchie Constitutionnelle. Elle avait été déterminée par des facteurs internes et externes, fournissant ainsi l'opportunité de créer une nouvelle structure politique.[22] C'est par les modifications constitutionnelles faites en 1909 dans un sens libéral que nous voyons la responsabilité ministérielle y prend place cette fois une formule plus proche au parlementarisme.

En effet, l'Article 30 de LCO est entièrement modifié, disposant la responsabilité solidaire des ministres (de la politique générale du Gouvernement) envers la Chambre. Pour les questions de leur ressort, la responsabilité est individuelle. Cela nous rapporte aussi l'obligation du contreseing ministériel en disposant dans le même article que tout acte du Sultan doit être contresigné par le Premier Ministre et ses collègues. Comme Le Sultan est irresponsable et sa personne est sacrée la responsabilité de l'exécutif se rapporte entièrement aux membres de gouvernement.[23]

III. Le Parlement

D'après l'Article 26 de la Constitution Belge ; le pouvoir législatif s'exerce collectivement par Le Roi, la Chambre des représentants et le Sénat. L'Article 32 dispose *« Les membres des deux chambres représentent la nation, et non uniquement la province ou la subdivision de province qui les a nommés. »* D'où ; 1es deux chambres se forment par les élections et aucune autre voie n'est prévue par la Constitution. L'Article 27 dispose ; *« L'initiative appartient, à chacune des trois branches du pouvoir législatif. ».* Donc, une égalité des fonctions a été admise par cet article.

Nous avons tracé brièvement le cadre du pouvoir législatif [24] de la Constitution Belge, dans le rapport avec notre étude. Maintenant nous verrons LCO suivant toujours la méthode déterminée à l'introduction.

Auprès du Sultan et de ses Ministres, La Constitution de 1876 crée une Assemblée Générale (Parlement) composée d'un Sénat (nommé par le Sultan) et d'une Chambre des députés (élue au scrutin secret). (L'Art. 42, 60, 65)

22 Pour plus de détails sur la proclamation de la Seconde Monarchie Constitutionnelle voir Tunaya (n15) 121-130.

23 İlhan Akın, *Türk Devrimi Tarihi* (6th edition Beta Yayınları 1999) 58-59.

24 Voir Charles Terlinden, 'Histoire du Droit Constitutionnel de la Belgique' in Saggi Storico-Giuridici a Cura del Comitato Internazionale di Scienze Storiche, Costituzione Degli Stati Nell'eta Moderna (Le Monnier 1933) 215-219.

Les deux Chambres doivent se réunir le premier novembre de chaque année. L'ouverture, ainsi que 1a clôture fixée au premier mars suivant doivent avoir lieu sur ordonnance impériale (L'Art. 43).

Donc, la première différence avec la Constitution Belge ; Le Sénat se forme par la nomination du Sultan chez les Ottomans. D'autre part, les attributions législatives au Parlement sont singulièrement réduites (L'Art. 53, 54). L'initiative de la proposition d'une loi ou de la modification d'une loi existante appartient en principe au Ministère. Le Sénat et la Chambre peuvent, eux aussi, demander le vote d'une nouvelle loi ou la modification d'une loi existante. Dans ce cas, la demande est soumise au Sultan et s'il y a lieu, le Conseil d'Etat est chargé, en vertu d'un ordre impérial, de préparer le projet de loi qui fait l'objet de la proposition. Les projets de loi ainsi élaborés par le Conseil d'Etat sont soumis en premier lieu, à la Chambre des députés, en second lieu, au Sénat. Une fois votés par les deux Chambres, ils doivent être sanctionnés par le Sultan pour être exécutoires.[25]

On voit très bien que le Parlement, en ce qui concerne l'initiative des lois, n'a qu'un droit de sollicitation, c'est une forme de l'assemblée consultative.[26] Et cela forme la deuxième différence élémentaire entre ces deux documents.

En effet, si on compare les dispositions des deux documents, on constate que le pouvoir législatif se présente parfaitement dans la Constitution Belge, par rapport à la Loi Constitutionnelle Ottomane. Les principes comme l'exercice collectif du pouvoir législatif, l'élection des deux Chambres par le suffrage universel et l'appartenance de l'initiative à trois organes constitutionnels, sont les traits dominants de cette supériorité.

Pour une normalisation des rapports entre le pouvoir exécutif et le pouvoir législatif, il fallait attendre les modifications constitutionnelles faites en 1909.[27] En effet, par une modification des dispositions des articles 53 et 54, l'initiative, en matière législative, appartient, à chaque Ministre, sénateur ou député. Les projets de loi votés par les deux Chambres ne reçoivent force légale qu'après avoir été ratifiés par le Sultan. Mais l'art. 54 dispose que, dans un délai de deux mois, les projets de lois doivent être ratifiés ou retournés à la Chambre pour y être examinés à nouveau. Donc, on peut faire deux observations sur ce point ; la première, la longue procédure pour l'initiative des lois a été quittée, en même temps que les attributions du Conseil d'Etat. Deuxièmement, le Sultan est limité par un délai (2 mois) pour sanctionner ou retourner les lois à la Chambre. Ces deux points essentiels des modifications de

25 Voir Tunaya (n14) 12-13.

26 Talat (n3) 10.

27 Pour plus de détails sur les modifications de 1909 voir Tunaya (n14) 21-22 ; Tanör (n4) 192-197 ; Ici, il faut noter que le premier vote de confiance dans la vie constitutionnelle ottomane, avait été demandé par le gouvernement de Kamil Pacha, avant les modifications de 1909, en tant qu'une réponse aux évènements au sein du parlement. Voir Tanör (n6) 185-186.

1909, approchent un peu de plus le régime politique ottomane à celui établi par la Constitution Belge.

Les projets de lois renvoyés à la chambre ne peuvent être votés qu'à la majorité des deux tiers ; mais la Constitution est muette sur le cas où le Sultan refuserait sa ratification encore une fois. Tandis que La Constitution Belge disposant son article 69 que *« Le Roi sanctionne et promulgue les lois »* précise, à mon avis la suprématie des Chambres, en matière du pouvoir législatif.

On doit noter que la rédaction d'une constitution reflète la structure sociale du pays. D'autre part, le parlement est l'une des institutions qui nous permettent d'observer cette structure. Ainsi, la différence entre les parlements belge et ottoman peut être comprise par la différenciation entre les deux sociétés. Dans la société belge, les classes sociales étaient cristallisées, et le parlement ainsi que la distribution des pouvoirs entre les institutions politiques avait été formés d'après les classes sociales. Cependant, le manque de soutien d'une société politique empêchait la Loi Constitutionnelle ottomane et le parlement de créer la même distribution du pouvoir entre les institutions politiques.[28]

Une dernière remarque se portera sur l'ouverture et la clôture des Chambres. *« Les Chambres se réunissent de plein droit, chaque année. »*, c'est la disposition commune des articles 70 de la Constitution Belge et article 43 de la Loi Constitutionnelle Ottomane. (Je dois préciser qu'au sujet de *« plein pouvoir »*, l'art. 43 gagne sa clarté par les modifications de 1909). Et de là, la séparation commence ; ainsi que les Chambres en Belgique se réunissent le deuxième mardi d'octobre, tandis que pour les Chambres ottomanes, 1'ouverture aura lieu le premier novembre de chaque année. L'ouverture, ainsi que la clôture fixée par la Loi Constitutionnelle Ottomane, doivent avoir lieu sur ordonnance impériale.

D'autre part, Le roi a le droit de convoquer et même prononcer la clôture de la session (Art. 70). On note sur ces articles, encore une fois, l'influence de La Constitution Belge sur la Loi Constitutionnelle Ottomane. Surtout, la ressemblance est remarquable sur les pouvoirs des deux souverains, vis à vis des Chambres.

Conclusion

La comparaison des lois constitutionnelles des deux pays nous aboutit multiples points très remarquables suivantes :

1) L'œuvre d'un groupe d'Elite ottomane, La Loi Constitutionnelle Ottomane est une « Charte Constitutionnelle » et le régime établi n'est pas « démocratique » malgré le remarquable ressemblance des statuts du Sultan et du Roi.

28 Voir Ahmet Yücekök, *100 Soruda Türk Devrim Tarihi* (1th edn, Gerçek Yayınevi 1984) 29-33.

2) Donc pour la gestion des affaires, le manque du contreseing ministériel dans la Loi Constitutionnelle Ottomane donne une certaine suprématie pour le pouvoir exécutif devant le parlement. D'où il n'existe plus une « harmonie » entre des deux forces exécutives et législatives.

3) La composition du Parlement se diffère aussi dans ces deux pays. Ainsi, les attributions législatives du Parlement Ottoman sont réduites et prend la forme d'une assemblée consultative. On remarque que le régime parlementaire adapté par les ottomans néglige son contexte essentiel.

4) En conclusion, même la présence des dispositions presque identiques dans les deux documents, le manque de la base sociale nécessaire avait amenée des différences importantes dans la pratique chez les Ottomanes.

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RESEARCH ARTICLE

The Impact of Online Hearings on the Enforcement of Arbitral Awards

Ceyda Süral Efeçınar*, Zeynep Derya Tarman**

Abstract

Due to the flexible nature of arbitration, it was possible to continue arbitral proceedings through online hearings during the global COVID-19 pandemic. The immense use of online hearings during these tough times forced arbitral institutions to provide certain guidelines and principles regarding the organization of online hearings. Meanwhile, the arbitration community figured out the advantages and efficiency of online hearings. Along with the rapid increase in energy prices, inflation rates, and climate change concerns, we believe that online hearings will continue to be an indispensable part of international arbitration practice in the future. However, despite being cost and time-effective, online hearings raise discussions in the context of the right to a fair trial, the right to be heard, and the principle of equality of the parties provided by Article 6 of the European Convention on Human Rights and by Article 36 of the Turkish Constitution. In our study, we will examine whether online hearings per se will be considered as an infringement of the right to a fair trial in light of recent decisions of the Turkish Constitutional Court evaluating the use of online hearings in court practice. We will try to make conclusions whether and/or under which circumstances the use of online hearings will constitute a ground of setting aside under the Turkish International Arbitration Act or denial of recognition or enforcement according to the New York Convention.

Keywords

International arbitration, Online hearings, International litigation, Right to be heard, Arbitral awards

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I. Introduction

Online hearings were widely used in arbitral proceedings during the Covid-19 pandemic. Thanks to the technological developments and certain platforms that enable several different participants to meet online by way of simultaneous sound and video transmission, arbitral proceedings were not completely halted although people were locked up at their homes. After the pandemic, along with the rapid increase in energy prices, inflation rates, and increasing climate change concerns, we believe that online hearings will continue to be an indispensable part of international arbitration practice in the future. However, despite being cost and time-effective, online hearings raise discussions in the context of the right to a fair trial, the right to be heard, and the principle of equality of the parties provided by Article 6 of the European Convention on Human Rights and by Article 36 of the Turkish Constitution. In this study, we will examine whether online hearings *per se* will be considered an infringement of the right to a fair trial and try to make conclusions about whether and/or under which circumstances the use of online hearings will constitute a ground for setting aside under the Turkish International Arbitration Act or denial of recognition or enforcement according to the New York Convention. First, we will briefly explain the relevant legislation in the Turkish criminal procedure law and Turkish civil procedure law; and explain recent decisions of the Turkish Constitutional Court evaluating the use of online hearings in criminal court practice. Then, we will give information about hearings and the use of online hearings in Turkish international arbitration law and come up with conclusions concerning the impact of online hearings on the enforcement of arbitral awards.

Online arbitration may be divided into two categories based on the level of use of information technologies. One may be referred to as "technology-assisted online arbitration" where information technologies are used for the exchange of information and a means of communication, and the other may be referred to as "technology-based online arbitration" where information technologies are used in all aspects of arbitration[1]. The concept of online hearing that is subject to our study is different from electronic dispute resolution methods where the disputes are resolved by an artificial intelligence system. We refer to classic arbitral proceedings where only certain evidence is conveyed via electronic means and where the hearings are held via an electronic platform.

Secondly, although our conclusions are induced from the use of online hearings in Turkish litigation; the concept of online hearing is different in litigation and arbitration. In arbitration, both parties and the arbitrators attend the hearings electronically; there is no physical contact of any relevant parties. In litigation, however, the judges

1 Seda Özmumcu, 'Dünyada ve Ülkemizde Online Uyuşmazlık Çözümleri Bağlamında Online Tahkim ve Uygulamaları', (2020) 78(2) İstanbul Hukuk Mecmuası 436.

are always physically present in the courtroom, and usually only one of the parties attends the hearing via an electronic system, whereas the other party is also physically present in the courtroom.

II. Online Hearings in Turkish International Litigation

A. Online Hearings in Turkish Criminal Procedure Law

Sound and video transmission techniques can be used to hear suspects, witnesses, experts, and accused persons according to Turkish Criminal Procedure Law[2]. Article 196/4 of the Criminal Procedure Law provides that an accused person may be interrogated and/or attend the hearings by use of sound and video communication systems if the judge or the court deems it necessary.

The Regulation on the Use of Sound and Video Information System in Criminal Procedure[3] entered into force on September 20, 2011. The Regulation provides principles and procedures for hearing relevant people by the public prosecutors, judges, or courts via Sound and Video Information System ("SEGBIS") which is defined as the system that enables transmission and collection of both sound and video within UYAP system which is the information system established to conduct justice services in an electronic platform.

According to Article 13 of the Regulation, those people who cannot attend the hearings due to a justifiable ground accepted by the authority that will hear them may be heard via SEGBIS and attend hearings via SEGBIS. There are special provisions for hearing of those who are imprisoned (Article 14); who are hospitalized (Article 15); who reside outside the jurisdiction of the relevant authority which will make the hearing (Article 16). SEGBIS can be used in appellate courts and the Court of Cassation (Article 21).

Upon entry into force of the Regulation, the SEGBIS system was welcomed by some of the Turkish doctrine and still, its advantages are accepted. One of these advantages is that the hearings are recorded so can be listened to and/or watched by the authorities and higher courts repeatedly which also eliminates the burden of holding accurate minutes. SEBGIS replaces the procedures of proxy judge which is used for hearing of those who reside outside the jurisdiction of the court which has to hear the party and/or witnesses. Therefore, the principle of directness and equality of arms are strengthened[4].

2 OG. 17.12.2014 / 25673.

3 OG. 20.09.2011 / 28060.

4 Erdal Yerdelen, 'Ceza Muhakemesinde Video Konferans Yönteminin (SEGBIS) Kullanımı' (2019) 2 Bilişim Hukuku Dergisi 273-275; S Acar and H Gürsoy, 'Türk Mahkemelerinde Sesli ve Görüntülü Kayıt ve Videokonferans Sistemi Uygulamasına Geçiş, Ceza Mahkemeleri Örneği', (2012) 70 (4) Ankara Barosu Dergisi 131; T Açıkmeşe and U Karaşahin,

On the other hand, the problem arises when the suspect or accused person wishes to personally attend a hearing but is obliged to use the SEGBIS system by the court. It is feared by some scholars that involuntary use of SEGBIS will spread, and an exceptional procedure will become the rule. It is opined that the court shall explain the reasons for the necessity of the use of SEGBIS and the grounds for not permitting the accused person's presence. The expedition of a criminal procedure can not solely be a ground for the use of SEGBIS as the aim of a criminal procedure cannot be finalization of the procedure in a short period but to reach the substantial reality[5].

Others opine that although the use of the SEGBIS system may be open to certain criticism such as the occurrence of technical problems, or reluctance of some courts to evaluate the condition of the necessity of use of SEGBIS, its use cannot be ended but has to be sustained and improved. Especially the circumstances that justify the use of SEGBIS shall be prescribed in more detail by law to prevent infringement of the right to a fair trial[6].

B. Online Hearings in Turkish Civil Procedure Law

On July 22, 2020, Article 149 of the Turkish Civil Procedure Law[7] was completely amended to enable the court hearings to be held via sound and video transmission[8]. According to Article 149/1, a party can request to attend hearings and take other procedural actions online. There is no requirement for the court to take into consideration the opinion of the other party in evaluating its decision concerning e-hearings[9]. Similarly, the court may order, or the parties may request that a witness or an expert be heard online. Article 149/3 makes a distinction for cases in which the parties are not free to dispose of. In such cases, the court may on its motion decide to interrogate parties online[10]. Therefore, the law requires no consensus of the parties for the use of the e-hearing system and even entitles the court to decide on its motion without the wills of the parties in certain types of disputes.

'Sesli Görüntülü Bilişim Sistemi (SEGBİS)', (2012) 5 UYAP Bilişim Dergisi 25-27.

5 Fahri Gökçen Taner, *Ceza Muhakemesi Hukukunda Adil Yargılanma Hakkı Bağlamında Çelişme ve Silahların Eşitliği*, (1st Edn, Seçkin 2019) 325-328.

6 Burak Ateş, 'Adil Yargılanma Hakkı Kapsamında Sanığın Duruşmada Hazır Bulunma Hakkı ve SEGBIS Sistemi' (July 2022) 13 (51) Türkiye Adalet Akademisi Dergisi 477-479.

7 OG. 04.02.2011/27836.

8 Act Amending Code of Civil Procedure and Several Other Acts, OG. 28.07.2020/31199.

9 Emre Kıyak, 'Duruşmada Etkinlik Kazanan Yargılama İlkeleri ile Usuli Müktesep Hak Işığında Türk Hukuk Yargılamasında Eş Zamanlı Ses ve Görüntü Aktarımıyla Duruşma Yapılmasının Olması Gereken Sınırları', (November-December 2021) 16 (205) Bahçeşehir Üniversitesi Hukuk Fakültesi Dergisi 1463.

10 It is stated in the doctrine that this provision shall be deemed as contrary to the Turkish Constitution as one can not be forced to waive his/her right to a fair trial. FG Taner and A Yıldırım, 'Suç İsnadına veya Medeni Hak ve Yükümlülüklere İlişkin Uyuşmazlıklarda Duruşmaya Video Konferans Yöntemiyle Uzaktan Katılma' (2021) 70 (1) Ankara Üniversitesi Hukuk Fakültesi Dergisi 284.

Based on this new provision, the Regulation on Hearings Via Sound and Video Transmission in Civil Procedure[11] entered into force on June 30, 2021[12]. The Regulation defines online hearings as "e-hearing"[13]. E-hearing system is saved, integrated with, and protected by the UYAP system which is the information system established to conduct justice services in an electronic platform. According to Article 7 of the Regulation, one of the parties may request to attend hearings or take other procedural actions via the e-hearing system at least two working days before the hearing. One of the parties may also request that a witness or expert be heard online. According to Article 9/1, the court shall decide on the request for e-hearing at least one working day before the hearing. The Court may deny the request if it is not timely made or if it is made with bad faith to delay the proceedings (Article 9/2). Article 9/3 of the Regulation provides that if it will be burdensome for a party, witness, expert, or other related persons to attend a hearing in person due to his/her illness, age, or disability, e-hearing shall be decided upon his/her request. According to Article 10/3, in the cases in which the parties are not free to dispose of, the court shall first hear the parties via the e-hearing system if the party resides outside the jurisdiction of the court and cannot personally attend the hearing.

According to Article 11 of the Regulation, parties and their attorneys may attend an e-hearing from the office of the attorney, special rooms dedicated to e-hearings by the bar associations or courts. If the party is interrogated or takes an oath, he/she shall attend the e-hearing from the rooms dedicated to this purpose by the courts or prisons. The same applies to witnesses or experts. However, if the party, witness, or expert is attending the e-hearing because of his/her illness, age, or disability, he/she may attend from his/her residence or institution. If the party attending via the e-hearing system makes a proposal concerning waiver, acceptance, or amicable settlement, the court shall settle a new hearing date to which the party will personally attend and repeat his/her proposal (Article 13/4). Article 12/4 provides that the verification of the identity of those who attend an e-hearing due to their illness, age, or disability is performed via the use of a secure electronic signature or mobile signature[14].

11 OG. 30.06.2021/31527.

12 Due to infrastructural deficiencies, the e-hearings could not be held immediately upon entry into force of the Regulation. Gökçe Varol Karaosmanoğlu, 'Ses ve Görüntü Nakli Yoluyla Duruşma Yapılmasına İlişkin Olarak 7251 Sayılı Kanunla Yapılan Değişikliklerin Doğrudanlık İlkesi Kapsamında Değerlendirilmesi' (2022) 8 (1) Anadolu Üniversitesi Hukuk Fakültesi Dergisi 76. However, according to the Turkish Union of Bar Associations, by November 2021, 1400 civil courts of first instance in all cities of Turkey started holding e-hearings. https://www.barobirlik.org.tr/Haberler/e-durusma-bugun-itibariyle-81-ilde-basladi-82051.

13 The same concept is referred to with different names in criminal and civil procedures. This variation is criticized in the doctrine. Same authors also believe that neither SEGBIS nor e-hearing are appropriate terminology. "Attendance to a hearing from abroad via videoconference" would be a better statement of the concept and in line with comparative law. Taner and Yıldırım (n 10) 232.

14 Ceyda Süral and Ekin Ömeroğlu, 'Protection of Persons with Disabilities in Turkish Law' (2022) 17 Actualidad Jurídica Iberoamericana 353-354.

It must be noted that, although the name e-hearing resembles a situation where all parties of the hearing are attending the hearing via an electronic platform, e-hearing refers to the cases where one of the parties or witnesses or experts attend the hearing via video conference whereas the other relevant parties are present in the courtroom. There is no option for the judges to attend hearings via video conference; they and other court officials always have to be present at courtroom[15].

C. The Relevance of Online Hearings with the Right to a Fair Trial

The key case where the ECHR evaluated the relevance of online hearings with the right to a fair trial is the case of *Marcello Viola v. Italy*[16]. In this case, ECHR stated that "*Although the defendant's participation in the proceedings by videoconference is not as such contrary to the Convention, it is incumbent on the Court to ensure that recourse to this measure in any given case serves a legitimate aim and that the arrangements for the giving of evidence are compatible with the requirements of respect for due process, as laid down in Article 6 of the Convention*." In this case, the applicant whose personal participation in a hearing was restricted had been accused of serious crimes related to the mafia's activities. The ECHR opined that the transfer of such a prisoner entails stringent security measures and a risk of absconding or attacks. It could also provide the applicant with an opportunity to contact his former criminal organizations. Furthermore, mafia members may, even by their mere presence in the courtroom, exercise undue pressure on other parties in the proceedings, the victims, and secret witnesses. Therefore, the ECHR considered that the applicant's participation in the hearings by video conference pursued legitimate aims under the Convention, namely, prevention of disorder, prevention of crime, protection of witnesses and victims of offenses in respect of their rights to life, freedom, and security.

In the case of *Yevdokimov and Others v. Russia*[17], the ECHR reiterated that "*Article 6 of the Convention does not guarantee the right to personal presence before a civil court but enshrines a more general right to present one's case effectively before the court and to enjoy equality of arms with the opposing side. ... The Court should establish whether the applicant, a party to the civil proceedings, had been given a reasonable opportunity to have knowledge of and comment on the observations made or evidence adduced by the other party and to present his case under conditions that did not place him at a substantial disadvantage vis-à-vis his opponent*". Therefore, in deciding whether personal presence is necessary, "*The Court must first examine*

15 Kıyak, (n 9) 1467.

16 Application no. 45106/04, 05.10.2006, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-77246%22]}.

17 Applications nos. 27236/05, 44223/05, 53304/07, 40232/11, 60052/11, 76438/11, 14919/12, 19929/12, 42389/12, 57043/12 and 67481/12, 16.05.2016, *https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-160620%22]}*

the manner in which the domestic courts assessed the question whether the nature of the dispute required the applicants' personal presence. Secondly, it must determine whether the domestic courts put in place any procedural arrangements aiming at guaranteeing their effective participation in the proceedings."

The Court has held in different decisions, that the appearances by video-link are as such not necessarily problematic, as long as this measure serves a legitimate aim and that the arrangements are compatible with the requirement for due process (see, for example, *Dijkhuizen v. the Netherlands*, no. 61591/16, § 53, 8 June 2021; *Bivolaru v. Romania (no. 2)*, no. 66580/12, § 138, 2 October 2018); *Ichetovkina and Others v. Russia*, nos. 12584/05 and 5 others, § 37, 4 July 2017; *Yevdokimov and Others v. Russia*, nos. 27236/05 and 10 others, §§ 41-43, 16 February 2016; and *Marcello Viola v. Italy*, no. 45106/04, §§ 67 and 73-74, ECHR 2006XI (extracts)).

In light of the relevant decisions of the ECHR, the requirements that are necessary for restricting personal presence in the hearings may be listed as follows: (i) The restriction shall have a legal base. In other words, online participation shall be provided by the domestic law of the relevant jurisdiction. (ii) The restriction shall have a legitimate aim. (iii) The restriction shall be proportionate. The right of defense mustn't be completely demolished. The relevant party shall have appropriate means to present his case and defenses. It is also important that the party who attends via video conference can see and hear what others in the courtroom say and that he/she is not in a very disadvantageous position due to technical problems[18].

D. Turkish Constitutional Court Decisions Concerning Online Hearings

The relevance of online hearings to the right of a fair trial was first evaluated by the Turkish Constitutional Court in its decision rendered as a result of the application of Emrah Yayla[19], who is imprisoned and who had initiated proceedings against prison officials claiming that their actions constitute torture. Emrah Yayla believed that prison officials restricted the prisoners' right to stay outside for fresh air by their arbitrary behaviors; so, one day when he was requested to go inside, he resisted doing so and shouted slogans. He was condemned to stay in an isolated cell for 5 months by the Disciplinary Board. Emrah Yayla opposed this penalty before the Judge of Execution. The judge did not allow Mr. Yayla to be taken to the court in person but decided to hear him via SEGBIS from the prison. Mr. Yayla refused to defend himself via SEGBIS and applied to the Criminal Court of First Instance against the decision of the Judge. The Criminal Court did not annul the Judge's decision. Emrah Yayla applied to the Constitutional Court claiming that his right to a fair trial was infringed because he was deprived of speaking before the judge or asking direct questions

18 Taner and Yıldırım (n 10) 251-255.

19 Turkish Constitutional Court, General Assembly, B. 2017/38732, T. 6.2.2020. Lexpera Caselaw Database.

to the witnesses. The Constitutional Court underlined that the right to a fair trial is guaranteed by Article 36 of the Turkish Constitution; therefore, it can only be limited by law and with a legitimate purpose. The legal ground is found in Article 196/4 of the Criminal Procedure Law where it is prescribed that the judge may decide to hear a defendant, residing in Turkey, by using technology that permits video and voice transmission if the circumstances require so.

On the other hand, it is also provided in Article 141 of the Constitution that the courts shall resolve cases within the shortest time possible using the least sources. Doing so, however, may become harder when the caseload of the courts increases; thus, they may need to resort to alternative methods to efficiently meet the requirements of this constitutional rule. Taking into consideration the need to expedite the proceedings and the burden of transferring prisoners to the court, the interference with the right to attend the hearing in person may be in line with the law and based on a legitimate purpose. The Constitutional Court also stated that a party does not necessarily have to attend a hearing in person especially if there are not any issues concerning the genuineness of the parties or witnesses or any other facts that require their physical presence, and the parties are given the opportunity of making their claims and defenses in writing. Nevertheless, the courts shall set forth the substantial and relevant grounds for the nonexistence of the necessity of the personal presence of the parties and the necessity of the use of SEGBIS. Therefore, the court shall explain why attendance to the hearings via SEGBIS is sufficient despite the demand of an applicant's presence and what the conditions that make personal presence impossible or burdensome.

In the case of *Emrah Yayla*, the Constitutional Court decided that the right to fair trial is infringed because the Judge of Execution only relied on the fact that the use of SEGBIS *per se* does not constitute infringement; but did not take into consideration that Mr. Yayla is making claims against the prison officials with whose presence he does not want to testify. Furthermore, the transfer of Mr. Yayla from the prison to the court is not burdensome as Kırıkkale is a small village and Mr. Yayla is in Kırıkkale prison which is not far from the Judge of Execution also located in Kırıkkale.

In its simultaneous case of *Şehrivan Çoban*[20], the Constitutional Court also was not satisfied by the mere statement of security concerns by the criminal court of first instance as a ground for denying the right of personal presence in the hearing. Şehrivan Çoban was accused of being a member of a terrorist organization and she was imprisoned in Van. In the days that coincided with the hearing, there was a risk of protests and demonstrations in Van. So, her life and public security could be at risk if she is transferred from Van to Ankara where the criminal court is located. The Constitutional Court decided that the right to a fair trial is infringed taking into

20 Turkish Constitutional Court, General Assembly, B. 2017/22672, T. 6.2.2020. Lexpera Caselaw Database.

consideration that the criminal court ignored the applicant's demand to personally participate in the hearing; continued the hearing without her presence; did not consider postponement of the hearing or other measures to enable her presence; and that a final decision was given at the hearing.

The Constitutional Court underlined the requirement that the courts shall set forth valid grounds for declining the demand of personal presence by the applicant in its subsequent decisions[21]. The mere statement that SEGBIS is prescribed by legislation without evaluating the circumstances of the case can not constitute a valid ground for declining personal presence and therefore causes infringement of the right to a fair trial[22].

In the case of *Ahmet Yalçınkaya*[23], the applicant himself was required to attend the hearings via SEGBIS, and upon finalization of the sentence of the criminal court finding the applicant guilty of being a member of a terrorist organization, he applied to the Constitutional Court. The Court decided that the right to a fair trial is not infringed as it was the applicant's demand not to be present at the hearings and one can waive the guarantees of the right to a fair trial by his own will[24]. Not only by making a clear demand, but also by not opposing attending the hearings via SEGBIS, one is deemed to have waived his right to be personally present at the hearings, and the right to a fair trial is not infringed in such a case either[25].

As seen, all Constitutional Court decisions are related to the use of the SEGBIS system in the criminal procedure. Unfortunately, there are yet no Turkish high court decisions concerning the e-hearing system and its compliance with the right to a fair trial. Especially in cases that are closely related to the character and lifestyle of the parties such as divorce, affiliation of and personal contact with a child, the right to attend personally to the hearings may be more delicate. In such cases, the court shall carefully evaluate whether there is a demand of the party for e-hearing, and the grounds for deciding an e-hearing shall be substantial and valid[26]. It is noteworthy that, according to the Regulation on e-hearings, these more delicate cases are the ones that the court may on its motion decide to use e-hearing.

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21 Case of Ahmet Aydın, Constitutional Court, 2nd Chamber, B.2019/41424, T.2.2.2022; Case of Cihan Sönmez, Constitutional Court, 2nd Chamber, B.2018/1347, T.2.3.2022; Case of Ali Osman Özpala, Constitutional Court, 2nd Chamber, B.2020/8108, T.14.4.2022; Case of Gazi Tekdemir, Constitutional Court, 2nd Chamber, B.2020/13836, T.14.4.2022; Case of Cebrail Sonkur, Constitutional Court, 2nd Chamber, B.2020/7708, T.14.4.2022; Case of Fatih Abdullah Oyar, Constitutional Court, 1st Chamber, B.2020/6573, T.21.9.2022. Lexpera Caselaw Database.

22 Case of Abdulkahar Aksoy and others, Constitutional Court, 2nd Chamber, B.2016/25089, T.10.6.2020. Lexpera Caselaw Database.

23 Turkish Constitutional Court, 1st Chamber, B.2020/19952, T.3.2.2022. Lexpera Caselaw Database.

24 One can waive the guarantees of right to a fair trial by his own will if the waiver is express, the result of the waiver is clearly foreseeable by the relevant party, minimum procedural guarantees are granted, and there is no higher public interest to prevent waiver. Case of Nurettin Balta, Constitutional Court, 2nd Chamber, B.2016/10023, T.28.12.2021. Lexpera Caselaw Daatbase.

25 Case of Ansar Onat, Constitutional Court, 2nd Chamber, B.2019/14515, T.15.6.2022; Case of Ökkeş Köksal, Constitutional Court, 1st Chamber. B.2020/25562, T.21.9.2022. Lexpera Caselaw Database.

26 Taner and Yıldırım (n 10) 284.

Furthermore, there are other concerns stated in the doctrine. For example, if the connection of the party is repeatedly interrupted, he/she will not be on an equal footing as the other party to the dispute[27].

III. Online Hearings in Arbitration

A. Arbitration in Turkey

In this part, firstly, the legislation regulating arbitration in Turkish law and the arbitration institutions commonly used in Turkey will be discussed. Then, the rules governing online arbitration hearings, which came to the agenda with COVID-19, and the advantages and problems that online hearings may bring will be discussed. Finally, the implications of the problems that may arise in the procedures for the recognition and enforcement of arbitral awards will be examined in detail.

1. Legislative Framework

International and domestic arbitrations are governed by different laws. The International Arbitration Law ("IAL")[28] applies to arbitrations of an international nature that are seated in Turkey or where its application is agreed to by the parties or arbitrators. Domestic arbitration is subject to the Code of Civil Procedure ("CCP")[29], which only applies to arbitrations seated in Turkey with no international element.[30]

Both laws are essentially based on the UNCITRAL Model Law on International Commercial Arbitration ("UNCITRAL Model Law")[31]. Where the provisions of the IAL differ from the UNCITRAL Model Law, Swiss International Arbitration Law[32] has been used. In other words, regulations regarding arbitration in Turkish law are in line with modern international arbitration laws and with the needs of international arbitration practice and practice. [33]

The provisions of the IAL are based on the principle of party autonomy. The mandatory arbitration provisions include the right to a fair trial and the principle of equality of the parties. According to IAL Art.8 B: "*The parties shall have equal rights and competencies in the arbitral proceedings. The parties shall be given an opportunity to present their respective claims and defenses."*

27 Kıyak (n 9) 1484.

28 OG, 05.07.2001/24453.

29 OG, 04.02.2011/27836.

30 Ziya Akıncı, *Milletlerarası Tahkim* (6th Edn, Vedat 2021) 42.

31 For the UNCITRAL Model Law on International Commercial Arbitration see https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf

32 For the Swiss International Arbitration Law see https://www.swissarbitration.org/wp-content/uploads/2021/05/20210129-Chapter-12-PILA_Translation_English.pdf

33 Akıncı (n 30) 70.

2. Arbitral Institutions in Turkey

Turkish parties most commonly refer to the International Chamber of Commerce (the "ICC") arbitration[34]. The Swiss Arbitration Centre (formerly the Swiss Chambers' Arbitration Institution), the Stockholm Chamber of Commerce (the "SCC"), and the London Court of International Arbitration (the "LCIA") are also frequently used institutions.

Within Turkey, the Istanbul Arbitration Center ("ISTAC") has become a prominent institution over the past few years. The ISTAC also contributed to the increase of arbitration awareness in Turkey. The ISTAC is a neutral institution established by law ("Istanbul Arbitration Center Law")[35] in 2015, as part of a wider project of the Istanbul Finance Centre ("IFC"). The ISTAC has its own set of arbitration rules, the ISTAC Arbitration and Mediation Rules[36], which entered into force on 26 October 2016.

According to ISTAC Arbitration Rules, unless otherwise agreed by the parties, the seat of arbitration shall be Istanbul (Art. 23/1) and the parties can determine the language of the arbitration (Art. 24/1). According to Art. 24/II, "*In the absence of such agreement between the Parties, the Sole Arbitrator or Arbitral Tribunal shall determine the language of the arbitration considering all circumstances and conditions.*"

According to Art. 13, "*The parties are free to agree on the number of arbitrators. In cases where the parties agree on more than one arbitrator, the number of arbitrators must be an odd number*. *In cases where the parties have not agreed on the number of arbitrators, the Board of Arbitration shall … decide that the dispute be resolved by either a sole arbitrator or by an arbitral tribunal consisting of three arbitrators*."

As for applicable law, according to Art. 25/1, "*The Sole Arbitrator or Arbitral Tribunal shall make their decision in accordance with the rules of law chosen by the parties as applicable to the merits of the dispute. In the absence of such agreement by the Parties, the Sole Arbitrator or Arbitral Tribunal shall apply the rules of law that is deemed to be appropriate.*"

The Union of Chambers and Commodity Exchanges of Turkey[37], situated in Ankara, also serves as an arbitral institution and administers the resolution of commercial disputes. The Istanbul Chamber of Commerce Arbitration Centre ("ITOTAM")[38], is

34 For the website of the Istanbul Chamber of Commerce see https://www.ito.org.tr/en

35 OG, 20.11.2014/29190.

36 For the ISTAC Arbitration and Mediation Rules, see https://istac.org.tr/wp-content/uploads/2023/01/istac_tahkim_kurallari_v3_tr-3.pdf

37 For the website of the Union of Chambers and Commodity Exchanges of Turkey, see https://www.tobb.org.tr/Sayfalar/Eng/AnaSayfa.php

38 For the website of the Istanbul Chamber of Commerce, see https://www.ito.org.tr/en

another arbitration institution; however, it can solely be activated when at least one of the parties is a member of the Chamber.

Regardless of the pandemic and online hearings, there was no obligation to hold a hearing even in the pre-COVID-19 period. The arbitration rules provide that a hearing may be held upon the request of one of the parties or when the arbitrator or the arbitral tribunal deems it necessary, although the parties do not request it. In line with the IAL Art. 11, the CCP Art. 429, the UNCITRAL Model Law Art. 24, and the ISTAC Arbitration Rules Art. 30, a hearing is not mandatory. A party, however, may request a hearing to be held, in which case the arbitral tribunal must hold a hearing unless there is an agreement to the contrary (IAL Art. 11/A/1; CCP Art. 429/1). The ISTAC Arbitration Rules give the right to decide whether to hold a hearing to the arbitral tribunal. If a party fails to attend a hearing, the arbitral tribunal may nevertheless proceed and render an award (IAL Art. 11/C/4; CCP Art. 430/1/c).

B. Online Hearings in Arbitration

1. General

In international commercial arbitration, the parties are usually able to present their claims and defenses in face-to-face hearings during the oral proceedings. Until the COVID-19 pandemic, arbitration rules and practices were based on face-to-face hearings. Following the World Health Organization's ("WHO") declaration of a pandemic, arbitral institutions have also taken several measures to maintain proceedings during the pandemic. Arbitration institutions have started to amend their rules and prepare guidelines to enable online hearings, thus encouraging video conferencing.

The most important concepts when it comes to online hearings are fairness and efficiency. The International Council for Online Dispute Resolution ("ICODR") has proposed additional standards[39] that online dispute processes should be accessible, accountable, competent, confidential, equitable, fair, impartial, neutral, protect all relevant laws, secure and transparent, and each of which can be considered a subset of fairness or efficiency.[40]

2. Online Hearing Rules

Upon the announcement of the COVID-19 pandemic, arbitration institutions provided certain guidelines related to the procedures and principles to be applied in online hearings. Based on these principles, the participants of the cases have the opportunity to hold hearings through teleconference or video conference methods.

39 For the International Council for Online Dispute Resolution Standards, see https://icodr.org/standards/

40 Jeffrey M. Waincymer, 'Online Arbitration' (2020) 9(1) Indian Journal Arbitration Law 1, 3.

The ICC promulgated an ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic on April 9, 2020,[41]. Guidelines are advisory and their use is at the discretion of the parties. According to Article 21 of the ICC Guidelines, if the parties agree or the arbitral tribunal decides to hold an online hearing, the parties and the arbitral tribunal will make some planning and the Secretariat is available to assist. Article 22 provides that if the arbitral tribunal decides to proceed with an online hearing without the agreement of the parties or despite a party's objection, it must justify its decision. The tribunal should do so by the principles of the right to be heard and the principle of equality. Article 28 of the Guidelines sets out procedural matters. Accordingly, to ensure that the parties are treated equally and that each party is allowed to present its case in an online hearing, the tribunal should take into account different time zones, the total number of participants, the location of participants, remote participants, the use of a real-time transcript or other forms of recording, the use of translators, the use of visual evidence, including screen sharing in determining the hearing dates, start and end times, and the length of the hearing day.

In addition, Article 26 of the ICC Arbitration Rules[42] was amended in 2021 to regulate online hearings and authorizes the arbitral tribunal to decide, after consulting the parties as appropriate, whether the hearings should be held face-to-face, by video conference, by telephone or by other means of communication appropriate for the purpose.

Similarly, after the global COVID-19 outbreak, ISTAC has introduced rules and procedures for conducting online hearings, ISTAC Online Hearing Rules and Procedures[43], - hearings via telephone or video conference - in arbitration proceedings conducted under the ISTAC Arbitration Rules. The online hearing rules and procedures consist of a total of 10 articles very simply addressing the main issues involved in conducting online hearings to serve as a guideline to parties and arbitrators. Under Art. 1/2 of these Rules, "*At the request of any party, or upon its own initiative, the Sole Arbitrator or the Arbitral Tribunal, may designate rules and procedures other than those provided herein."* According to Art. 2, "*At the request of any party or in cases where the Sole Arbitrator or the Arbitral Tribunal deems appropriate, hearings or meetings may be conducted through video conference or teleconference."* Therefore, the Article authorizes the arbitral tribunal to hold an online hearing if "*the sole Arbitrator or the Arbitral Tribunal deems appropriate*", even in the absence of agreement between the parties.

41 For the ICC COVID-19 Guidance (Guidance Note Possible Measures Mitigating Effects COVID-19), see https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/icc-guidance-note-on-possible-measures-aimed-at-mitigating-the-effects-of-the-covid-19-pandemic/

42 For the ICC Arbitration Rules, see https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/

43 For the ISTAC Online Hearing Rules and Procedures, see https://istac.org.tr/en/dispute-resolution/arbitration/istac-online-hearing-rules-and-procedures/

The technical infrastructure and preparation shall be completed before the conduct of the online hearing. Such include technical details such as the software to be used, dial-in information, usernames, and passwords to participate in the online hearing, as well as taking necessary measures to maintain confidentiality and security of the hearing. ISTAC Secretariat offers its technical support to parties and arbitrators in these respects. Parties shall provide a list of participants to the arbitrator or the arbitral tribunal before the online hearing; no additional third party shall be allowed to participate in the online hearing. During the online hearing, only one participant shall be allowed to speak at one time and the others shall mute their microphones to maintain audio and video quality. Parties may submit documents electronically during the online hearing upon approval of the arbitrator or the arbitral tribunal. According to Article 8 of the Rules, witnesses and experts may also participate in the online hearing provided that they are situated in front of their computers to allow the rest of the participants to see their faces. Witnesses and experts may be questioned based on documents shown to them electronically upon approval of the arbitrator or the arbitral tribunal. Interpreters may also be present during the online hearing either separately or together with the person requiring interpretation. The arbitrator or the arbitral tribunal may, upon informing the parties, decide to record the online hearing to be circulated after the hearing. The arbitrator or the arbitral tribunal may also, at the expense of the parties, decide to have the audio recording turned into written minutes of the hearing. It is forbidden to make a private recording of any part of the online hearing without the permission of the arbitrator or arbitral tribunal.

ICSID published a brief guideline regarding online hearings on its website on March 24, 2020. ICSID's videoconferencing platform does not require specialized hardware or software, so participants can participate from anywhere.[44] According to the other guide regarding online hearings of ICSID, "Virtual Hearing", all ICSID online hearings use end-to-end encryption, and a technical expert and court secretary are present throughout the hearing to ensure the smooth running of the hearing. ICSID also offers a range of options for simultaneous interpretation in multiple languages.[45]

Online hearings are also possible in ad hoc arbitration. Since there is no regulatory body in ad hoc arbitration, the process is governed by the law of the seat of arbitration, unless the parties have agreed otherwise, and the arbitral tribunal may amend the procedural rules of the arbitration.

44 For "A Brief Guide to Online Hearings at ICSID", see https://icsid.worldbank.org/news-and-events/news-releases/brief-guide-online-hearings-icsid

45 For "Virtual Hearings", see https://icsid.worldbank.org/news-and-events/news-releases/brief-guide-online-hearings-icsid

3. Advantages of Online Hearings

The main advantage of online hearing is it eliminates barriers of location and distance. With the removal of these barriers, many experts, regardless of their location, can participate in the hearings, which allows for a wide range of professional knowledge to be accessed. Another advantage of online hearings is the simplicity and convenience of the process.[46] In this context, the process also saves a lot of time and reduces costs. For example, there is no need to find and rent any place for the hearings. In addition, there is no need for printed documents, it is easier for the parties to find relevant documents and information they need which will save time. Personalized links and passwords also prevent unauthorized persons from attending hearings. Audio and video recording of hearings is also an advantage in terms of the transcripts that will be sent to the parties so that they can review the process. All of these increase the speed and efficiency of the arbitration process.

4. Disadvantages of Online Hearings

Information security is important in online hearings and parties may be concerned about the confidentiality and security of electronic documents, witness and expert testimony, and the defense. In March 2020, the Seoul Protocol on Videoconferencing in International Arbitration (Seoul Protocol) was published, which provides Guidelines to suggest that parties may provide teleconferencing or alternative video/audio methods and to eliminate technical and legal risks associated with the planning and conduct of videoconferencing.[47] This Protocol is a short document containing regulations on the questioning of witnesses, observers, presentation of documents, technical requirements, translation, recording, etc. Overall, although there are some disadvantages such as confidentiality, connectivity problems, difficulties in scheduling hearings due to the presence of arbitrators, lawyers, clients, experts, or witnesses from different locations, how cross-examination can be carried out, good hearing preparation, preparing cyber protocols or taking necessary precautions within the framework of confidentiality, using the most appropriate video conferencing platforms to avoid technical problems will eliminate these disadvantages and ensure that arbitration proceedings can be concluded quickly and at less cost without delay.[48]

46 AE Manav Özdemir and B Vural Çelenk, 'Virtual Hearings in Arbitration and Evaluation of Virtual Hearings in the Context of the Right to be Heard and Principle of Equal Treatment' (2022) 42 (1) Public and Private International Law Bulletin 224-225.

47 For the Seoul Protocol on Video Conferencing in International Arbitration, see http://www.sidrc.org/static_root/userUpload/data/%5BFINAL%5D%20Seoul%20Protocol%20on%20Video%20Conference%20in%20International%20Arbitration.pdf

48 Manav Özdemir and Vural Çelenk (n 47) 24.

5. Online Hearings in the Light of the Right to be Heard and Principle of Equality of the Parties

Whether the arbitration proceedings are conducted in ad hoc or institutional arbitration, the arbitrator, or the arbitral tribunal, as a rule, has the right of discretion in matters of arbitration procedure. The arbitral tribunal's discretion is limited by the principle of equality of the parties and the right to be heard.[49] Article 18 of the UNCITRAL Model Law and Article 8, Paragraph B of the IAL refer to the parties' "assertion of their claims and defenses" and both articles regulate the parties' equal exercise of their rights of claim and defense in arbitration proceedings. Under these provisions, the principle of equality of the parties undoubtedly extends to virtually every stage of the arbitration process. It is possible that the party challenging the arbitrator's or tribunal's decision to hold an online hearing may seek to dismiss the arbitral tribunal while the proceedings are pending or if the relevant proceedings are unfavorable to it, seek to set aside the award or to prevent its enforcement in a country where enforcement is sought. If the arbitration agreement stipulates that the hearings may be held online, the arbitral tribunal may enforce this provision in the agreement. If the parties have not agreed in the arbitration agreement that the hearing will be held online or face-to-face, if the claimant requests an online hearing in the request for arbitration and the respondent accepts this request in its response to the request for arbitration, the parties agreement on this issue will still be realized. If, contrary to the will of the parties, the arbitrators decide to hold an online hearing and insist on it, they must justify to the parties why the hearing should be online rather than physical. In ISTAC practice, Article 2 of the ISTAC Online Hearing Rules and Procedures, taken together with Article 7, provides that the arbitrator must stop the hearing if the parties clearly state that their right to be heard has been violated during the online hearing. Otherwise, the arbitral award rendered in such a case may be subject to a setting aside procedure, which will be discussed below. In practice, one of the reasons why parties tend to object to online hearings is that there is inequality between the parties due to the time zone difference between the locations of the parties, lawyers, arbitrators, witnesses, and experts. In the context of equality of the parties, the time difference should be considered when determining the time of the hearing, and the time interval that is most convenient for both parties should be determined.[50]

The decision of the Austrian Supreme Court is important as it is the first known court decision in continental Europe to consider online hearings and fair trial guarantees in arbitration together. On July 23, 2020, the Austrian Supreme Court (Oberster Gerichtshof, OGH), in a case concerning a motion to dismiss an arbitral tribunal due to online hearings, considered whether the conduct of arbitration proceedings through online hearings, despite the party's objection, violates the right to a fair trial

49 Waincymer (n 41) 4-5.

50 Waincymer (n 41) 17

(Case No. 18 ONc 3/20s)[51]. The Court emphasized that considering the particularities of the concrete case, holding a hearing solely online would not be considered a direct violation of the right to be heard, and may even serve the right to be heard under certain circumstances.

The respondent, who lives in Vienna, requested the dismissal of the arbitral tribunal in the arbitration proceedings held at the Vienna International Arbitration Center (VIAC) because the arbitral tribunal had decided to hold the evidentiary hearing online. After the VIAC rejected this request, the case was brought before the OGH. The Court rejected the request because the fact that the arbitral tribunal decided to hold an online hearing against the party's consent was not a procedural violation of sufficient gravity to warrant the recusal of the arbitrator. At the same time, the Court emphasized that under Austrian law, the arbitral tribunal has broad discretion over the procedure and organization of the arbitration. On the merits, the OGH emphasized that fair trial guarantees must be observed by the arbitral tribunal at all stages of the proceedings and, in particular, that equal opportunities for both parties to participate in the hearings are part of this right. The Court held that the fact that the arbitral tribunal did not postpone the hearing under the existing COVID-19 measures to hold a physical hearing and decided to hold it online did not violate the principle of equality of the parties. The Court also rejected the claimant's argument that they had not been notified of the hearing at the appropriate time.

In the Austrian Supreme Court decision, it is emphasized that the interest in online hearings in both arbitration and court proceedings increased all over the world, especially during the pandemic period. In the decision, it was also stated by the court that online hearings contributed to the realization of the proceedings. In its decision, the Court stated that online hearings serve the right to access justice and the right to be heard in terms of fair trial guarantees, especially as they prevent the suspension of the proceedings. In the case at hand, the court rejected the parties' request for the dismissal of the arbitral tribunal because the parties could not prove their claims in terms of the principle of equality of the parties in terms of fair trial rights, especially the principle of equality of the parties.

6. Impacts of Online Hearings in Turkey

a. Setting Aside Procedure of the Arbitral Award

The first recourse against an arbitral award rendered through an arbitration might be the setting aside of the arbitral award. Article 15 of the IAL provides a setting aside procedure. According to the Article, set aside action against an arbitral award

51 For the original German version of the Austrian Supreme Court Decision, see ttps://www.ris.bka.gv.at/Dokumente/Justiz/JJT_20200723_OGH0002_018ONC00003_20S0000_000/JJT_20200723_OGH0002_018ONC00003_20S0000_000.pdf

can be filed before the competent regional appellate court within 30 days from the notification of the award or any revision of/interpretation on/addition to the award by the arbitral tribunal. the competent court for a setting aside action is the civil court of first instance with jurisdiction. Article 15 (A) codifies the same grounds as provided in Article 34 of the UNCITRAL Model Law. The grounds for setting aside listed in Article 15 are exhaustive.[52]

If at least one party objects to the online conduct of the hearing, the award may be set aside on the two grounds listed in Article 15. First, Article 15 (A) 1/g provides, that an arbitral award may be set aside based on the fact that the parties to the arbitral proceedings were not treated equally. The principle of equality of the parties also refers to the equal treatment of the parties in terms of procedural law during the proceedings. It should be considered in terms of the parties' ability to assert their claims and defenses.[53]

Second, according to Article 15 (A) 2/b, an arbitral award may be set aside if the award conflicts with public policy. Since there is no precise definition of public order and it changes according to time and place, it will be necessary to recognize the judges' right of discretion. For this reason, it would be appropriate for the judges to decide in line with the understanding of public order in international arbitration rather than the public order in domestic law. The contravention of public order may be raised in the decision on the merits of the dispute or about the arbitration procedure. The cases of violation of public policy that may be raised about the merits of the dispute will be extremely limited. In particular, provisions that eliminate the right of defense, even if agreed by the parties or by the rules applicable to the arbitration procedure, may constitute a violation of public policy.[54] Arbitrability and public order issues are considered *ex officio* by Turkish courts, whereas the other grounds should be proven by the party requesting the setting aside.

An example of a situation where an arbitral award may be set aside based on Article 15 as a result of an online arbitration hearing is where one of the parties objects to the arbitral tribunal because it considers itself to be in a disadvantaged position, particularly concerning the hearing of witnesses. The objection is rejected, and the hearing continues to be conducted online. If one party is heard physically by the arbitral tribunal while the other party is heard online against its consent, the arbitral award may also be subject to challenge. By the principle of equality of the parties, it would be appropriate for the arbitral tribunal to hear both parties in the same manner[55]. Yet, it appears that each case might be considered according to its own merits.

52 Akıncı (n 30) 401.

53 Ibid 501.

54 Ibid, 273.

55 Manav Özdemir and Vural Çelenk (n 47) 33-39; Aysel Çelikel and Bahadır Erdem, *Milletlerarası Özel Hukuk,* (2021) 844.

This issue is also closely related to the right to a fair trial. Although there is a clear provision as a ground for setting aside in the CCP, which is explicitly regulated as a violation of the right to a fair trial, such violation is not explicitly mentioned among the grounds for setting aside in the IAL. The fact that it is not explicitly mentioned does not mean that this right is not protected within the framework of the IAL and cannot be a ground for setting aside an arbitral award. As for the legal basis for protecting the right to a fair trial, there are various opinions on the doctrine. First of all, Article 8 of the IAL, titled "Determination of Procedural Rules, Equality and Representation of the Parties," states that parties must be allowed to present their claims and defenses. This regulation is a mandatory rule. In doctrine, some authors consider compliance with the right to a fair trial in arbitration proceedings as a mandatory component of compliance with the principle of equality of the parties, which is envisaged as a ground for setting aside in Article 15 of the IAL.[56] Moreover, it is also stated in the doctrine that the guarantees of a fair trial provided in the European Convention on Human Rights (ECHR)[57] can be used as a basis for setting aside an arbitral award on the grounds of public policy to the extent that they are compatible with arbitration.[58]

b. Recognition and Enforcement of Arbitral Awards

The recognition and enforcement of arbitral awards are regulated under the Turkish Private International Law and International Civil Procedure Code. ("PIL Code").[59] However, by Article 1/2 of the PIL Code, if there is an international treaty on this matter, it shall be applied primarily. Turkey, like most States today, is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention")[60] since its entrance into force on 25 September 1992. As of January 2023, the convention has 172 state parties. Therefore, in most of the cases New York Convention will be applied. It is important to note that provisions on recognition of arbitral awards in the PIL Code are implemented from the New York Convention, therefore, the recognition conditions listed in Article 62 of the PIL Code comply with provisions of the New York Convention.[61]

In line with Article I/3, Turkey has made two common reservations about the New York Convention[62], which have little impact on the enforceability of nearly all

56 Turgut Kalpsüz, *Türkiye'de Milletlerarası Tahkim* (2nd edn, Yetkin 2010) 140-142; Vahit Doğan, *Milletlerarası Ticaret Hukuku* (1st edn, Savaş Yayınevi 2020) 1208.

57 For the European Convention on Human Rights, see https://www.echr.coe.int/documents/convention_eng.pdf

58 Hatice Özdemir Kocasakal, 'Avrupa İnsan Hakları Mahkemesi'nin Pecshtein Kararı Çerçevesinde CAS'ın Tarafsızlığı ve Bağımsızlığı', (2020) 40 (1) Public and Private International Law Bulletin 89-90; Manav Özdemir and Vural Çelenk (n 47) 33.

59 OG, 12.12.2007/26728.

60 For the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, see https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/new-york-convention-e.pdf

61 C Şanlı and E Esen and İ Ataman Figanmeşe, *Milletlerarası Özel Hukuk,* (9th edn, Beta 2021) 838.

62 For Turkey's reservations to the New York Convention, see https://uncitral.un.org/en/texts/arbitration/conventions/

awards. Turkey declared that it would apply the New York Convention only if the award was granted in a State that is a signatory to the New York Convention and has limited the applicability of the New York Convention to conflicts arising from relationships that are categorized as commercial under Turkish law. [63] However, since the number of states party to the New York Convention is now 172, it can be said that Turkey's reservation on reciprocity has lost its importance and effect.

Based on Article V 1 (b) of the New York Convention, enforcement of an arbitral award can be refused due to infringement of the right to be heard of the parties. The New York Convention explicitly mentions the right to be heard in this provision, stating that "The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or the arbitration proceedings or was otherwise unable to present his case; or." According to this provision, the burden of proof falls on the party making the claim. The right to a fair trial in this convention also covers the principle of equality of the parties in Article 8 of the ICC.[64] Article 62, paragraph 1 (ç) and (d) of the PIL Code regulates that failure to respect the right to proper notice constitutes an obstacle to enforcement. Therefore, if one of the parties has not been properly represented before the arbitrators and has not explicitly accepted the proceedings carried out later, and if the party against whom the arbitrator's decision is enforced has not been notified of the arbitrator's appointment or has been deprived of the opportunity to claim and defend, the court is regulated to reject the request for enforcement of the foreign arbitrator's decision.[65]

Both the New York Convention and the PIL Code have regulated the violation of public policy as one of the obstacles to the enforcement of an arbitral award. Article V, paragraph 2 (b) of the New York Convention and Article 62, paragraph 1 (b) of the PIL Code state that the enforcement of a foreign arbitral award may be refused if it is contrary to the public policy of the country where enforcement is sought. The violation of the right to a fair trial is closely related to the violation of public policy, but these two grounds are regulated separately in both regulations. Unlike the specific ground for refusal of the right to be heard explained above, this ground for refusal may be considered ex officio by the court.[66] In addition, the party requesting the refusal of enforcement on the grounds of the right to a fair trial in the enforcement case must have objected to the right to a fair trial before the arbitrator promptly. If the necessary objections were made before the arbitrator promptly, but this did not affect the merits of the award, only in this case enforcement may be challenged.[67]

foreign_arbitral_awards/status2

63 Akıncı (n 30) 527-528; Aysel Çelikel and Bahadır Erdem (n 31), 823.

64 Akıncı (n 30) 574.

65 Şanlı and Esen and Ataman Figanmeşe (n 62) 838; Mehmet Akif Gül, *New York Sözleşmesi Bağlamında Usuli Tenfiz Engelleri* (1st edn, Oniki Levha 2018), 33, 34.

66 Manav Özdemir and Vural Çelenk (n 47) 37. Çelikel and Erdem (n 39) 844.

67 Akıncı (n 30) 581.

Unlike the IAL, the principle of equality of the parties is not explicitly mentioned in either of the two legislations. Especially in the discussions considering the purpose of the New York Convention, it is accepted that this principle is a principle that is observed throughout the convention and even if it is not explicitly mentioned, it will be protected within the scope of the provisions mentioned above.[68]

IV. Conclusion

Although the use of online techniques is accepted and provided in Turkish civil and criminal procedure law, in light of the decisions of ECHR and the Turkish Constitutional Court and relevant doctrine that have been set forth above, it may be concluded that the judges in deciding to make use of these online technologies can not merely rely on the fact that the law permits the use of them. The courts shall make sure and demonstrate that denial of physical presence to one of the parties does not infringe his/her right to a fair trial and does not put him/her in a disadvantageous position compared to the other party in presenting his/her case.

To make conclusions concerning the enforcement of arbitral awards made within a procedure where online hearings were held, it must first be said that arbitral tribunals should act cautiously upon deciding to conduct arbitration hearings online, especially if one of the parties objects to the online hearing. Since arbitration is a dispute resolution method based on the will of the parties, there will be no concern unless both parties agree to the hearing being conducted online. The main objective of the arbitral tribunal is to render an award that will not be set aside and will be enforceable in the future. At this point, the arbitral tribunal needs to justify its decisions during the arbitration process, especially in cases where one of the parties objects. Therefore, when making decisions regarding the online hearing and the procedure, they must be justified. The holding of an online hearing does not in itself constitute a ground for setting aside or an obstacle to recognition and enforcement. The greatest risk of conducting hearings online is the possibility of violations of the parties' right to be heard and the principle of equality of the parties. In this case, the disadvantaged party will be able to challenge the award and eventually, this could lead to the setting aside of the award or the refusal of recognition and enforcement. Therefore, arbitral tribunals should evaluate every individual circumstance of the case and the parties; they should evaluate separately whether there is a violation of the principle of equality of the parties and the right to be heard. When the arbitral tribunal decides on having the hearing online it must set forth valid and substantial grounds for the use of an online hearing instead of a physical hearing. Overall, to overcome the challenges arbitral tribunals must act in line with the aforementioned Austrian Supreme Court decision,

68 Ferda Nur Güvenalp, *Milletlerarası Ticari Tahkimde İddia ve Savunma Hakkının İhlali* (1st edn, Oniki Levha 2018) 113; Manav Özdemir and Vural Çelenk (n 47) 38

guidelines of the prominent arbitral institutions, and provisions of the related laws and conventions. Under these conditions, we believe that the use of online hearings will not be an obstacle to the enforcement of arbitral awards under Turkish law.

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RESEARCH ARTICLE

Criminalisation of Sex Work: A Critical Approach to Criminalisation Theories from a Human Rights Perspective*

Başak Ekinci**

Abstract

Criminalisation is a popular legal approach to sex work. It adopts the view that sex work is harmful and wrong both for sex workers and the community. This argument seemingly coincides with fundamental principles of criminalisation, namely harm and wrong principles. However, I provide a new approach to criminalisation theories which introduces a real restriction on the state's authority to criminalise. In doing so, I first discuss that harm and wrong principles are only *defining* principles which determine the scope of behaviours that can be considered within the criminal law realm. On the other hand, the *restricting* principles, namely those of proportionality and prohibition of discrimination, determine the boundaries of the state's authority to criminalise the *defined* harmful wrongdoings. After I apply the defining principles to sex work, I investigate whether the restricting principles give countervailing reasons against criminalisation. The conclusion is that, unless it is proven to be contrary in a specific jurisdiction, sex work should not be criminalised because prima facie reasons cannot turn into all-things-considered reasons to justify criminalisation of sex work.

Keywords

Sex work, Criminalisation theory, Human rights, Prohibition of discrimination, Proportionality

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Introduction

Sex work (SW) has been suggested to be one of "the oldest professions" in the world.[1] However, the fact that it has existed for centuries does not imply that there has been a common understanding of how SW can be defined. Indeed, there are two opposite conceptualisations of SW. The most prevalent is that SW is a degrading and unacceptable activity, while the other and the less popular is that it is a common occupation which is socially understandable.[2]

The negative view of SW accepts that it is inherently oppressive and violent because it makes sex workers the victims of sexual exploitation.[3] According to this view, "abuse, coercion, and control" within the patriarchal sex industry constitute complete victimhood of sex workers.[4] The sexual exploitation of sex workers is even understood as "the worst form of slavery" which should never be seen as tolerable.[5] On the other hand, the other view argues that SW carries with it the free choice of workers to exercise sexual autonomy, and it should be seen as an ordinary occupation.[6] This approach admits that sexual labour can be exploited just "like other forms of work", and it mostly focuses on the human rights of sex workers as a solution to the harm that sex workers are generally exposed to.[7] Alongside these two opposite approaches to SW, some research studies argue that sex workers do not constitute a homogeneous group, and both "gendered victimisation" and "gendered survival strategy of sex workers as free agents" apply to the nature of SW.[8] The complexity of the issue in developing a common understanding is revealed by these fundamental approaches alone, notwithstanding the diversity of studies on SW that take different positions in explaining the activity.

The divergent conceptions are reflected in the different legal approaches to SW around the world. Despite the fact that each state has its own specific laws and regulations on SW, there are five main different legal approaches: Prohibitionism, abolitionism, neo-abolitionism, legalisation, and decriminalisation.[9] The prohibitionist approach seeks to directly or indirectly punish all forms of SW since it sees SW as an unacceptable degrading activity.[10] In this approach, any involvement in SW is sanctioned by criminal

1 See Lujo Bassermann, *The Oldest Profession: A History of Prostitution* (1st edn, Dorset Press 1994).

2 Teela Sanders, Maggie O'Neill and Jane Pitcher, *Prostitution: Sex Work, Policy and Politics* (SAGE 2009) at 3.

3 Ibid at 6

4 Ibid. 8.

5 Amihud Gilead, 'Philosophical Prostitution' (2010) 6 (1) Journal of Social Sciences 85, 92.

6 Sanders and others (n 2) at 9

7 Jane E. Larson, 'Prostitution, Labor and Human Rights' (2004) 37(3) U.C. Davis Law Review 673, 698., also see Berta E. Hernández-Truyol and Jane E. Larson, 'Sexual Labor and Human Rights' (2006) 37(2) Columbia Human Rights Law Review 391, 391.

8 See Joanna Phoenix, 'Prostitute Identities: Men, Money and Violence' (2000) 40(1) The British Journal of Criminology 37.

9 Laura Barnett and Lyne Casavant, *Prostitution: A Review of Legislation in Selected Countries* (Library of Parliament Background Papers 2014) Library of Parliament <https://publications.gc.ca/collections/collection_2015/bdp-lop/bp/2011-115-1-eng.pdf> 'accessed 25 Aug 2023'.

10 Ibid 2.

procedures, detention, confinement and/or fines.[11] The abolitionist approach does not punish the sale of sex, but prohibits all other SW-related activities such as soliciting, procurement or living off the earnings of SW.[12] The neo-abolitionist approach, which has recently been adopted by the European Parliament as well, makes a distinction between selling and buying sex, and only punishes the clients and procurers of sex workers on the basis of the view that sex workers are victims of exploitation.[13] Prohibitionist, abolitionist, and neo-abolitionist approaches are accepted to be subdivisions of criminalisation of SW since they all intervene in SW directly or indirectly through criminal law.[14] Criminalisation is generally justified by the link between SW and crimes such as human trafficking, and some alcohol and drug-related crimes.[15] Other common given reasons for criminalisation are preventing sexual exploitation of sex workers, and protecting communities from public nuisance caused by kerb crawling, loitering and soliciting.[16] This shows that the criminalisation approach adopts the victimhood view, and accepts that SW is inherently harmful not only for sex workers themselves but also for the community as a whole.[17]

On the other hand, the legalisation approach regulates the conditions for SW.[18] This approach aims to reduce SW-related crimes and maintain public order with control mechanisms such as registration, licensing, and health checks.[19] The underlying view behind this approach is that SW is a social need that needs to be controlled.[20] Lastly, in the decriminalisation approach, SW is neither prohibited nor regulated, as all SW related laws are repealed.[21] Human rights are the main concern of this approach, and the enhancement of health, safety and working conditions of sex workers is given importance .[22]

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11 Amnesty International, 'Policy on State Obligations to Respect, Protect and Fulfil the Human Rights of Sex Workers' (2016) < www.amnesty.org/en/documents/pol30/4062/2016/en/> 'accessed 26 Aug 2023' 4.

12 Barnett and Casavant (n 9) 14.

13 Ibid at 12., European Parliament, *Resolution of 14 September 2023 on the regulation of prostitution in the EU: its cross-border implications and impact on gender equality and women's rights (2022/2139(INI))* <www.europarl.europa.eu/doceo/document/TA-9-2023-0328_EN.pdf> 'accessed 10 Oct 2023' par. 41-42.

14 Frances M. Shaver, 'Prostitution: A Critical Analysis of Three Policy Approaches' (1985) 11(3) Canadian Public Policy 493, 493, also see Amnesty International (n 11) 4.

15 See Scottish Parliament, *Proposed Criminalisation of the Purchase of Sex (Scotland) Bill (2)* (2012) <https://archive2021.parliament.scot/S4_MembersBills/Criminalisation_of_the_Purchase_of_Sex_(2)_Consultation.pdf > 'accessed 26 Aug 2023' 16. Also see Home Office, *Paying the Price: A Consultation Paper on Prostitution* (2004) <http://news.bbc.co.uk/nol/shared/bsp/hi/pdfs/16_07_04_paying.pdf> 'accessed 10 Oct 2023' 74.

16 Home Office (n 15) at 54.

17 Ibid. and also see Nina Persak, 'Prostitution, harm and the criminalisation of clients' in Lieven Pauwels and Gert Vermeulen (eds) *Update in de criminologie VI: actuele ontwikkelingen inzake EU-strafrecht, veiligheid & preventie, politie, strafprocedure, prostitutie en mensenhandel, drugsbeleid en penology* (Maklu 2012) at 230.

18 Barnett and Casavant (n 9) at 9.

19 Ibid.

20 Ibid.

21 Barnett and Casavant (n 9) 2.

22 Christine Harcourt and others, 'The decriminalisation of prostitution is associated with better coverage of health promotion programs for sex workers' (2010) 34(5) Australian and New Zealand Journal of Public Health 482, 485. and Amnesty International (n 11) 11.

The existence of such opposite legal approaches to SW is a significant point to consider. These legal approaches do not differ from each other in terms of applying different strategies to control SW or improve the conditions of sex workers. Instead, as indicated above, legal responses to SW are different from each other with regard to their preferred social understanding of what SW is and what causes it.[23] Therefore, it can be claimed that it is the description and perception of SW which make the legal approaches different from each other and which lead to different strategies. The divergence of perceptions is perhaps comprehensible considering that SW is a social activity that has gender, economic, political and moral dimensions.[24] However, in regard to the question of whether or not SW should be criminalised, reasoning should not be based solely on some predominant and morally and/or politically preferred arguments.[25] State intervention in individuals' lives through criminal law should be justified within some specific principles that determine the limitations on criminalisation.[26] The free will of individuals and "the right not to be punished" should be preserved to the utmost, and any intervention should be restricted to the minimum.[27]

However, determining "the minimum" with restricting principles has never been simple. There are various arguments for determining the fundamental principles for criminalisation, and the principles vary according to the legal systems.[28] This article will address the concepts of harm and wrong, which are the perhaps the most well-known and widely accepted reasons and principles for criminalisation.[29] While the harm principle argues that it is justifiable to criminalise an act only if it causes harm to others[30], the wrong principle claims that only substantial wrongful conduct should be criminalised.[31] The principles of harm and wrong are also justified with the primary purposes of criminal law which are the prevention of harm and censuring those who

23 House of Commons Home Affairs Committee, *Prostitution* (2016) <http://www.publications.parliament.uk/pa/cm201617/cmselect/cmhaff/26/26.pdf> 'accessed 28 Aug 2023' 36.

24 See Jo Phoenix, 'Sex, money and the regulation of women's 'choices': a political economy of prostitution' (2007) 70(1) Criminal Justice Matters 25, 25., and Sanders and others (n 2) at 3.

25 Persak (n 17) at 235.

26 Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press 2007) at 77.

27 Husak (n 26) 57., John Stuart Mill and John Gray, G.W. Smith (eds), *J.S.Mill, On Liberty, in focus* (Routledge 1991) at 30.

28 The principles of harm and wrong discussed in this article are the Anglo-Saxon principles. Their European counterparts are legal good (*Rechtsgut* in German) and offensività principles. While this is the case, it is important to note that the choice to examine the principles of harm and wrong is not necessarily exclusive of the other principles. For an article demonstrating how all these principles from different legal systems share common elements and how they can be used together see Lucille Micheletto, 'Towards an Integrated (and Possibly Pan-European?) Prima Facie Legitimacy Test: Merging the Rechtsgut Theory, the Offensivita Principle, and the Harm Principle' (2021) 29 European Journal of Crime, Criminal Law and Criminal Justice 241.

29 See Mill and others. (n 27) at 23, and see Michael S. Moore, *Placing blame: a general theory of the criminal law* (Oxford University Press 2010) Chapters 16,17.

30 Mill and others. (n 27) at 30.

31 Robin Antony Duff, 'Towards a Modest Legal Moralism' (2014) 8(1) Criminal Law and Philosophy Vol.8(1) 217, 219, and Andrew Ashworth, 'Is the criminal law a lost cause?' (2000) 116 Law Quarterly Review 225, 240.

commit wrongful behaviours.[32] Accordingly, it has been accepted that criminal law should be reserved and limited to those serious harmful wrongs as a last resort when other means fail to respond to an incident that raises social concern.[33]

In this article, I will argue that the harm and wrong principles are only *defining principles* which indicate what kind of behaviour can be criminalised. In this respect, they determine the scope of behaviours that can be discussed within the criminal law realm and give prima facie reasons for criminalisation of those behaviours. Nevertheless, they do not give all-things-considered reasons for criminalisation since they do not examine the limitations of the authority to criminalise. I will discuss that, if criminal law should be the last resort for only the serious wrongdoings that cause harm to others, the limitations of the authority to criminalise should be determined with further principles.[34] Therefore, in addition to these *defining principles,* we need *restricting principles* that determine the boundaries within which the state authority may intervene in the liberty of individuals who conduct those *defined* harmful wrongdoings. I will suggest the human rights principles of non-discrimination and proportionality as the restricting principles. On the issue of criminalisation of SW, I will first examine whether the harm and wrong principles give prima facie reasons for criminalisation. After applying these *defining principles* to SW, I will analyse the *restricting principles* to investigate whether there are strong countervailing reasons against criminalisation of SW. In the last section , I will emphasise the link between the prima facie reasons for the criminalisation of SW and the countervailing reasons against it while prioritising human rights. My main argument is that SW should not be criminalised since the *restricting principles* are so strong that prima facie reasons cannot turn into all-things-considered reasons to justify criminalisation.

Terminology

In this article, the term "sex work" is used to indicate the conduct or occupation of engaging in sexual activity for money or some other "form of remuneration".[35] It refers to *consensual* exchange of sexual services between adults without any threat, fraud, or any means of coercion.[36] As SW involves reciprocal commercial sexual activity, criminalising means the criminalisation of either the selling or buying of sexual activity, or both.[37] This definition relates to SW in the narrow sense and excludes other types of businesses, such as pornography or online sex work, which

32 Ashworth (n 31) at 249.

33 Ibid 225. and Andrew Ashworth 'Conceptions of Overcriminalization' (2008) 5 Ohio State Journal of Criminal Law 407, 417.

34 Ashworth (n 33) 408.

35 Amnesty International (n 11) 3.

36 Ibid 4.

37 Ibid.

are prevalent in the sex industry. In other words, the concept of SW is not used synonymously with the sex industry. Similarly, although there is an often-asserted link between SW and human trafficking, procuration, living on the earnings of SW or any other exploitative activity, this article only focuses on the criminalisation of SW.[38]

The article recognises the different approaches to SW and considers all the arguments and evidence provided by these approaches. However, while seeking an answer to the question of whether SW should be criminalised, an objective analysis of the criminalisation principles will be developed based on the fact that SW is a consensual social activity that raises social concern.[39]

I. Harm, Wrong, and Sex Work: The Defining Principles

In this section, I will discuss the characteristics of the harm and wrong principles and argue that these are not restricting principles for criminalisation. Although I will examine them separately, it should be pointed out that the concepts of harm and wrong often overlap or complement each other.[40] For example, it has been argued that wrongfulness is a broader concept than harm, since there can be both harmful and harmless wrongs.[41] Likewise, the fact that some claim that only harmful wrongs can be criminalised[42], while the others argue that harmless wrongs can also be criminalised, shows that these concepts are considered and applied together.[43]

Nonetheless, although the relationship between harm and wrong is an interesting and significant matter, this will not be an issue to be discussed in this article. Here, wrongfulness and harmfulness will be discussed as commonly held reasons for criminalisation, and both will be accepted as valid principles without prioritising one over the other. Therefore, the usage of these terms interchangeably or together in the article should not cause any ambiguity. What I will essentially argue here is that both wrong and harm principles constitute *defining* principles for criminalisation, and they only give prima facie reasons for criminalisation. In doing so, I will suggest that these principles, while defining the scope of behaviours that are open to discussion of criminalisation, should not be used as a means of enforcement of morals.[44] The discussion regarding criminalisation of SW will be based on the two aspects of these

38 Ibid. and Amnesty International (n 11) at 3.

39 Ashworth (n 33) 417. Also see Roger Matthews and Maggie O'Neill, *Prostitution* (Ashgate 2003) at xiii

40 A.P. Simester and Andreas Von Hirsch, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (Hart 2011) at 50, and Joel Feinberg, *The Moral Limits of the Criminal Law Volume 1: Harm to Others* (Oxford University Press 1987) at 31.

41 Feinberg (n 40) at 34.

42 Victor Tadros, 'Harm, Sovereignty, and Prohibition' (2011) 17(1) Legal Theory 35, 37.

43 Simester and Hirsch (n 40) at 50.

44 Persak (n 17) at 235.

defining principles. Firstly, if neither harm nor wrong principles can provide prima facie reasons for criminalisation of SW, there can be no justification and any further discussion for criminalisation. Secondly, in the case of prima facie reasons given by the defining principles, restricting principles should then be further examined to determine whether it is, all-things- considered, justifiable to criminalise SW.

A. Harm

The harm principle has been perhaps the most well-accepted principle of criminalisation.[45] The aim of this liberal principle is to determine the limitations of the power of the state to criminalise in a democratic society.[46] Mill asserts that the purpose of preventing harm to others can be the only purpose for "which power can be rightfully exercised over" any individual of society against their will.[47] He argues that individuals are "sovereign over their bodies and minds", and they can only be accountable to society when their conduct concerns *others* and causes harm to *others*.[48] Feinberg develops the harm principle, and claims that harm prevention is not the only reason for criminalisation, but "always a good reason in support of" it.[49] Therefore, he supports the idea that there can also be some other good reasons for criminalisation apart from harm prevention, "such as prevention of serious offence that does not amount to harm".[50] While Mill explains harm as "evil to others"[51], Feinberg defines harm as "setbacks of interests that are wrongs, and wrongs that are setbacks to interest"[52]. He also includes "unreasonable risk of harm" in the concept of harm.[53] Mill's harm principle is criticised for being narrow and exclusionary since it only accepts "prevention of harm to others" as a valid purpose of criminalisation and only determines "what to exclude" from criminal law.[54] On the contrary, Feinberg's harm principle is seen as the permissive and broader version that is helpful in determining "what to include" in criminal law.[55]

While the harm principle, either the exclusionary or the permissive version, has been widely recognised, Harcourt argues that it is now a collapsed principle since today's criminalisation discussion is not limited to the question of whether or not

45 Ibid 230.

46 Ibid 232. Mill and others (n 27) at 30.

47 Mill and others. (n 27) 30.

48 Mill and others. (n 27) at 30

49 Feinberg (n 40) 26.

50 Ibid. and Robin Antony Duff, *Answering for Crime Responsibility and Liability in the Criminal Law* (Hart 2007) 124.

51 Mill et al. (n 27) 31.

52 Feinberg (n 40) 36.

53 Ibid 11.

54 Duff (n 50) 123. Also see Bernard E. Harcourt, 'The Collapse of the Harm Principle' (1999) 90(1) Journal of Criminal Law and Criminology 109, 114.

55 Duff (n 50) 123, and Harcourt (n 54) 114.

conduct causes harm.[56] He claims that "what type and what amount of harms the challenged conduct causes, and how the harms compare" constitute the core questions of the issue of contemporary criminalisation.[57] However, it must be noted that even Harcourt's suggestion is centred on harm. Thus, despite the elaborated discussions on the harm principle, "harm" is still acknowledged as a strong justificatory reason for criminalisation.[58] Then, the main question regarding criminalisation of harmful conduct, regardless of which meaning or version of the harm principle is adopted, should be as follows: What does the existence of harm imply for criminalisation of the conduct that causes such harm?

According to Mill, if one performs an act that is harmful to others, there exists "a prima facie case for punishing" that person.[59] On the other hand, Feinberg argues that the harm principle should be supplemented with some other "principles of justice" before it can be applied to the "real legislative" discussions regarding criminalisation of an act.[60] Interestingly, this aspect of the harm principle and its effect on criminalisation is mostly ignored, and perhaps this is why the harm discussions for justifying criminalisation often reach a dead end. It is significant to recognise that the harm principle has never actually been suggested as a firm reason that indicates the necessity of criminalisation of harmful conduct.[61] According to the harm principle, the existence of harm can only provide "prima facie" justification for criminalisation, since it only gives prima facie reasons for criminalisation.[62] This implies that proving the existence of harm does not suffice to justify criminalisation per se, and there needs to be some further inquiry to decide whether a harmful act deserves criminalisation. On the other hand, the harm principle also indicates that there should not even be a matter of debate on the criminalisation of those conducts that are judged to be harmless to others.[63] Therefore, the harm principle can only be a defining principle that determines which acts of conduct can be discussed in the realm of criminal law, because it does not suggest any specific limitations on the authority to criminalise. Accordingly, while it averts the possibility of justified criminalisation to conclude that SW is not harmful, proving that it is harmful does not justify criminalisation of it per se because it requires a further evaluation of restricting principles.[64]

56 Harcourt (n 54) at 113.

57 Ibid 113.

58 Persak (n 17) 230. Also see Lindsay Farmer, 'Criminal Wrongs in Historical Perspective' in Robin Antony Duff and others (eds), *The Boundaries of the Criminal Law* (Oxford 2010) at 214.

59 Mill and others (n 27) 32.

60 Feinberg (n 40) 36.

61 Mill and others (n 27) 32.

62 Ibid.

63 Tadros (n 42) at 37.

64 See "Human Rights and Sex Work" title in this article.

Meanwhile, when assessing harm, it must not be overlooked that the harm principle objects to paternalism and enforcement of morals.[65] The opinion of the majority cannot be a sufficient warrant to criminalise an act of conduct.[66] An act might be considered by the majority of society as wicked or immoral, and there might be a great desire for its avoidance. However, individual liberty and the capacity of individuals to make their own choices should not be interfered with unless their conduct is proven to be harmful to others.[67] At this point, it is helpful to make a distinction between "harmed condition" and "harmful condition".[68] Conduct can lead to a harmed condition in which the actor feels deep pain, sorrow or despair. However, this does not, on its own, show that such conduct causes harm to others.[69] In order to agree that there is a prima facie reason for criminalisation on the ground of harm, there should be a harmful condition in which harm perceptibly affects others.[70] Therefore, even if a harmed condition exists, one's own good, as well as the opinions and morals of the majority or the annoyance caused by the conduct cannot provide a prima facie reason for criminalising it.[71]

When we look at SW, bearing all these aspects of the harm principle in mind, we see that harm is at the centre of the arguments for criminalising it.[72] It has often been claimed that SW is inherently harmful because of the notion that the reasons behind SW, the environment in which it occurs, and ultimately SW itself are all harmful.[73] The reasons that lead to SW are mostly explained by the social and economic backgrounds of sex workers.[74] Poor economic conditions, lack of education opportunities, racism, abuse or neglect in the family, sexism, and previously experienced "physical and emotional harm" have been discussed to be the main reasons why sex workers choose, or are forced to choose, to engage in SW.[75] This view is supported by some sex workers who also see themselves as the victims of their own lives since they were "born victims" and indicate that they were "already victims" even before SW.[76] Accordingly, sex workers are even described as persons with "histories of victimisation".[77] However, not all sex workers define themselves as

65 Persak (n 17) at 230.

66 Mill and others (n 27) at 30.

67 Ibid.

68 Feinberg (n 40) 31.

69 Ibid.

70 Ibid.

71 Mill and others (n 27) at 30.

72 Peter de Marneffe, *Liberalism and Prostitution* (Oxford University Press 2009) at 73.

73 Ole Martin Moen, 'Is prostitution harmful?' (2014) 40(2) Journal of Medical Ethics 73, 74.

74 Jennifer James 'The prostitute as victim' in Jane Roberts Chapman and Margaret Gates (eds) *The victimization of women* (Sage 1978) at 183. Also see Sanders and others (n 2) at 3.

75 Melissa Farley, 'Prostitution and the Invisibility of Harm' (2003) 26(3-4) Women & Therapy 247, 251.

76 Phoenix (n 8) 50.

77 James (n 74) 193.

"victims" in this sense. Some do choose to be a SW, even if they have other appealing job opportunities, because they prefer making money easily and quickly in this way.[78] Also, some prefer to be sex workers to have an independent lifestyle, although they have not experienced victimisation in their lives in any respect.[79] Therefore, it is neither right nor explanatory to generalise the existence of devastating background and victimisation to each sex worker. In other words, harm is not always the reason for engaging in SW. On the other hand, even if victimisation is held as a common situation, this kind of harm cannot be applied to the harm principle. This is because the grievous social and economic conditions that lead to SW can only be seen as a "harmed condition" in which some sex workers find themselves, like in any social problem that many people might partially or wholly face, but this does not prove that SW is harmful to *others*.[80] The harmed condition of sex workers is irrelevant to the harm principle in this sense.

As for the argument that the environment in which SW operates is harmful, we see that this aspect is often explained with the claim that the environment is intrinsically associated with serious crimes.[81] Among those that are alleged to be directly related to SW are drug-related crimes, forced and controlled SW by pimps, and exploitation of sex workers by human traffickers.[82] It is frequently argued that sex and drug markets flourish with SW, and so it serves as an environment in which serious crimes are committed and more people are driven into SW.[83] In this respect, the suggestion that dealing with SW is a necessary step in reducing the rates of sex and drug-related crimes is particularly directed at street SW because the high rates of crimes on the streets visibly disturb society.[84] This argument seems substantially powerful at first, since it, as per the harm principle, asserts that SW affects *others* in a harmful way. However, when it is elaborated, it can be seen that the argument is mistaken in two respects. Firstly, when it comes to the exploitation of sex workers, it should be noted that abused or coerced SW is not SW, it is "abuse" or "coercion".[85] It is a fact that human trafficking involves the exploitation of persons for commercial sexual activity, and the commercial sex market paves the way for the abuse of SW.[86] Nevertheless, this only shows that SW is easy and open to abuse, but does not prove that SW

78 de Marneffe (n 72) at 14.

79 James (n 74) at 186.

80 See Feinberg (n 40) at 31.

81 Home Office (n 15) at 74., also see Paul Bisschop, Stephen Kastoryano and Bas van der Klaauw, 'Street Prostitution Zones and Crime' (2015) IDEAS Working Paper Series from RePEc Discussion Paper No. 9038 at 6.

82 Daniela Danna, *Report on prostitution laws in the European Union* (2014), <http://lastradainternational.org/lsidocs/3048-EU-prostitution-laws.pdf> 'accessed 3 September 2023' at 30.

83 Home Office (n 15) at 74.

84 Ibid.

85 Persak (n 17) 231.

86 See United Nations Office on Drugs and Crime, *Human Trafficking,* <www.unodc.org/unodc/en/human-Trafficking/Human-Trafficking.html> 'accessed 4 Sep 2023'. Also see Crown Prosecution Service, *Prostitution and Exploitation of Prostitution*, <https://www.cps.gov.uk/legal-guidance/prostitution-and-exploitation-prostitution> 'accessed 4 Sep 2023'.

promotes these kinds of exploitation.[87] Secondly, claiming that the environment in which SW occurs is "a den of iniquity" that harms others is not convincing enough to prove that SW is also harmful. Although drug dealing or any other crime is often committed within SW, this does not indicate that these crimes are intrinsic to it.[88] We do not claim that being poor is harmful because the places poor people live and work have high crime rates, nor do we prohibit marriage just because domestic abuse is frequent in marriages. The link between crimes and some specific activities can help us understand why, how, and by whom these crimes are committed. However, these links do not demonstrate that any activity that is related to a specific crime is automatically harmful. Asserting the contrary would mean contributing to the enforcement of morals since the link between SW and other crimes can only support the claim that SW is an undesirable activity, rather than that it is harmful.

Lastly, the problem with the claim that SW itself is harmful should be briefly elaborated. According to this claim, even if there is a consensual agreement between sex workers and clients, SW seriously harms sex workers because it involves violence, objectification, and exploitation.[89] Moreover, the argument is that sex workers find themselves in adverse physical and psychological conditions that cause serious problems involving drug or alcohol abuse, depression, or disease.[90] Although much can be said for and against these claims, the significant point to consider here is that the asserted harm is self-harm and the harm principle is essentially concerned about harm to *others*.[91] Self-harm is a much-debated issue, and the questions about whether self-harm should be included in the harm principle and whether it should be criminalised require further deliberation. However, without deciding whether or not self-harm should be criminalised, it should be noted here again that the harm principle should not be turned into a paternalistic principle that determines what should be seen as harmful for people and their own good.[92]

For SW, the risk of falling into the trap of paternalism is high because harm assessment of the activity is often influenced by the opinion that SW is immoral. First and foremost, the evidence indicates that self-harm in SW can be considerably reduced through social support and health care, and this type of self-harm is neither inevitable nor irreducible.[93] Also, if we put aside the moral discussions around SW

87 Persak (n 17) 231.

88 Ibid at 230.

89 Farley (n 75) at 249, and Teela Sanders, 'The Risks of Street Prostitution: Punters, Police and Protesters' (2004) 41(9) Urban Studies 1703, 1705.

90 Moen (n 73) at 75. Also see Tiggey May and others, *Police Research Paper Series 118 Street business: The links between sex and drug markets* (1999) at 9.

91 Mill and others (n 27) at 30.

92 Laura Stoker, 'Political Value Judgments' in James H. Kuklinski (ed.) *Citizens and Politics* (Cambridge University Press 2001) 450.

93 Michael L. Rekart 'Sex-work harm reduction' (2005) 366(9503) The Lancet 2123, 2125., Andrea Krüsi and others, 'Criminalisation of clients: reproducing vulnerabilities for violence and poor health among street-based sex workers in

and say that it is, after all, work, it is easy to admit that some other exhausting jobs, e.g. garbage collecting or construction, can be just as dangerous and harmful as SW. The distinction made between SW and other jobs in this respect appears to be based on moral values. If not, those who claim that SW is harmful because it is risky and dangerous must prove why they do not find other jobs equally harmful in this sense. Therefore, even if this kind of harm is to be included in the harm principle, it is not convincing enough to conclude that SW is harmful. This is because the harm in focus is only the harm inflicted upon sex workers by society with their discriminatory attitude of leaving them alone with no support.[94] Criminal law is not a means for thinking of what would be the least harmful and best for sex workers while ignoring their demands for better conditions which would reduce the harm. Therefore, any given prima facie reason for criminalisation in this respect is weak and questionable as it has potential for being paternalistic.

B. Wrong

The concept of wrong is another significant basis for discussions on criminalisation. It emerged as a complementary concept to the harm principle, yet it developed the harm principle into the "wrongful harm" principle.[95] After Feinberg argued that the harm principle aims to prevent "only those harms that are wrongs"[96], the view that criminal law should only be concerned with wrongful harms became a commonly shared one.[97] However, the concept of wrong has not remained limited to the harm principle or its explication but has also evolved as a discrete principle of criminalisation.[98] According to Husak, the "wrongfulness constraint" is a principle of its own that has already existed in the general part of criminal law as one of the internal constraints on criminalisation because criminal liability can only be imposed for wrongdoings.[99] For Husak, even the defence of excuse presupposes the existence of a wrongdoing which proves the principle.[100]

However, we need further explanation of the wrong principle to determine which conduct can be seen wrongful and whether all wrongful acts can be justifiably criminalised. In this respect, the concept of "public wrong" has been suggested, and it has been claimed that only those kinds of wrongs that increase public concern

Canada – a qualitative study' (2014) 4(6) BMJ Open <http://dx.doi.org/10.1136/bmjopen-2014-005191> 'accessed 5 Sep 2023' at 7.

94 For detail, please see "Human Rights and Sex Work" title in this article.

95 Farmer (n 58) 215.

96 Feinberg (n 40) 36.

97 Farmer (n 58) at 215, Also see Duff (n 50) at 127.

98 Farmer (n 58) 215.

99 Husak (n 26) at 66.

100 Ibid.

and require "collective response" can be criminalised.[101] Public wrongs have been defined as wrongs that are considered as done to "individual members of the community" as a whole, in terms of their "shared membership" due to their shared interests.[102] Therefore, for this principle, crimes require a public condemnation of the public wrongs, and they declare that some specific conduct is wrongful because there is a "shared and public view" that such conduct concerns all individuals in the community even if it is directed against one individual member.[103]

Nonetheless, not every conduct that is unanimously considered wrong by the community can be a concern of criminal law. Criminalisation should only aim to respond to those wrongs that are sufficiently serious.[104] Sufficient seriousness here does not refer to a degree, but to the characteristic of a wrongdoing that makes it "public".[105] Determining the characteristics of a wrong is not simple, but two aspects can help assess the seriousness of a wrong. Firstly, what makes a wrong sufficiently serious in this respect is its capacity to interest the community as if it were done to *all* individual members of the community.[106] This is the point where public wrongs differ from private wrongs, and merit criminalisation. Violating a contract can be commonly seen as a wrong by the community, but its wrongness only concerns the parties to the contract. Thus, a breach of contract can only be seen as a private wrong, and its wrongness cannot lead to criminalisation.[107] Secondly, a sufficiently serious wrong, in addition to the existent concern of the community, should necessitate censure by criminal law.[108] This implies that every situation in which a wrong threatens public order and/or interest does not inevitably require criminal censure.[109] In order to require criminal censure, a sufficiently serious wrong should concern individual rights and interests which are under the protection of the state.[110] Therefore, censure by criminal law should be understood as part of the state's duty to protect and "to promote respect" for such rights and interests.[111]

As it is seen, just like the harm principle, the wrong principle is a defining principle that determines which acts can be a concern of criminal law. However, it does not demand that all determined public wrongs must be criminalised since the existence

101 Sandra Marshall and Robin Antony Duff, 'Criminalization and Sharing Wrongs' (1998) 11 Canadian Journal of Law and Jurisprudence 7, 7.

102 Ibid 20. and Robin Antony Duff, 'Perversions and Subversions of Criminal Law' in Robin Antony Duff and others (eds), *The Boundaries of the Criminal Law* (Oxford University Press 2010) 89.

103 Marshall and Duff (n 101) at 13.

104 Ashworth (n 31) at 241.

105 Marshall and Duff (n 101) 8.

106 Ibid at 18.

107 Ibid 8.

108 Duff (n 31) at 219.

109 Marshall and Duff (n 101) at 9.

110 Ibid.

111 Ibid.

of a public wrong does not suffice to justify criminalisation per se.[112] As the wrong principle only gives prima facie reasons for criminalisation, determining a public wrong can only provide prima facie justification for criminalisation. In other words, that there can be some countervailing reasons against criminalisation, and the decision on whether a public wrong can be justifiably criminalised needs further inquiry.[113] On the other hand, concluding that a wrong is not a *public* wrong indicates that there should not even be a discussion for criminalisation. Accordingly, while deciding that SW is not a public wrong, which averts the possibility of justified criminalisation, defining it as a public wrong only provides a prima facie reason for criminalisation and necessitates an evaluation of restricting principles.[114]

SW has been claimed to be wrong in several respects. One claim is that SW constitutes a wrong because it is degrading to sex workers.[115] According to this claim, sex workers have the lowest social status in society for they engage in exploitative sexual activity which is often violent, humiliating, and stigmatizing.[116] Also, it has been argued that SW degrades the quality of the lives of sex workers since it causes psychological problems, drug and alcohol abuse, and some other diseases.[117] As is understood from the underlying reasons why SW is seen as degrading, the wrongness of SW here has been explained with its harm, especially self-harm, and it is claimed to be a "harmful wrong". However, to decide whether SW can be seen as a public wrong in this respect, the abovementioned two points should be assessed.

Firstly, does wrongness of SW concern all individuals in society as if it were done to them? Since the wrong discussed here is fundamentally self-harm, it might seem difficult to admit that it also concerns society. However, there is a strong radical feminist argument that the way SW harms sex workers is also degrading to all women in society, on the grounds that SW objectifies women's bodies and promotes the patriarchal perception of women.[118] Taking this further and considering the existence of transgender or male sex workers, it can even be argued that SW wrongs all individuals of society since it harms sex workers as a group by objectifying and exploiting them as members of society.[119] However, this interpretation is too broad

112 Duff (n 31) 230.

113 Ibid.

114 See "Human Rights and Sex Work" title in this article.

115 de Marneffe (n 72) at 49.

116 Ibid. and also see Igor Primoratz, 'What's Wrong with Prostitution?' (1993) 68(264) Philosophy 159 at 162.

117 Ibid. Also see (n 93)

118 Jane Scoular, 'The 'subject' of prostitution: interpreting the discursive, symbolic and material position of sex/work in feminist theory' (2004) 5(3) Feminist theory 343, 343.

119 See Ine Vanwesenbeeck, 'Prostitution Push and Pull: Male and Female Perspectives' (2013) 50(1) The Journal of Sex Research 11 at 12, and Erika Schulze and others, *Sexual exploitation and prostitution and its impact on gender equality* (2014) European Parliament Policy Department C: Citizens' Rights and Constitutional Affairs PE 493.040, <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493040/IPOL-FEMM_ET(2014)493040_EN.pdf> 'accessed 15 Sep 2023' 29.

that every wrong can be defined as a public wrong in this respect. Besides, as SW is a consensual activity, the claim that this consensual self-harm extends to society can be criticised for being a paternalistic argument.[120] Each individual must choose their own lifestyle for their own benefit, even if it appears harmful or wrongful to the general public.[121] As for SW, any "paternalist interference" with it can be criticised for being excessive because sex workers, by definition, *choose* this occupation and the harm supposedly intrinsic to it.[122] On the other hand, the second point that whether this harmful wrong deserves criminal censure is open to the same criticism, since such censure would imply that the state should protect sex workers from the self-harm caused by their own activities which would only be a paternalistic censure.

The other claim is that a distinction should be made between street and off-street SW because only street SW can be defined as a public wrong.[123] According to this claim, though off-street SW can also be defined as immoral and wrong, it can only be a "private" wrong since it falls within a realm of private immorality which should not be intervened by criminal law.[124] In return, street SW is seen as a public wrong which concerns and affects other individuals because it is practiced within the public space.[125] Street SW is seen as a significant concern for society, as the evidence demonstrates that, when compared to off-street SW, it is more violent, dangerous, and damaging.[126] Both customers' or pimps' brutal violence towards street sex workers as well as the vulnerability of sex workers to other criminal behaviour have been discussed as reasons why street SW is riskier for sex workers.[127] Moreover, society has been claimed to be affected by street SW since it causes "residential discontent" and insecurity in the neighbourhood due to the violent and criminal environment caused by SW and SW-related activities such as kerb-crawling.[128]

Regarding the violence and risk that sex workers face while working, the explanation made in the previous paragraph also applies to street SW because this kind of harm is self-harm caused by a consented activity. However, whether public nuisance caused by SW constitutes a public wrong is another point. As it concerns the individuals of society, the main point to be focused on here is whether street SW deserves criminal censure. At first glance, it appears that such censure is necessary in

120 Husak (n 26) at 88.

121 Mill and others (n 27) at 90.

122 Primoratz (n 116) 165.

123 See John Lowman, 'Street Prostitution Control: Some Canadian Reflections on the Finsbury Park Experience' (1992) 32(1) The British Journal of Criminology 1 at 1, Sanders (n 89) at 1705.

124 See Home Office, *Report of the Committee on Homosexual Offences and Prostitution* (Cmnd 1957) at 80.

125 Home Office (n 124) at 80.

126 Celia Williamson and Gail Folaron, 'Violence, Risk and Survival Strategies of Street Prostitution' (2001) 23(5) Western Journal of Nursing Research 463 at 464.

127 Williamson and Folaron (n 126) at 464, and Danna (n 82) at 22.

128 Tracey Sagar, 'Street Watch: Concept and Practice' (2005) 45(1) The British Journal of Criminology 98, 100.

this regard because the state has the duty to ensure security and to take precautions for the activities that cause public nuisance. However, when we take the claims in question as a basis, it is important to realise that it is not street SW itself, but the surrounding violent and criminal environment that concerns the society. As street SW does not directly wrong the interests of the individuals of society, it is dubious whether it is a valid reason to censure the activity because of its indirect effects when the effects can be addressed separately. Therefore, even if street SW is seen as disturbing and morally wrong, this must not suffice to claim that it should be censured by criminal law.

II. Human Rights and Sex Work: The Restricting Principles

Today, human rights are recognised as the rights of each human being in the world, regardless of their "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".[129] While one aspect of human rights is that all human beings have "universal and inalienable" rights, another aspect is the obligation of states to respect and protect them.[130] Accordingly, the right of individuals to demand that their human rights are not violated is enshrined in the very concept of human rights. This makes it both critical and difficult to determine the scope of human rights and to answer the question of which rights are "human rights". With regard to SW, discussing and determining the extent of human rights has been even more problematic. There are diametrically opposing views on this issue. While some define SW as a human rights violation just as human trafficking or slavery[131], others argue that SW is an exercise of the right to personal autonomy, and thus not a human rights violation but a component of human rights.[132] However, although much is said about the connection between *SW* and *human rights*, there is little discussion about the link between the *criminalisation of SW* and *human rights*. This deficiency is evident in the discussions about criminalising SW, but not specific to this activity. The significance and the role of human rights have been mostly ignored while discussing whether conduct should be criminalised, even though criminalisation has been one of the most severe powers of the sovereign to intervene in individual liberties.[133]

In this section, I will contend that the issue of human rights should be the restricting principle on criminalisation, and I will argue for the prohibition of discrimination and

129 United Nations, *The Universal Declaration of Human Rights* (UDHR) (1948), <http://www.un.org/en/universal-declaration-human-rights/> 'accessed 16 Sep 2023' Article 2.

130 United Nations Human Rights Office of the High Commissioner, *What are human rights?* < www.ohchr.org/en/what-are-human-rights#:~:text=These%20universal%20rights%20are%20inherent,work%2C%20health%2C%20and%20liberty.> 'accessed 16 Sep 2023'.

131 Laura Reanda, 'Prostitution as a Human Rights Question: Problems and Prospects of United Nations Action' (1991) 13(2) Human Rights Quarterly 202, 207.

132 de Marneffe (n 72) at 115.

133 Persak (n 17) 233.

proportionality as the restricting principles. It should be noted here that the discussion will not focus on the liberty of SW, but on the impact of the criminalisation of SW on freedom. As Husak indicates, "when any criminal law is enacted", it is not about the liberty to perform specific types of conduct, but rather it is about other fundamental liberties which might be at stake.[134] Therefore, the main constraint on criminalisation should be the protection of human rights, and so the question of how criminalisation might affect these rights must be rigorously evaluated when deciding whether a type of conduct is to be criminalised.

A. Prohibition of Discrimination

Prohibition of discrimination is one of the essential principles which is safeguarded by many international and regional human rights instruments.[135] Discrimination is described as "distinction, exclusion, restriction or preference" made on the basis of any status of a person or a group of persons.[136] The prohibition of discrimination and the principle of equality are two sides of the same coin because prohibiting discrimination is the necessary element for ensuring equality.[137] In this respect, the right to equality before the law and the right to equal protection of the law have been guaranteed under the principle of prohibition of discrimination.[138] Although they often overlap, the right to equality before the law requires that everyone is subject to the same law and that the law is applied impartially, while the right to equal protection of the law necessitates that "the substantive provisions of the law" provide the same rights and protections to everyone without discrimination.[139] However, it should be pointed out that these principles aim for "fair equality", rather than "absolute equality", and only those differential treatments that have no "reasonable and objective justification" can be considered as discrimination.[140]

134 de Marneffe (n 72) 101.

135 See UDHR (n 129) Articles 2 and 7, United Nations*, International Covenant on Civil and Political Rights* (ICCPR) (1966) <https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf> 'accessed 9 Oct 2023' Article 26., United Nations, *International Covenant on Economic, Social and Cultural Rights* (ICESCR) (1966) <www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf> 'accessed 9 Oct 2023> Articles 2 and 3., African Commission, *African Charter on Human and Peoples' Rights* (ACHPR) (1998) < https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf> 'accessed 9 Oct 2023' Articles 2 and 3., Council of Europe, *European Convention on Human Rights* (ECHR) (1950) <http://www.echr.coe.int/Documents/Convention_ENG.pdf> 'accessed 9 Oct 2023' Article 14.

136 United Nations, *The Convention on the Elimination of All Forms of Racial Discrimination* (CERD) (1965) <www.ohchr.org/Documents/ProfessionalInterest/cerd.pdf> 'accessed 8 Oct 2023' Article 1., Also see United Nations, *The Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) (1979) <www.un.org/womenwatch/daw/cedaw/text/econvention.htm> 'accessed 9 Oct 2023' Article 1.

137 Daniel Moeckli and others, (eds) *International human rights law* (Oxford University Press 2014) at 158.

138 Li Weiwei, 'Equality and Non-Discrimination Under International Human Rights Law' (2004) 03/2004 The Norwegian Centre for Human Rights Research Notes, 14.

139 Ibid 15.

140 Weiwei (n 138) 8. Also see Olivier de Schutter, *The Prohibition of Discrimination under European Human Rights Law* (2011) European Commission Directorate-General for Justice, < www.ab.gov.tr/files/ardb/evt/1_avrupa_birligi/1_6_raporlar/1_3_diger/human_rights/prohibition_of_discrimination_under_european_human_rights_law.pdf > 'accessed 19 Sep 2023', 28.

Discrimination can exist in various forms, namely direct and indirect discrimination.[141] It is called "direct discrimination" when specific groups of persons are treated differently without a legitimate purpose and proportionate means to achieve that purpose.[142] Prohibition of direct discrimination is enshrined in criminal law because criminal law should equally censure those who "commit wrongs of equivalent seriousness in relevantly similar circumstances".[143] When direct discrimination is considered in terms of criminalisation of SW, there can be two cases. Firstly, it can be claimed that distinguishing between street and off-street SW and criminalising only one of them can be seen as discrimination because both street and off-street sex workers perform the same activity. Secondly, distinguishing between selling and buying of sex, and criminalising only the buying of sex (or only the selling of sex) can also be regarded as discrimination, since both parties mutually and consensually engage in the same activity, which is SW in the framework of a buy-sell relationship.

It is certain that treating people differently does not automatically constitute discrimination. However, under the prohibition of discrimination, if the state treats some or all parties to SW differently through criminal law, it must be based on a legitimate aim and proportionate means. Nonetheless, in this justification, the existence of harm or public wrong per se is no longer enough because what is needed to be justified here is the differentiation between the same activities conducted by similar groups of people. In other words, the question changes from "why SW should be criminalised" to "why this type of SW should be criminalised while other types cannot". As discussed above, off-street sex work does not differ significantly from street SW nor does buying SW differ significantly from selling it. Therefore, it is not easy to find a reasonable justification for separating them. Beyond that, however, the criminal law's preference for one over the other constitutes unfair treatment on the one hand and has the more serious consequence of preventing the realisation of the legitimate aim through disproportionate negative implications on the other. As this part of the question will be examined in detail below, to avoid repetition, it should be noted here that such a distinction by criminal law would bear the risk of discrimination as it requires a legitimate aim and a proportionate means, which are difficult to find.

On the other hand, indirect discrimination occurs when an apparently neutral and equal law creates a disadvantage for a certain group of people or adversely and disproportionately affects a specific group within "disparate impact, except it is "reasonably and objectively justified".[144] Moreover, in case the law fails to provide an

141 de Schutter (n 140) at 21.

142 Ibid.

143 Ashworth (n 31) 245.

144 de Schutter (n 140) 23.

exception for the individuals of a certain group that need different treatment and treat them differently, this again constitutes indirect discrimination.[145] As is seen, making neutral and equal laws does not suffice to ensure equality since there is also a need for preventing predictable adverse effects of the laws on certain groups.

Considering indirect discrimination as a limitation of criminal law may seem challenging at first. It is obvious that criminal law, by its nature and by the means of censure and punishment, adversely affects those who fail to comply with the law.[146] Indeed, criminal law distinguishes between law-abiding citizens and those who are criminally liable for a crime and creates a "criminal status" in which convicted persons are treated differently from law-abiding individuals.[147] However, the fact that one of its functions is to treat differently those who commit harmful and/or wrongful conduct does not imply that criminal law is not subject to the prohibition of discrimination. The principles of equality and prohibition of discrimination should be respected and protected by criminal law, and criminalisation should be enacted only if it complies with these principles.[148] Accordingly, while deciding whether or not a defined conduct, SW in our case, can be justifiably criminalised, the following questions should be asked: Does criminalisation of the defined conduct target a group that is already in need of protection of the law, or will criminalisation disproportionately and adversely affect a specific group? Unless the answers are negative, it should be acknowledged that criminalisation is not justified since it violates the restricting principles.

For SW, it has often been stated that the specific group that will be affected by criminalisation is women because the majority of sex workers are women and SW should be understood in terms of gender inequality.[149] Although this seems a reasonable argument, the specific group here will be recognised as *sex workers*, rather than *women*. This is because criminalisation of SW affects all sex workers as a social group, and discrimination against them is based on what they do in common. Nonetheless, this approach only aims to focus on the activity threatened with criminalisation and does not deny the fact that when, e.g., a *woman* or *LGBTI+* identity is combined with a *sex worker* identity the compound discrimination on different grounds is seriously at stake. With this in mind, the question to be answered in this part is whether or not sex workers are already a disadvantaged group that should be protected by the law, and whether criminalisation might affect sex workers adversely.

145 European Union Agency for Fundamental Rights, *Handbook on European non-discrimination law* (2010) <www.refworld.org/pdfid/4d886bf02.pdf > 'accessed 9 Oct 2023' at 30.

146 Andrew Ashworth and Lucia Zedner, 'Prevention and Criminalization: Justifications and Limits' (2012) 15(4) New Criminal Law Review 542, 568.

147 Persak (n 17) 233.

148 Ashworth (n 31) at 245

149 Don Soo Chon, 'Gender Equality, Liberalism, and Attitude Toward Prostitution: Variation in Cross-National Study' (2015) 30(7) Journal of Family Violence 827, 828. Also see European Parliament (n 13)

There is a wide range of evidence demonstrating that sex workers are frequently exposed to human rights abuses just because they are sex workers.[150] These abuses mainly concern sex workers' right to life, right to security, and right to access to justice, as well as their equal opportunity to benefit from health services.[151] The evidence proves that human rights abuses against sex workers are prevalent due to social perception of sex workers and the states' attitude towards them.[152] This is facilitated by the common perception that any violent, abusive, or discriminatory behaviour against sex workers can be seen to be tolerable.[153] Moreover, despite the fact that the human rights of sex workers have often been violated in many respects, there is little effort by the states to tackle the situation.[154] Thus, while society ignores or normalises the abuses that sex workers experience, the states fail to protect, or prefer not to protect, them from these abuses.

As indicated in the previous sections, sex workers are often exposed to work-related violence, including physical, psychological and sexual violence.[155] Even in cases where the risk of violence amounts to death, sex workers find themselves isolated.[156] This is because there is a great "deviant" and "criminal" stigma attached to them, and this stigma affects the criminal justice system's response to the incidents in which they are victimised.[157] Due to this stigma, it is surprisingly common for sex workers to get arrested or exploited while trying to report their victimisation to the police.[158] In the incidents in which a sex worker is threatened with death, physically attacked, or raped, reporting the incident to the police often makes it worse.[159] Sex workers feel more abused when they are told by the police that they "deserve" whatever happens to them.[160] Especially in case of a sexual assault by a client or a pimp, the police response can be even more problematic because the perception that "sex workers are unrapable" causes the police officers to see the incident as a "normal" incident, rather than a criminal one.[161] It has even been suggested that serial killers prefer sex

150 Amnesty International (n 11) at 10.

151 Ibid.

152 Ibid 9.

153 Ibid 10.

154 Ibid at 5.

155 Also see Yan Alicia Hong and others, 'Self-Perceived Stigma, Depressive Symptoms, and Suicidal Behaviors Among Female Sex Workers in China' (2010) 21(1) Journal of Transcultural Nursing 29, 32.

156 Schulze and others. (n 119) 14. Also see Home Office, *A Review of Effective Practice in Responding to Prostitution* (2011) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97778/responding-to-prostitution.pdf> 'accessed 7 Oct 2020' 3.

157 Juline Koken, 'Independent Female Escort's Strategies for Coping with Sex Work Related Stigma' (2012) 16(3) Sexuality & Culture 209, 209.

158 House of Commons (n 23) 31., Danielle Friedman Nestadt and others, 'Criminalization and coercion: sexual encounters with police among a longitudinal cohort of women who exchange sex in Baltimore, Maryland' (2023) 20(11) Harm Reduction Journal 1.

159 Jolanda Sallmann, 'Living With Stigma: Women's Experiences of Prostitution and Substance Use' (2010) 25(2) Affilia Journal of Women and Social Work 146, 151.

160 Ibid.

161 Williamson and Folaron (n 126) 464.

workers as their victims because their death is not seen as an "incident" that should be proceeded with investigation.[162] As it is seen, sex workers are not even seen as *victims* because it is categorically accepted in the criminal justice system that they are not "ideal victims".[163] This is perhaps the most significant, yet ignored, reason why sex workers try to find their own survival strategies to protect themselves from such high risk of violence instead of applying to the criminal justice system.[164] They do not have any expectations of the system with regard to the protection of their lives, security and safety.[165]

On the other hand, the same situation applies to the opportunity for sex workers to equally enjoy health services. To prevent sexually transmitted diseases such as HIV, sex workers must use condoms and receive regular health checks since SW is a risky activity.[166] Health checks are especially crucial for sex workers due to inconsistent condom use, as either clients insist on not using one or sex workers prefer high-priced unprotected sex.[167] However, they usually face stigma and discrimination when they use health services.[168] Some sex workers describe their experiences with health care providers as judgmental because they are often treated as "dirty" or "undeserving of respect".[169] Therefore, for many sex workers, accessing health services means adding more stigma from others when they already suffer from that stigma in other aspects of their lives.[170] This results in either avoidance of using health care services or sharing less information about themselves and hiding the "medically relevant" information that is necessary for proper care to protect themselves from the stigma.[171]

Under these circumstances, it can be conveniently argued that sex workers are systematically ignored in the criminal justice system, and they are often treated differently, in a discriminatory manner, in health care services. Their access to justice and health care is significantly hindered by discrimination. Therefore, it can be claimed that sex workers constitute a specific disadvantaged group that needs

162 Brian Simpson, 'Murder, prostitution and patriarchy: why serial killing is a feminist issue' (2001) 26(6) Alternative Law Journal 278, 279.

163 Nils Christie, 'The Ideal Victim' in Ezzat A. Fattah (ed) *From Crime Policy to Victim Policy*: *Reorienting the Justice System* (Palgrave Macmillan 1986) 19.

164 Williamson and Folaron (n 126) at 470.

165 House of Commons (n 23) 17.

166 Krüsi (n 93) at 1.

167 See Elena Regushevskaya and Tuija Tuormaa, 'How do prostitution consumers value health and position health in their discussions? Qualitative analysis of online forums' (2014) 42(7) Scandinavian Journal of Public Health 603, 605., Rekart (n 93) 2123.

168 Koken (n 157) 212.

169 Ibid. and also see Teresa Whitaker, Paul Ryan and Gemma Cox, 'Stigmatization Among Drug-Using Sex Workers Accessing Support Services in Dublin' (2011) 21(8) Qualitative health research 1086, 1095.

170 Kirsten Roche and Corey Keith, 'How stigma affects healthcare access for transgender sex workers' 23(21) British Journal of Nursing 1147 at 1148.

171 Ibid., and Koken (n 157) 212.

equal treatment and equal protection of the law and its application.[172] In this respect, the evidence indicates that criminalisation of sex workers might lead to indirect discrimination against them since it might promote the stigma and discrimination that sex workers already experience by failing to recognise their disadvantaged status and so enhancing their victimisation.[173]

B. Proportionality

Proportionality is another fundamental principle of justification for interference with human rights.[174] This principle requires that any interference with a right be proportionate to the legitimate aim pursued by that interference.[175] When it comes to criminal law, though much-discussed and widely accepted for the relationship between the seriousness of a crime and punishment, proportionality has often been overlooked in regard to the link between criminalisation and the aim pursued by it.[176] However, it should be one of the essential principles of criminalisation, because it interferes with freedoms in the most powerful way, through censure and punishment.[177] Husak clearly explains this point with "the right not to be punished", and argues that enacting criminal law should be an exception because criminalisation intervenes in individual liberties.[178] This is also in compliance with the standard that criminal law should be the last resort of legal protection, as it is the "ultimate measure" only for those serious types of conduct that are "socially damaging and unbearable" for society.[179] Therefore, criminal law should be a *proportionate* response to the defined harmful and/or wrongful acts. In this respect, to justify criminalisation, states must prove that they have respected the principle of proportionality which is another restricting principle for criminalisation.

The principle of proportionality is composed of three sub-principles, namely suitability, necessity, and absence of excessive burden, and all these sub-principles must be fulfilled for an interference to be considered proportionate.[180] The suitability principle requires that a means adopted for a legitimate aim be "appropriate to achieving" that aim, while the necessity principle entails the means "necessary in

172 House of Commons (n 23) 17.

173 Also see pages between 22-25 in this article.

174 Janneke Gerards, 'How to improve the necessity test of the European Court of Human Rights' (2013) 11(2) International Journal of Constitutional Law 466, 467.

175 Jan Sieckmann, 'Proportionality as a Universal Human Rights Principe' in David Duarte, Jorge Silva Sampaio (eds), *Proportionality in Law: An Analytical Perspective* (Springer 2018) 5.

176 See William Wilson, *Central Issues in Criminal Theory* (Hart 2002) at 54, and Douglas Husak, 'Why Punish the Deserving?' (1992) 26(4) Noûs 447, 462.

177 Persak (n 17) 233.

178 Husak (n 26) 101.

179 Rudolf Wendt, 'The principle of "Ultima Ratio" And/Or the Principle of Proportionality' (2013) 3(1) Oñati Socio-Legal Series 81, 87.

180 Robert Alexy, 'Constitutional Rights, Balancing and Rationality' (2003) 16(2) Ratio Juris 131, 135., and Sakari Melander, 'Ultima Ratio in European Criminal Law' (2013) 3(1) Oñati Socio-Legal Series 42, 54.

order to achieve" it.[181] The principle of non-excessive burden, on the other hand, stipulates that the means should not "impose an excessive burden on" individuals.[182] When the principle is applied to criminalisation and the means to intervene in liberties is criminal law, it is first necessary to determine the purpose of criminalisation. In the simplest term, the primary aim of criminalisation is to tackle the defined harmful and/or wrongful conduct and make the actors of those acts answerable to society.[183] Accordingly, in terms of criminalisation, these sub-principles require that criminalisation is an appropriate and necessary means to prevent the defined conduct, while the burden imposed by criminalisation is not excessive.

Then, the suitability of criminalisation should be evaluated first with respect to the question of whether criminalising SW is a proportionate means to tackle it. Criminalisation can only be seen as a suitable interference with SW if it can be proved that it is "capable of realising the aim" pursued by it.[184] As discussed in the previous sections, SW has generally been defined as a harmful and/or wrongful activity that adversely affects not only sex workers themselves but also society as a whole.[185] Accordingly, criminalisation and other means of legal interference with SW generally undertake the duty to reduce SW and/or SW-related harm, such as exploitation, violence, and crimes.[186] Therefore, within the frame of the principle of suitability, the capability of criminalisation for reducing SW and related harm becomes crucial.

Although it seems that none of the legal approaches to SW in the world can provide a "complete solution", there is evidence that some responses can help achieve the aim, while some others are counterproductive in terms of realising it.[187] For criminalisation, there is a strong claim that it is not effective in reducing SW or SW-related problems.[188] Moreover, it is also argued that criminalisation actually worsens the conditions of sex workers, and increases harm and risk of harm in SW.[189] The effects of criminalisation in this sense are much more evident in the countries where the buying of sex is criminalised because it is rather a new way to tackle SW and its effects have become comparable to pre-criminalisation. After Sweden made it illegal to buy sex in 1999, other countries such as Norway and France enacted the criminalisation of buying sex in order to fight off harm in the sex industry, especially

181 Melander (n 180) 54.

182 Melander (n 180) 54.

183 Duff (n 50) at 49.

184 Gerards (n 174) 473.

185 See "Harm, Wrong and Sex Work" title in this article.

186 See (n 15)

187 House of Commons (n 23) 35.

188 Rekart (n 93) 2124.

189 Ibid.

exploitation and violence.[190]

Nevertheless, the evidence demonstrates that criminalisation only reduced street SW in these countries, but did not have a concrete effect on SW in general.[191] Also, it has been indicated that criminalisation changed the ways sex is sold, and pushed SW underground where it became less visible but riskier.[192] Many police officers denote that criminalisation made it impossible for sex workers to report incidents of exploitation, trafficking or violence because of the fear of arrest or any other police action against them.[193] Therefore, contrary to what was aimed by criminalisation, sex workers have become more vulnerable to exploitation and violence as they have shifted to work in a more dangerous and risky environment.[194] Moreover, condoms have been used as evidence of SW in some regions, and thus sex workers became more likely to accept unprotected sex due to the desperation for money and the fear of losing clients who insist on not using condoms.[195] Besides, access to health services for regular checks decreased because of the fear of being suspected.[196] Consequently, again contrary to the pursued aim, the risk of HIV and other sexually transmitted infections increased, and the health conditions of those who engage in commercial sexual activity have been adversely affected.[197] In this respect, it is not convincing that criminalisation of SW is a suitable way to combat the activity, if that is the aim.

On the other hand, the criminalisation of SW also seems to fail the test of necessity. The sub-principle of necessity implies that the interference in question should be the least intrusive and severe means to achieve the aim, and there should be a "pressing need" for such interference.[198] Accordingly, with regard to criminalisation, necessity means that criminal law should be the last resort, as it is the most severe means of legal interference.[199] As mentioned above, apart from criminalisation, there have been several other means of interference with SW such as regulation of SW. While the existence of other means by itself proves that criminalisation is not the only, or the last, remedy for dealing with SW, the evidence discussed above indicates that criminalisation is actually not a preferable interference since it does more harm than good. Field research, especially by human rights organisations, shows that decriminalisation is more effective than criminalisation in addressing the problems

190 House of Commons (n 23) 2.

191 Ibid at 27

192 Ibid 25. Also see Schulze and others (n 119) 36., Arthur Gould, 'The Criminalisation of Buying Sex: the Politics of Prostitution in Sweden' (2001) 30(3) Journal of Social Policy 437, 445.

193 House of Commons (n 23) 31.

194 Rekart (n 93) 2124.

195 Amnesty International (n 11) 10. Also see Susan Dewey, Tiantian Zheng and Treena Orchard, *Sex Workers and Criminalization in North America and China: Ethical and Legal Issues in Exclusionary Regimes* (Springer 2016) 29.

196 House of Commons (n 23) 26., and Koken (n 157) 212.

197 Rekart (n 93) 2124.

198 Gerards (n 174) at 467.

199 Persak (n 17) 233.

arising from SW, as seen in the New Zealand example.[200] Therefore, it is possible to achieve the desired goal when even administrative law as a less intrusive means, let alone as criminal law, is not put into effect. So, it can be claimed that there is no necessity to enact criminal law in order to tackle the issues regarding SW.

Although failure to comply with one of the sub-principles of the principle of proportionality suffices to conclude that the principle is violated, it is useful to look at the last sub-principle, the absence of an excessive burden, here. Thus, the next question to be examined is whether criminalisation might impose an excessive burden on sex workers. The social stigma on sex workers and its serious consequences, especially on the safety, security and health of sex workers have already been discussed above. However, it should be pointed out here that criminalisation is likely to place an excessive burden on sex workers by adding a "criminal" stigma on them and intensifying the existing stigma. According to the evidence, criminalisation not only worsens the conditions of sex workers but also makes it more difficult for them to exit the work and recover from the SW-related harm.[201] This is because the "criminal" stigma, combined with the pre-existing social stigma, makes it substantially harder to find the necessary means, such as a new job or a house, to make a new start.[202] Many sex workers indicate that they feel stuck in this business because their "dirty" background follows and frustrates them whenever they want to leave.[203] Moreover, it is evident that whenever a sex worker faces a fine and/or imprisonment, they have to work more in order to pay the fine or rebuild their life after imprisonment.[204] Also considering that the social stigma on sex workers even extends to social workers and health care providers who try to support them, it is not plausible to expect criminalisation to end SW and the harm related to it.[205] In this respect, it can be claimed that criminalisation imposes a great burden on sex workers by giving them no choice except to live with the stigma and to continue to engage in SW. In conclusion, if SW is criminalised, it is highly likely that the principle of proportionality will be violated in all its dimensions.

200 See Lynzi Armstrong, Gillian Abel, *Sex Work and the New Zealand Model: Decriminalisation and Social Change* (Bristol University Press 2020).

201 Sallman (n 159) 157.

202 Miyuki Tomura, 'A Prostitute's Lived Experiences of Stigma' (2009) 40(1) Journal of Phenomenological Psychology 51, 66.

203 Koken (n 157) at 217. Also see Sharon S. Oselin, 'Leaving the Streets: Transformation of Prostitute Identity Within the Prostitution Rehabilitation Program' (2009) 30(4) Deviant Behavior 379, 400.

204 Phoenix (n 8) 40.

205 See Rachel Phillips and others, 'Courtesy stigma: a hidden health concern among front-line service providers to sex workers' (2012) 34(5) Sociology of Health & Illness 681, 685.

III. Criminalisation: A Decision of Prioritising

Thus far, I have discussed that the wrong and harm principles should be acknowledged as the defining principles, because they determine which conduct can be discussed as a matter of criminal law. Moreover, I have argued that the principles of prohibition of discrimination and proportionality should be considered as the restricting principles for criminalisation, since they identify the limits of criminalisation. However, discussing these principles separately is not sufficient for answering the question of whether specific conduct should be criminalised. There is a need for further explanation of how these principles work together to help make a decision on criminalisation.

When there is a social demand for interference with conduct that gives rise to concern, the decision of criminalisation should be made through the evaluation of the defining and the restricting principles in the given order. Firstly, it should be recognised that not every conduct that leads to public disapproval requires interference by criminal law. If criminal law is considered an appropriate way to deal with such conduct, it should first be proved by the state that the conduct in question can be defined as harmful and/or wrongful conduct in accordance with the wrong and harm principles. In case the conduct cannot be defined as such, some other means to interfere with the conduct should be discussed, because criminalisation should not be enacted for those types of conduct that cannot even be defined as harmful and/or wrongful. On the other hand, in case the conduct at issue can be proved to be harmful and/or wrongful, it can be accepted that there is prima facie justification for criminalisation because the defining principles give prima facie reasons for criminalisation of the conduct. However, it should be emphasised that this only creates a *prima facie* case for criminalisation and does not provide an *all-things-considered* justification for it.

Therefore, secondly, it should be proved that criminalisation of the conduct complies with the restricting principles, namely the prohibition of discrimination and proportionality. If it can be proved that criminalisation will not substantially violate these principles, it can be concluded that criminalisation is an *all-things-considered* justified way to deal with the conduct. Otherwise, in case of a substantial violation, the restricting principles indicate the existence of *countervailing* reasons against criminalisation and prevent criminal law from interfering with the conduct in question. As criminal law is a means of protecting the rights of individuals from those defined as harmful and/or wrongful conducts, enacting criminal law should not violate them in defiance of the restricting principles.[206] It is against criminal law's nature to claim the protection of the rights of individuals by criminalisation but to cause further violations of human rights.[207] In this respect, the state bears the burden

206 Marshall and Duff (n 101) 9., and Husak (n 26) 71.

207 Ibid.

of proof to provide all-things-considered justification by ensuring the protection of human rights.[208] Therefore, whether criminalising a defined conduct can be all-things-considered justified is a decision of prioritisation of human rights and protection of these rights to the utmost with the restricting principles.

So far, with regard to criminalisation of SW, the defining and restricting principles have been evaluated without reaching a final decision. In the light of the explanation above, to decide whether criminal law can be a justifiable response to SW, the defining principles should be reviewed first. Nevertheless, in doing so, the harm and wrong principles should not be considered as paternalistic principles, and they should not be used as a means of enforcement of morals.[209] In this respect, the question of how these principles should be understood has been explained in this article, and some arguments for defining SW as harmful and/or wrongful have been criticised. Accordingly, pursuant to the harm principle, it has been discussed that SW can only be defined as harmful conduct in terms of self-harm. However, it has been noted that self-harm is not a strong claim for defining SW as harmful in terms of the harm principle, since it might give rise to paternalism. The same conclusion was reached with respect to the wrong principle as it has been determined that SW can only be defined as a public wrong on the ground of self-harm. Nonetheless, defining self-harm as a public wrong was again criticised for being open to paternalism. Therefore, if we set aside the risk of paternalism and include self-harm in the principles, it can be established that SW can be defined as harmful and/or wrongful only due to the self-harm it causes and that the defining principles give prima facie -albeit weak- reasons for criminalisation of SW in this respect.

However, as indicated above, these prima facie reasons do not suffice to justify criminalisation. It should also be proved that criminalisation of SW does not substantially violate the restricting principles. As discussed in the relevant section, sex workers constitute a vulnerable group that should be equally protected by the law, because the evidence shows that they are commonly discriminated against, due to the stigma, particularly in the criminal justice and health care systems. Moreover, it was discussed in this paper that criminalisation of SW is not a proportionate means since it is not a suitable and necessary response to it. Also, this paper indicates that criminalisation might impose an excessive burden on sex workers considering that they already suffer from stigma and discrimination in many aspects of their lives. Accordingly, the evidence discussed suggests that criminalisation of SW might cause substantial violation of the restricting principles by disproportionately interfering with SW and leading to increase in SW-related harm. Further, it should be underlined that the defining principles only give prima facie reason for the criminalisation of

208 Husak (n 26) at 99.

209 Persak (n 17) at 235

SW in terms of the self-harm it causes, whereas the restricting principles indicate that criminalisation might cause more self-harm to sex workers by intensifying the stigma and discrimination they experience. This point clearly demonstrates that the criminalisation of SW might actually contradict the aim pursued by it, and substantially violate the human rights of sex workers without having a legitimate aim. Therefore, it can be concluded that criminalisation of SW cannot be all-things-considered justified.

Conclusion

Although SW is a social activity that gives rise to serious concern with regard to its moral and social aspects, criminalising it should only be based on the principles of criminalisation. In case criminal law is considered as a possible response to SW, the state must prove that criminalisation is justified on the basis of the defining and restricting principles. The harm and wrong principles should be recognised as the defining principles, while the principles of prohibition of discrimination and proportionality should be acknowledged as the restricting principles. Accordingly, the state must prove that there is a prima facie reason for the criminalisation of SW pursuant to the defining principles, and yet no strong countervailing reason against criminalisation due to substantial violation of the restricting principles. It should be acknowledged that the decision of criminalisation should be based on the prioritisation of human rights, because the protection of these rights is one of the fundamental aims of criminal law.

While the defining principles give prima facie reason for criminalisation of SW only on the ground of the self-harm caused by it, the evaluation of the restricting principles suggests that criminalisation might lead to more harm than it aims to prevent. According to the evidence from different jurisdictions, sex workers need equal protection of the law because they are predominantly disadvantaged individuals that suffer from stigma and discrimination. Moreover, criminalisation might be a disproportionate response to SW that causes more harm. Therefore, unless the situation is proved to be contrary in a specific jurisdiction, SW should not be criminalised as it cannot be justified with the principles of criminalisation.

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RESEARCH ARTICLE

Autonomous Weapon Systems and the Humanitarian Principle of Distinction

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Abstract
Autonomous Weapon Systems have been on the international agenda for more than ten years now. Autonomy in warfare and its attached promises have been dubbed as the most recent revolution in military technologies. Many commentators have a rather sceptical view of these systems. They believe that the very existence of international humanitarian law and the minimal protection offered by it are at risk due to the gradually increasing use of autonomous weapons. Albeit a minority, some other commentators welcome the development of these warrior machines, with the insinuation that wars will be conducted more humanely due to the dehumanisation of warfare. This paper undertakes to evaluate these autonomous systems in terms of their compatibility with the requirements brought about by the principle of distinction, one of the cardinal principles of international humanitarian law.

Keywords
International Law, International Humanitarian Law, Principle of Distinction, Autonomous Weapon Systems

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Introduction

Progress in mechanical capabilities and artificial intelligence has had a concrete impact on many sectors including military affairs.[1] The introduction of weapon systems with differing levels of autonomy has been dubbed as the third revolution in military technologies following gunpowder and nuclear bombs.[2] Autonomous weapon systems have become one of the most intensely debated topics of recent years.[3] There is a concrete possibility that autonomous weapon systems will completely change the reality of the contemporary battlefield, for they are to replace humans in the military decision-making process.[4]

It seems realistic to suggest that the legal regulation being favoured by some countries in those debates on the subject aims primarily to ban these weapons altogether. At least there is a serious effort in this direction on behalf of a big assortment of various international actors.[5] It is clear from the debates that some other states perceive them as science fiction weapons. This futuristic Star Wars approach makes the whole body of discussion essentially redundant. It is the observed position of these states that international humanitarian law of today is more than sufficient to tackle any problems that may arise in connection with the deployment of such weapons and weapon systems.[6] This diplomatic stance is also the concrete emergence modality of an underlying policy goal, which ultimately aims to block the introduction of any bans or restraints as regards these weapons and systems.[7]

1 Collin Douglas, 'What We Talk About When We Talk About Killer Robots: The Prospects of an Autonomous Weapons Treaty' (2023) 51 Georgia Journal of International and Comparative Law 501, 502; Anna-Katharina Ferl, 'Imagining Meaningful Human Control: Autonomous Weapons and the (De-) Legitimisation of Future Warfare' [2023] Global Society 1; Denise Garcia, 'Lethal Artificial Intelligence and Change: The Future of International Peace and Security' (2018) 20 International Studies Review 334, 335.

2 Lucie König, 'Autonome Waffensysteme Und Das Humanitäre Völkerrecht' (IFSH 2017) 11 1; Adem Özer, *Silahlandırılmış Yapay Zeka: Otonom Silah Sistemleri ve Uluslararası Hukuk* (Adalet Yayınevi 2022) 251; Afonso Seixas-Nunes, *The Legality and Accountability of Autonomous Weapon Systems: A Humanitarian Law Perspective* (Cambridge University Press 2022) 140 <https://www.cambridge.org/core/books/legality-and-accountability-of-autonomous-weapon-systems/FE880FD3F459B29A495D79D0C8347D79>.

3 Justin Haner and Denise Garcia, 'The Artificial Intelligence Arms Race: Trends and World Leaders in Autonomous Weapons Development' (2019) 10 Global Policy 331, 331; Sebastian Schwartz and Christian Reuter, '90.000 Tonnen Diplomatie 2.0: Die Integration von unbemannten Systemen in den operativen Flugzeugträgerbetrieb am Beispiel der X-47B' (2020) 13 Zeitschrift für Aussen- und sicherheitspolitik 23, 24; Sehoon Park, 'Analysis of the Positions Held by Countries on Legal Issues of Lethal Autonomous Weapons Systems and Proper Domestic Policy Direction of South Korea' (2020) 32 The Korean journal of defense analysis 393, 394; Christoph Sebastian Widdau, 'Reißen opake autonome Waffensysteme eine Verantwortungslücke? Eine kriegsethische Frage' [2022] WeltTrends: internationale Politik und vergleichende Studien 1, 24.

4 Mustafa Can Sati, 'The Attributability of Combatant Status to Military AI Technologies under International Humanitarian Law' [2023] Global Society 1.

5 Vivek Sehrawat, 'Autonomous Weapon System: Law of Armed Conflict (LOAC) and Other Legal Challenges' (2017) 33 Computer Law & Security Review 38, 39; Douglas (n 1) 502.

6 Charles P Trumbull, 'Autonomous Weapons: How Existing Law Can Regulate Future Weapons' (2020) Volume 34 Emory International Law Journal 535; Anja Dahlmann, Elisabeth Hoffberger-Pippan and Lydia Wachs, 'Autonome Waffensysteme und menschliche Kontrolle - Konsens über das Konzept, Unklarheit über die Operationalisierung' (SWP 2021) Nummer 31 8.

7 Douglas (n 1) 502; Jeroen C van den Boogaard and Mark P Roorda, '"Autonomous" Weapons and Human Control' in Rogier Bartels and others (eds), *Military Operations and the Notion of Control Under International Law: Liber Amicorum Terry D. Gill* (TMC Asser Press 2021) 422

However, weapons with a certain level of autonomy in different functions like targeting and engagement are already in use.[8] In this respect, one must be reminded that an image inspired by the robots in the movie series Terminator may be misleading. Even if they do not achieve full autonomy like that of those robots in movies, systems with varying degrees of autonomy are already in use today. The actual state may be as alarming as it is for those who value the proper implementation of humanitarian rules. The trends on the other hand indicate a willingness on behalf of certain states, which strikingly enough boast already enjoying very powerful armies. Needless to say, the introduction of autonomous weapon systems into their arsenal will enable them to expand their military capabilities even further.[9]

The highest level of autonomy that humans can imagine is likely to be created in the not-too-distant future, regardless of which level of autonomy we now choose in our legal regulations and rules for defining these weapon systems. The achievement of levels lower than this highest level, but still neighbouring full autonomy, will be observed in a relatively short period of time, if, of course, that has not yet been reached.

The existence of weapon systems of this nature is, not entirely a problem of the law of armed conflicts. Here, it is essential to take a broader view, including the extreme consequences and possibilities, such as rendering meaningless the entire fabric of the international system against the use of force. Undoubtedly, autonomous weapon systems will create an asymmetry in favour of strong states including but not at all limited to the USA, China and Russia.[10] This alarming probability of decreasing deterrence to the detriment of weaker states and entities may increase the use of force on a global scale which in turn automatically triggers the implementation of international humanitarian law with its time and battle-tested principles. The distinction is one of the cardinal principles of this body of law.[11]

In this paper, the author will probe into the significant question of whether the increasing deployment of autonomous weapon systems jeopardises the proper implementation of the humanitarian principle of distinction. To achieve this, first one must take a deeper look at autonomous weapon systems to delineate their impacts on

8 Laura Bruun, Marta Bo and Netta Goussac, 'Compliance with International Humanitarian Law in the Development and Use of Autonomous Weapon Systems: What Does IHL Permit, Prohibit and Require?' (Stockholm International Peace Research Institute 2023) 3 <https://www.sipri.org/publications/2023/other-publications/compliance-international-humanitarian-law-development-and-use-autonomous-weapon-systems-what-does> accessed 17 July 2023.

9 Haner and Garcia (n 3) 332–335.

10 Dahlmann, Hoffberger-Pippan and Wachs (n 6) 7–8; Robin Geiß, 'State Control Over the Use of Autonomous Weapon Systems: Risk Management and State Responsibility' in Rogier Bartels and others (eds), *Military Operations and the Notion of Control Under International Law: Liber Amicorum Terry D. Gill* (TMC Asser Press 2021) 441 <https://doi.org/10.1007/978-94-6265-395-5_21>.

11 İsmail Ataş, 'Otonom Silah Sistemlerinin İnsancıl Hukukun Temel İlkelerine Uygunluğunun Sağlanmasinda Anlamlı İnsan Kontrolünün Etkisi' (2022) 12 Hacettepe Law Review 767, 782; Gökhan Güneysu, *Otonom Silah Sistemleri: Bir Uluslararası Hukuk İncelemesi* (Nisan Kitapevi 2022) 92; König (n 2) 3; Paul Scharre, *Army of None: Autonomous Weapons and the Future of War* (WW Norton & Company 2018) 243; Seixas-Nunes (n 2) 150.

the humanitarian situation during hostilities. Following that, the rule of distinction shall be elaborated. Finally, we will evaluate these systems from a pro-humanitarian distinction viewpoint.

I. Autonomous Weapon Systems

Autonomous weapon systems are ground-breaking force multipliers that are already in use.[12] It is imperative to keep in mind that an asymmetry of power will be created in favour of states that can effectively develop and use such weapon systems.[13] As Rossiter accurately reminds us in this respect '*(a)utonomy in this decision-making context means that the system has ability to independently decide among different courses of action. Delegated decision-making to autonomous systems has the potential for substantial efficiencies between stages of the kill chain, compressing the time it takes from identifying a target to destroying it*'.[14] It is a safe bet now to claim that military targeting cycles will take remarkably less time to analyse, value and engage enemy targets. This will contribute to the emergence of a huge power asymmetry between states with autonomous weapons and those without.

Yet, defining autonomous weapons has so far proven to be an extremely thorny issue.[15] In this regard, different definitions have been made by various individuals and organisations. However, there is no legal framework for the time being, which states and other international actors have hitherto agreed upon, that happens to include among others a binding legal definition of these systems.[16] The United States Department of Defense defined autonomous weapon systems as systems that 'once activated, can select and engage targets without further intervention by a human operator'.[17] The International Committee of the Red Cross seems to have assumed a functionalist approach in their dealing with this definition challenge.[18] In this conceptualisation of the term, autonomous weapon systems are those which autonomously control the 'critical functions' of acquiring, tracking, selecting and attacking targets.[19]

12 Daan Kayser, 'Why a Treaty on Autonomous Weapons Is Necessary and Feasible' (2023) 25 Ethics and Information Technology 25, 24; Douglas (n 1) 507.

13 Gökhan Güneysu, 'Yeni Silahların Tabi Tutulması Gereken Hukukîlik Denetimi ve Otonom Silah Sistemleri' (2023) 14 Türkiz 81, 84.

14 Ash Rossiter, 'AI-Enabled Remote Warfare: Sustaining the Western Warfare Paradigm?' (2023) 60 International Politics 818, 825.

15 Shane R Reeves, Ronald TP Alcala and Amy McCarthy, 'Challenges in Regulating Lethal Autonomous Weapons under International Law Fighting in the Law's Gaps' (2021) 27 Southwestern Journal of International Law 101, 102; van den Boogaard and Roorda (n 7) 423.

16 Dahlmann, Hoffberger-Pippan and Wachs (n 6) 1; Güneysu, 'Yeni Silahların Tabi Tutulması Gereken Hukukîlik Denetimi ve Otonom Silah Sistemleri' (n 13) 84.

17 Douglas (n 1) 506; Reeves, Alcala and McCarthy (n 15) 105.

18 Douglas (n 1) 506.

19 Kayser (n 12) 25; Reeves, Alcala and McCarthy (n 15) 106; Douglas (n 1) 506.

It seems fair to embrace a definition based on these two separate definitions which are by now widely quoted in the academia. The autonomous character of the war-making functions of these systems seems to make sense with a view to separating them from other machines that function in other sectors. Some UAV or UCAV's like the Turkish Kargu-2 are reported to have autonomous navigation capabilities.[20] However, this navigational capability *per se* is not deemed to be listed among the critical functions of an autonomous weapon system, for it lacks any distinguishing property due to the facts that it is vastly used in other sectors like transportation and aviation and that navigation is not exclusively a military function, hence not capable of establishing an instant nexus with the status of a weapon or a weapon systems.

Harmonious with this line of thinking, target selection and engagement must significance attached as necessitated by the definition put forward by the ICRC. The same applies for the definition of the US DOD, which clearly highlights the dehumanised modus operandi of these systems, which basically means '(t)he removal of a soldier from the battlefield'.[21] Dehumanisation is, obviously, another indispensable quality of autonomous weapon systems.

For the purposes of this paper, autonomous weapon systems can be defined as such systems that perform target identification and assessment as well as hostile engagement without any need for human input.[22] It is thus the nature of the functions in which autonomy is to be observed that is decisive but not the mere existence of some degree of autonomy anywhere on the functions plate of the weapon system concerned.[23] Any weapon or weapon system with autonomy in the said critical functions are to be deemed as autonomous weapon systems. The overall autonomy level of the system on the other hand is not to have significance attached.[24]

An autonomous weapon system controlled by a program will be able to collect more data with developing sensor technology[25] and implement the necessary changes in its speed and direction in light of this information[26]. With this adaptability, autonomous systems will be able to perform missions even in open and unstructured environments. This freedom and adaptability are one of the features that distinguish autonomous systems from automated weapons like anti-personnel mines. Automated

20 STM, 'STM - KARGU - Combat Proven Rotary Wing Loitering Munition System' (*STM*) <https://www.stm.com.tr/kargu-autonomous-tactical-multi-rotor-attack-uav> accessed 20 July 2023.

21 Anzhelika Solovyeva and Nik Hynek, 'Going Beyond the" Killer Robots" Debate: Six Dilemmas Autonomous Weapon Systems Raise.' (2018) 12 Central European Journal of International & Security Studies 177.

22 Christoph Bartneck and others, 'Military Uses of AI' in Christoph Bartneck and others (eds), *An Introduction to Ethics in Robotics and AI* (Springer International Publishing 2021) 94 <https://doi.org/10.1007/978-3-030-51110-4_11>.

23 ibid 95; Bruun, Bo and Goussac (n 8) 2. "ibid 95; Bruun, Bo and Goussac (n 8)

24 Bruun, Bo and Goussac (n 8) 2."Bruun, Bo and Goussac (n 8)

25 Seixas-Nunes (n 2) 62–63.

26 Rossiter (n 14) 824; Agnieszka Szpak, 'Legality of Use and Challenges of New Technologies in Warfare – the Use of Autonomous Weapons in Contemporary or Future Wars' (2020) 28 European Review 118, 119.

weapons are such weapons that perform a single type of function and are generally deployable within a mechanical structure.[27] Here, there is no decision that requires high technology, such as actively searching for targets, evaluating the obtained image or information based on an algorithm or artificial intelligence.[28] It is necessary to talk about uniform responses to a plethora of very simple variables like movement or weight.[29] However, in the spectrum from automated systems to full autonomy, as the level of autonomy increases, crisis situations may tend to increase in which uncertainty and complexity will be observed in excess.[30]

Obviously, confusing autonomous weapons with automated weapons such as mines will be misleading since the latter weapons operate automatically and have simple one-dimensional tasks.[31] In automated weapons, the outcome of the process is predefined and utterly predictable[32], whereas in autonomous weapon systems the whole process is complicated and the outcomes unpredictable. Autonomous weapon systems differ from automatic (or automated) systems in that '*the activities of these systems are goal-oriented (teleonomic), they operate based on a set of constraints or perceptions in their internal workings to achieve a certain goal and they do not operate based on a simple energy input, but actively perceive and interpret their environment and the consequences of their possible future actions*'.[33] Therefore, the outcome may vary as the input to the battlefield elements fluctuates. Since it is for the readers of Clausewitz nothing but normal to expect that war will come with its own fog on aboard, there is no way to predict how those autonomously-generated outcomes will look.

Autonomous systems that orient themselves according to 'the input' obtained after scanning the environment continue to perform their tasks under the light of the principles of their own internal processes.[34] Automatic weapons lack decision-making processes whereas autonomous systems exhibit goal-driven 'behaviours'.[35] Autonomous systems are supposed to have a higher degree of awareness of their

27 Erica Ma, 'Autonomous Weapons Systems Under International Law' (2020) 95 New York University Law Review 1435, 1441.

28 Güneysu, *Otonom Silah Sistemleri: Bir Uluslararası Hukuk İncelemesi* (n 11) 27.

29 Ma (n 27) 1441.

30 Harald Schaub, 'Der Einsatz Autonomer Waffensysteme Aus Psychologischer Perspektive' (2020) Volume 13 Zeitschrift für Außen- und Sicherheitspolitik 335.

31 Armin Krishnan, 'Enforced Transparency: A Solution to Autonomous Weapons as Potentially Uncontrollable Weapons Similar to Bioweapons' in Jai Galliott, Duncan MacIntosh and Jens David Ohlin (eds), *Lethal Autonomous Weapons: Re-Examining the Law and Ethics of Robotic Warfare* (Oxford University Press 2021) 219 <https://doi.org/10.1093/oso/9780197546048.003.0015> accessed 18 July 2023.

32 William H Boothby, *Conflict Law: The Influence of New Weapons Technology, Human Rights and Emerging Actors* (TMC Asser Press 2014) 104.

33 Cristiano Castelfranchi and Rino Falcone, 'From Automaticity to Autonomy: The Frontier of Artificial Agents' in Henry Hexmoor, Cristiano Castelfranchi and Rino Falcone (eds), *Agent Autonomy* (Springer US 2003) 105 <https://doi.org/10.1007/978-1-4419-9198-0_6>.

34 Güneysu, *Otonom Silah Sistemleri: Bir Uluslararası Hukuk İncelemesi* (n 11) 28.

35 Castelfranchi and Falcone (n 33).

surroundings. This awareness is expected to increase owing to advanced sensor technology and machine learning, which will be applied more frequently and more successfully in the future, as well as being more capable than humans of minimizing breaches of humanitarian rules.[36]

Autonomous systems may, depending on current settings, have a greater or lesser role in the decision-making process regarding where, when and by what methods to attack enemy personnel or property. In a system operating with full autonomy, for example, this involvement is to its fullest extent possible.[37] Therefore, autonomy should not and cannot be conceptualised in absolute dichotomies, given its fluctuating nature. As stated elsewhere: '*Autonomy is a characteristic, not a thing in and of itself. It could be applied to any weapon system. It could be applied to different parts of any system—for example, something might be able to determine its path and navigate autonomously, but once on target, humans are involved in the decision to engage. You might have an adjustable object with an autonomous mode, automatic mode and human-operated mode*'.[38]

The best way to understand autonomous weapon systems and their autonomy would be to place machine autonomy on a spectrum. Although there are as of today no systems that are fully autonomous and fully self-cognisant like those terminator robots, there is a very high number of systems that are autonomous in their functioning. The level of autonomy these systems have may vary not only from system to system but also from modality to modality, under which one specific system may be selected to work. Just as is the case with some aerial defence systems, human operators may select to turn on the fully autonomous mode or may just opt to keep it in such a setting that requires an operator to confirm or reject any solutions autonomously generated by the system.

As Dahlbeck hints, there is a plethora of confusion and misconceptions as to autonomy.[39] One common misunderstanding is the confusion of machine autonomy and artificial intelligence, or rather the former cannot be real without the latter, which is a misunderstanding. Machine autonomy does not have to be completely AI-powered via deep learning. This is a very common misconception as to autonomy. Machine autonomy may very well start with relatively simple algorithms that cannot turn the systems into self-thinking entities. A system working on an algorithm will still be able to generate a solution as to whether to attack a certain building within the parameters of its programming. Machine learning systems, on the other hand,

36 Douglas (n 1) 535.

37 Güneysu, 'Yeni Silahların Tabi Tutulması Gereken Hukukîlik Denetimi ve Otonom Silah Sistemleri' (n 13) 85.

38 UNIDIR, 'The Weaponization of Increasingly Autonomous Technologies: Concerns, Characteristics and Definitional Approaches. A Primer' (UNIDIR 2017) No. 6 19.

39 Moa De Lucia Dahlbeck, 'AI and Spinoza: A Review of Law's Conceptual Treatment of Lethal Autonomous' (2021) 36 AI & SOCIETY 797, 799.

are capable of learning to fulfil tasks through training, use and human feedback[40]. To reiterate, to have and deploy perfectly autonomous weapon systems, it does not take human-like intelligent beings.

Human-machine interaction during the deployment of an autonomous weapon system is crucial.[41] Control, for some, can only mean that the human remains in-the-loop, meaning that final decisions on critical matters like targeting and engagement are left exclusively to human decision-making.[42] In this modality, the execution of the final critical function is left to human personnel alone. The system, which operates autonomously during navigation and target acquisition, is not equipped with the authority to decide on the executive action to deliver the final blow.[43] What the author means here is that even if the system performs many critical military functions autonomously, it is not programmed to take the decision to attack enemy personnel or other military targets on its own. In this case, the system is only capable of taking offensive action after human instruction to do so. The decision to attack, in this type of interaction, rests solely with human personnel.[44]

The human-controller model, according to which the human component supervises the operation of the autonomous system and reserves the possibility to intervene in its solutions, but does not interfere unless necessary, can also be deemed sufficient to ensure meaningful control, which the ICRC and SIPRI define as a key necessity for autonomous weapon systems' deployment in hostilities.[45]

The human-controller model, in contradistinction to in-the-loop mode, undoubtedly leaves a wider decision and action room for the machine and is called on-the-loop typology.[46] In this type of interaction, the autonomous weapon system not only acquires targets but also takes the final decision to attack. The human operator takes a step back and monitors the whole process from afar.[47] The difference here is that human instruction is not explicitly required. The human operator is, however, authorised to override the autonomously generated decision about the hostile act. In the case where the human refrains from undertaking anything within a given amount of time, the system will execute its own decision without seeking any approval from the human operator.

40 Shin-Shin Hua, 'Machine Learning Weapons and International Humanitarian Law: Rethinking Meaningful Human Control' [2019] Georgetown Journal of International Law 117, 118.

41 Merel Ekelhof, 'Moving Beyond Semantics on Autonomous Weapons: Meaningful Human Control in Operation' (2019) 10 Global Policy 343, 345.

42 Rebecca Crootof, 'A Meaningful Floor for "Meaningful Human Control"' (2016) 30 Temple International and Comparative Law Journal 53, 54; van den Boogaard and Roorda (n 7) 422.

43 Güneysu, *Otonom Silah Sistemleri: Bir Uluslararası Hukuk İncelemesi* (n 11) 29.

44 Leila Methnani and others, 'Let Me Take Over: Variable Autonomy for Meaningful Human Control' (2021) 4 Frontiers in Artificial Intelligence 2 <https://www.frontiersin.org/articles/10.3389/frai.2021.737072>.

45 Edward Hunter Christie and others, 'Regulating Lethal Autonomous Weapon Systems: Exploring the Challenges of Explainability and Traceability' [2023] AI and Ethics <https://doi.org/10.1007/s43681-023-00261-0>.

46 Crootof (n 42) 54.

47 Douglas (n 1) 506; Methnani and others (n 44) 2.

There are also evaluations that autonomous weapon systems should be considered as combatants due to their ability to make decisions based on artificial intelligence or algorithms and, in a sense, to exercise discretion. According to this view, these systems should be considered as subordinate personnel. In such a case, these systems should be directly subject to humanitarian law regulations. Therefore, if such an understanding prevails, autonomous systems will cease to be the object of humanitarian law and will become its subject. Combatants are legally cleared to commit the act of killing during a conflict. According to Akerson, systems with this characteristic should be considered as unlawful combatants since they do not fully meet the requirements of being combatants under Article 43 of Additional Protocol I, yet are perfectly capable of killing humans and engaging targets.[48] This author finds in Akerson's proposal a ground-breaking negation of anything and everything international humanitarian law wishes to establish. This body of law openly addresses real persons by creating for them obligations and/or rights although this whole process functions via states as the principal addressees of humanitarian law. However, the end beneficiary is nothing but real persons. Humanitarian law functions by the actions of real persons and it attaches legal consequences to illegal actions or omissions of real persons. Taking into account this human-centric nature of humanitarian law, Akerson's proposal should be declined. Besides, there is no palpable use in this hypothetical personification of robots, since it is impossible to apply sanctions on these machines if any transgression of law occurs.

II. Principle of Distinction

Humanitarian law is a specific branch of international law that will be applied in the event of an armed conflict.[49] It has the objective to diminish the evils of hostilities to an extent possible, especially with a view to protecting civilians from the impacts of war.[50] It has been developed in accordance with the specific conditions of the conflicts and under the light of concrete experiences of armed conflicts.[51] Humanitarian law has separate rules of law for international and non-international armed conflicts.[52]

By definition, international armed conflicts are such conflicts between at least two states. The development of autonomous systems has so far been the exclusive domain of state actors. Therefore, at least in the foreseeable future, the acquisition

48 David Akerson, 'Chapter 3 The Illegality of Offensive Lethal Autonomy' in Dan Saxon (ed), *International Humanitarian Law and the Changing Technology of War* (Brill | Nijhoff 2013) 88–89 <https://brill.com/view/book/edcoll/9789004229495/B9789004229495-s005.xml>.

49 Boothby (n 32) 7.

50 Ronald C Arkin, *Governing Lethal Behavior in Autonomous Robots* (CRC Press 2009) 71; König (n 2); Scharre (n 11) 243.

51 Rieke Arendt, 'Völkerrechtliche Probleme Beim Einsatz Autonomer Waffensysteme' (Doctoral Thesis, Universität Potsdam 2016) 43.

52 Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (1st edn, Cambridge University Press 2004) 1–3 <https://www.cambridge.org/core/books/conduct-of-hostilities-under-the-law-of-international-armed-conflict/6F968AB75832E7A46CD4FEE7CA86BB8F> accessed 18 July 2023.

of autonomous weapon systems by non-state actors will be considered a security problem and will be tried to be prevented by any means necessary. However, just because only state actors have hitherto managed to develop and deploy these systems does not necessarily mean that they will never be used in non-international conflicts by some armed groups.

Humanitarian law texts on armed conflicts of an international character are more comprehensive, and their regulations are more detailed. As required by historical circumstances, the dominant concept of warfare at the time these rules were created was inter-state in nature, and the principles and conventions of humanitarian law that have evolved since then have found their place in the legal framework of international conflicts[53].

In armed conflicts, as a rule, the main target is the armed forces of the enemy. This is due the fact that these forces are the only obstacle in the way of the unfettered dictation of the political will of another state over that state.[54] Accordingly, military actions taken during an armed conflict should only target the enemy's military power.[55] As early as in 1868, the weakening of the armed forces of the enemy was declared to be the sole legitimate objective of the whole war campaign by virtue of the St. Petersburg Declaration.[56] In fact, the principle of distinction is said to be as old as the organized armed conflict itself.[57]

In order for an attack to be lawful according to international humanitarian law, an attack must exclusively be directed against such legitimate targets.[58] Similarly, the Hague Conventions on the Law of War of 1899 and 1907 and the Geneva Conventions of 1949 also contain rules ordering such a distinction.

In the same vein, many national and international courts or arbitration tribunals have rendered decisions confirming the existence of the rule on distinction. In one of them, the so-called Coenca Brothers v. Germany Case, '*the Greek-German Mixed Arbitration Panel decided a dispute concerning the bombing of the city of Thessaloniki by a Zeppelin in 1916. The award found Germany liable for violations of international law. According to the December 1927 award, the attack was carried*

53 Arendt (n 51) 45.

54 Gökhan Güneysu, *Çevrenin Silahlı Çatışmalar Esnasında Korunması* (Adalet Yayınevi 2014) 197.

55 ibid; Jonathan Crowe and Kylie Weston-Scheuber, *Principles of International Humanitarian Law* (Edward Elgar Publishing 2013) 53.

56 Güneysu, *Çevrenin Silahlı Çatışmalar Esnasında Korunması* (n 54) 198; Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law: Volume 1: Rules*, vol 1 (Cambridge University Press 2005) 3 <https://www.cambridge.org/core/books/customary-international-humanitarian-law/9F4A7A9222814BF47BF62221C7B581BA> accessed 17 July 2023.

57 Arthur van Coller, 'An Evaluation of the Meaning and Practical Implications of the Concept of "Direct Participation in Hostilities"' (University of Pretoria 2015) 157.

58 Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar Publishing 2019) 29 <https://www.elgaronline.com/view/9781786438546/9781786438546.xml>; Crowe and Weston-Scheuber (n 55) 53.

out at night and from a height of 3,000 meters, without any prior warning. According to the Panel, one of the principles generally recognized by International Law is that the combatants should, as far as possible, protect the civilian population'.[59]

Most recently, Article 48 of the Additional Protocol I of 1977 has the following on this point:

'*In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.*'

The principle of distinction regulated in Article 48 provides a general protective blanket for non-combatants. The direct targeting of civilians is thus prohibited.[60] This prohibition will apply even in such instances where it might be considered ultimately beneficial to target civilians with a view to terrorising and demoralising them so that any potential for armed resistance could be weakened.[61]

In addition to this basic rule, there are specific layers of protection provided by, inter alia, Additional Protocols I and II. Article 51(2), for example, states that the civilian population as well as individual civilians shall not be the target of attack and that acts or threats of violence of which the main purpose is to spread terror among the civilian population are prohibited.[62] Article 51(4) prohibits attacks that are indiscriminate either by design of the military planners or due to the peculiarities of the means or methods of war deployed during that attack.[63] Regardless of the underlying reason, any indiscriminate attack is thus *expressis verbis* prohibited. This offers another protective blanket for the civilian population. Thus, Article 51 aims at the protection of non-combatants, that is real persons, during hostilities.

Article 52 AP I, on the other hand, aims to protect civilian objects. Article 52 (3) has another important layer of protection by foreseeing that '*(i)n case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used*'. In the light of this, any military commander may not find the existence of mere doubt a sufficient ground to make the buildings concerned the objective of an attack. Another Article that one may elaborate on in this regard is Article 57 of the Additional Protocol I of

59 Güneysu, *Çevrenin Silahlı Çatışmalar Esnasında Korunması* (n 54) 199.

60 Crowe and Weston-Scheuber (n 55) 53.

61 Güneysu, *Çevrenin Silahlı Çatışmalar Esnasında Korunması* (n 54) 198; Crowe and Weston-Scheuber (n 55) 53.

62 Henckaerts and Doswald-Beck (n 56) 3–4.

63 Damien Cottier, 'Emergence of Lethal Autonomous Weapons Systems (LAWS) and Their Necessary Apprehension through European Human Rights Law' (Council of Europe, Committee on Legal Affairs and Human Rights 2022) 30; Crowe and Weston-Scheuber (n 55) 57.

1977, which orders commanders to constantly 'do everything feasible to verify' that the objects they are attacking are genuinely military objectives.[64]

In light of the foregoing, there is no doubt in the existence of the legal requisite of a constant distinction between combatants and civilians.[65] In accordance with the principle of distinction in contemporary law of armed conflict, it is at all times necessary to distinguish between civilians and civilian objects, as well as between military personnel and military targets.[66] Accordingly, the immediate target of a military attack is only those persons and objects that may legitimately be military targets.[67] The constant character of this legal obligation is of import. The distinction is not something one may easily neglect after the end of a certain stage in the cycle of military decision-making. The planning phase, where the targets shall be valued in terms of military advantage, offering if/when the targets are destroyed, is not the only phase during which the distinction rule is taking cognisance. During the tactical phases (i.e., execution) of the whole military loop, military personnel are under the burden of distinguishing between civilians and enemy combatants.

The ICJ, in its Advisory Opinion of 1996[68] underlines unmistakably that '*(t)he cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets*'.

In this regard, whether the deployment of autonomous weapons will have a negative impact upon the implementation of this 'basic rule' is a question of vital import. An autonomous weapon system can continue to kill people with continuity and efficiency, not unlike the action of a production tool that screws certain parts together in an automobile factory. Not only is it not possible for a weapon system to feel any remorse or anxiety about the human life it ends as a result of the act of killing, but these systems also lack the capacity to reason about the meaning and significance of the human life they end. The killing of humans is therefore reduced to a simple numerical expression in an algorithm that just needs to be run without glitches and with periodical maintenance. It does not seem possible at the moment for a machine to attribute any meaning to actions such as the meaning of life and its ending, nor will it be realistic to expect that

64 Seixas-Nunes (n 2) 171; van den Boogaard and Roorda (n 7) 427; van Coller (n 57) 159.

65 Dinstein (n 52) 82; Seixas-Nunes (n 2) 173.

66 Elvira Rosert and Frank Sauer, 'Prohibiting Autonomous Weapons: Put Human Dignity First' (2019) 10 Global Policy 370, 371.

67 Henckaerts and Doswald-Beck (n 56).

68 International Court of Justice, 'Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion' (*Refworld*) <https://www.refworld.org/cases,ICJ,4b2913d62.html> accessed 20 July 2023.

machines would be able to grasp the gravity of the autonomously generated decision to kill and/or wound humans during armed conflicts.

The fact that machines, which cannot, at least for the time being, have any human perception, emotion and thought, are to be the ultimate decision-makers on the termination of human life brings to the fore first and foremost an ethical problem.[69] According to those who hold this view, it is unethical to leave it to machines to decide which life ends due to the engagement of autonomous weapons since they possess by no means any meaningful 'internal states' as the agent using force to comprehend the consequences of that specific hostile act.[70] Likewise, reducing human life to simple and meaningless information data should be seen as a violation of respect for human life and human dignity. Ethical problems caused by autonomous weapon systems are found perfectly sufficient by many to justify a complete ban on such systems.[71]

On the other hand, some authors and thinkers argue that autonomous weapon systems do not have human feelings and that this can actually be considered as an advantage in terms of humanitarian protection.[72] According to this approach, human beings have already shown that they are capable of committing all kinds of crimes in a war environment. It is not uncommon for crimes to be committed due to motives such as fear, revenge, etc. and for reasons such as threat and chaos[73]. Hence, it is actually humans that should not be trusted to follow rules on military conduct and that autonomous systems, which do not have the emotions humans have, might be an advantage for the sake of humanitarian protection[74].

Still, the most important concern expressed in diplomatic discussions as well as in the reports of individuals and organisations has constantly been that these weapons pose a serious risk of violating or circumventing the rules and principles of humanitarian law.[75]

III. The Appraisal of Autonomous Weapon Systems under the Light of the Principle of Distinction

Autonomous weapon systems, which dynamically interact with the environment, are able to detect and evaluate potential targets with the help of remote sensing

69 Scharre (n 11) 264.

70 Alex Leveringhaus, 'Morally Repugnant Weaponry?: Ethical Responses to the Prospect of Autonomous Weapons' in Silja Voeneky and others (eds), *The Cambridge Handbook of Responsible Artificial Intelligence* (1st edn, Cambridge University Press 2022) 482 <https://www.cambridge.org/core/product/identifier/9781009207898%23CN-bp-27/type/book_part> accessed 24 July 2023.

71 Scharre (n 11) 264.

72 Douglas (n 1); Leveringhaus (n 70) 478; Widdau (n 3) 26.

73 Schaub (n 30).

74 Ma (n 27) 1445.

75 Scharre (n 11) 244; Trumbull (n 6) 534.

technology. In addition to the algorithm-based or artificial intelligence-based distinction of targets, it is also possible to talk about the establishment of a priority order among the targets acquired. Such capabilities, if/when developed properly, will also work as built-in guarantees for such conduct on the battlefield that at least converges to the standards set by the law especially in relation to the principle of distinction.[76]

There is no doubt that the development of sensor technology in particular will contribute to the application of the principle of distinction. However, today and in the near future, important decisions will need to be made during warfare under time pressures and pretty much under the chaos of the battlefield.[77] For the time being, it is not possible for autonomous systems to make such decisions reliably. As Solovyeva and Hynek highlight, it is still an 'illusion that AI algorithms are capable of independent decision-making, at least at the current stage of their development'.[78]

As mentioned above, there is a legal obligation to constantly try to make the distinction between combatants and civilians during hostilities. This capability has to be injected into the system in the course of the preparation of the software running the system. In addition, we know that some algorithmic limitations can go beyond the identity and nature of the target. In this vein, limitations on the deployment of weapons only in geographies with certain characteristics can also be inserted into the algorithm in advance. At least as an option, it must be made possible for the military end-user to choose whether or not to operate in certain geographies during a forthcoming operation.[79] In addition, in certain settings such as urban settlements, the autonomous system may via an algorithm be forced to use such ammunition or weapons that inherently cause minimal collateral damage since such warfare by its very nature cannot entirely avoid civilian populations and must be administered in strict accordance with the principle of proportionality. As regards urban settlements, it can also be a sound policy to insert absolute operation bans into the software so that these settlements will be kept out of the operational area of these systems.

The International Committee of the Red Cross seems to opine strongly in favour of geographical limitations on deployment of autonomous systems with a view to facilitating the proper implementation of humanitarian rules including but not limited to the principle of distinction.[80] Sharkey warns in this regard as well, that

76 Güneysu, *Otonom Silah Sistemleri: Bir Uluslararası Hukuk İncelemesi* (n 11) 28.

77 Scharre (n 11) 137.

78 Anzhelika Solovyeva and Nik Hynek, 'When Stigmatization Does Not Work: Over-Securitization in Efforts of the Campaign to Stop Killer Robots' [2023] AI & SOCIETY <https://doi.org/10.1007/s00146-022-01613-w>.known more impartially as autonomous weapons systems (AWS

79 Güneysu, *Otonom Silah Sistemleri: Bir Uluslararası Hukuk İncelemesi* (n 11) 58.

80 'Autonomous Weapons: Decisions to Kill and Destroy Are a Human Responsibility' 29 <https://www.icrc.org/en/document/statement-icrc-lethal-autonomous-weapons-systems> accessed 21 July 2023; Seixas-Nunes (n 2) 177.

automated weapon systems should work solely with '*low cluttered environments and with military objects such as tanks in the desert and ships at sea. The methods are unreliable with medium to high-clutter environments and are not used. This is unlikely to change significantly in the near to medium term future although improvements are expected in the longer term*'.[81] Accordingly, short-range defensive systems for ships against aerial targets or other immovable defensive systems for border protection may be considered to have more positive results in terms of humanitarian law since the probability of the existence of civilians and civilian objects is pretty low under given circumstances. Geographical limitations on systems like CIWS would make sure, albeit not completely, that no rules of humanitarian law are breached due to the isolated nature of where they will habitually be deployed.

Measures can be taken in advance, such as not using a weapon system that is likely to use high destructive power ammunition in places where there are civilian targets and people, such as cities and towns, or ensuring that ammunition with a lower impact is used exclusively in these environments by the system in question. Therefore, such measures may pave the way for the systems to be used exclusively in localities where there are relatively fewer or no civilians. Alternatively, all these options can be made available to the user, and military personnel can make the decision on this issue. What is important is that such options should already be incorporated at the software development stage, *i.e.,* at the very beginning of the system's life-cycle in the form of absolute limitations in the form of 'if … then' propositions.[82] Such absolute limitations are among the measures that can be effective in preventing the distinction-related humanitarian risks posed by autonomous systems. With that said, it is not, in the time of algorithm-preparation, possible to foresee all the deployment scenarios and cover them accordingly with convenient limitations and/or authorisations. In light of this, options should be kept broader leaving more room for manoeuvre for the military decision-makers.

If the autonomous weapon system enters a predetermined area during targeting operations, or if it can conclude through machine learning that it is in an inhabited area based on the number of buildings and the structure of the settlements, and if it is absolutely prevented from functioning in areas with these characteristics by virtue of an absolute software prohibition, it is obvious that this measure will greatly increase the chances of compliance with basic humanitarian law principles such as distinction and proportionality. In other words, here, the machine may have previously entered the coordinates of areas where fighting should not be committed, or such a command may be entered into the system by a human operator during the operation. In addition, in a dynamic combat environment, the machine may itself detect the presence of such

81 'Autonomous Weapons: Decisions to Kill and Destroy Are a Human Responsibility' (n 80).

82 Güneysu, *Otonom Silah Sistemleri: Bir Uluslararası Hukuk İncelemesi* (n 11) 63.

a civilian area. The important thing is to include an attack-obstacle in the algorithm in advance, regardless of its source, which will be acted upon or recommended to the human controller or operator to act upon the relevant data. This will lead to far-reaching humanitarian gains. Here, it is necessary to examine the issue of prior inclusion in the algorithm. Without a prior inclusion of humanitarian and geographical limits of *absolute nature*, humanitarian considerations will be exposed to behemothic risks.

Concluding Remarks

Barring a miracle-like turn of events, autonomous weapons are here to stay and the international community must take note of this unfortunate inevitability.[83] As a matter of fact, it has tried to respond to this by virtue of talks, first non-formal, then on a governmental representative level. There is confusion as to how humanity should tackle this problematic issue. However, owing much to the inertia created by the strict attitudes of different groupings of states, no concrete outcomes have been borne out of these talks. This author finds it right and realistic to have a healthy dose of prudence that calls for a sceptical attitude as regards autonomous weapon systems. These systems will in all probability make it easier to bend if not completely break the rules of *jus ad bellum*. Yet, a complete eradication of *jus ad bellum* should never be ruled out. Regrettably enough, they also possess the potential to reduce all the principles and rules of humanitarian law to a farce.[84]

One of these humanitarian rules is the principle of distinction that echoes through a number of legally binding articles, especially those of AP I. This foundational principle of international humanitarian law *per se* is easy to grasp. It is a legal obligation to attack only enemy personnel and military objectives. However, there will be situations that are unavoidably not that absolute. In fact, it will almost always be difficult to distinguish between civilians and combatants on the battlefield during hostilities.[85] This is exactly where sensor quality and technology must come into play. The better quality these parts have, the sounder the understanding of what is afoot in the theatre of battle will be achieved. However, this level has not yet been reached.

The development of machines that can distinguish between combatants and civilians in an extremely isolated laboratory environment, will not automatically guarantee similar success in the distinction between civilians and soldiers on a complex battlefield, with many moving parts and variables competing against each other in the background.[86] This failure to transfer displayed laboratory success to

83 Geiß (n 10) 441.

84 Scharre (n 11) 244.

85 Rosert and Sauer (n 66) 370.

86 Berkant Akkuş, 'The Dehumanization of International Humanitarian Law: An Analysis of the Potential Impact of Autonomous Weapon Systems on International Humanitarian Law' (2022) 24 Güvenlik Çalışmaları Dergisi 174, 181.

real combat zones due to brittleness is the crux of these discussions.[87] Computer simulations or prototypical trials can achieve a significant level of success if ideal and isolated conditions are met.[88] The successes achieved in these constrained environments lead to an increase in optimistic predictions and forecasts for the future.[89] Nonetheless, reality usually presents much more complex scenarios than isolated situations. It is of great importance to build systems with robustness that may close the gap between the chaos of reality and the foreseeability and the order of the simulation.[90] For the time being though, it is easy to deceive autonomous weapon systems as well as machine learning processes.[91] This ultimately comes to mean that such systems, deceivable as they are, by no means deserve any confidence as to any promise on the implementation of the principle of distinction. The ICRC seems to carry the same opinion. According to ICRC, there are '*serious doubts about the ability of autonomous weapon systems to comply with IHL in all but the narrowest of scenarios and the simplest of environments*'.[92]

One reassuring measure would be the deployment of autonomous weapon systems in defensive roles and especially in such places where it will be almost impossible to run into civilians due to the isolated place of deployment. Here, one should remember that one of the most important advantages of autonomous weapon systems is that they are more resistant to countermeasures such as hacking and other similar disruptive activities.[93] These effective countermeasures have necessitated the creation of less interconnected, self-powered weapon systems that can attack, and return to base. For this reason, in the opinion of this author, diligent implementation of geographical limitations during combat will yield more successful results in terms of humanitarian protection.

Since there is no legal ban on autonomous weapon systems, governments have the right to further develop them.[94] Obviously, however, there will be serious risks for humanitarian values and their safeguarding until the necessary level of sensor and computer learning competences is reached. When this can be achieved is a question of technology. Until the time is ripe for an acceptable level of implementation of humanitarian rules during the deployment of autonomous weapon systems, it must be seen as the wiser step to put on hold use of such systems in armed conflicts.

87 Seixas-Nunes (n 2) 178.

88 David D Woods, 'The Risks of Autonomy: Doyle's Catch' (2016) 10 Journal of Cognitive Engineering and Decision Making 131, 131.

89 ibid 132.

90 ibid 131.

91 König (n 2) 3; Seixas-Nunes (n 2) 178.

92 van den Boogaard and Roorda (n 7) 429.

93 Noel Sharkey, 'Fully Autonomous Weapons Pose Unique Dangers to Humankind' (*Scientific American*) <https://www.scientificamerican.com/article/fully-autonomous-weapons-pose-unique-dangers-to-humankind/> accessed 21 July 2023; Güneysu, *Otonom Silah Sistemleri: Bir Uluslararası Hukuk İncelemesi* (n 11) 59.

94 Krishnan (n 31) 231.

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RESEARCH ARTICLE

Romantic Relationships in the Workplace: a Critical Approach to the Turkish Courts' Case Law on the Employee's Right to Respect for Private Life

Deniz Ugan Çatalkaya*, Hande Heper**

Abstract

The nature of an employment contract carries the risk that an employee's personal rights, including their private life, may become open to the employer's intervention. As the employee's private life is an area which is open to employer intervention, the need to draw the boundaries of employer intervention in the context of balancing the interests of the employee and the employer, as well as the need to protect the privacy of the employee's private life within the boundaries of the workplace, keeps this issue on the agenda of Turkish labour law doctrine and the judiciary today. To demonstrate the current developments in Turkish labour law - which will reveal the current approach towards the fundamental rights of employees, especially romantic relationships in the workplace- in this article, after briefly explaining the principles of the individual application system to the Constitutional Court in Turkish law and the concept of the right to respect for private life, the topic is discussed in light of the individual application jurisprudence of the Turkish Constitutional Court and the judgments of the Court of Cassation and Courts of Appeal.

Keywords

Turkish labour law, Employee's private life, Right to respect for private life, Romantic relationships in the workplace, Individual's fundamental rights in labour relations, Individual application jurisprudence of the Constitutional Court

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I. Introduction

Although historically, it was considered that an individual's fundamental rights could be protected by limiting the state's intervention (negative obligation), later, it was seen that this limitation was insufficient for protection. Violations of individuals' fundamental rights and freedoms within the scope of relations between private law persons have been experienced with painful examples[1]. Therefore, by accepting the obligation of the state to ensure the protection of these rights within the scope of relations between private law persons, the scope of protection of individuals' fundamental rights and freedoms has been expanded.

In labour relations, the power imbalance between the employer and employee indicates a structure similar to the relationship between a state and an individual[2]. When an employee starts working under an employment contract, it means that they begin to work under the subordination of the employer and must follow their instructions. Therefore, since there is a hierarchical structure between the employer and employee, the risk of the employer's interference with the employee's fundamental rights and freedoms is much higher, and the importance of protecting these rights and freedoms becomes more evident. Correspondingly, with the acknowledgement of the need to protect individuals' fundamental rights and freedoms within the sphere of protection of private persons, the approach that an employer has absolute authority over its employees has been abandoned in the historical development of labour law. The opinion that employees can enjoy their fundamental rights and freedoms in the workplace and that the employer's authority may be limited in the face of these rights and freedoms has improved accordingly. Thus, the distinction between private life and working life in labour law has become essential; the employer's authority has been limited, and the employee's individual rights have entered the workplace[3].

The right to respect for private life of the employee is only one aspect of the employee's personality rights in the labour relationship and workplace[4]. As the employee's private life is an area which is open to employer intervention, the need to draw the boundaries of employer intervention in the context of balancing the interests of the employee and the employer, as well as the need to protect the privacy of the employee's private life within the boundaries of the workplace, keeps this issue on the

1 For the examples concerning the labour relations, *see*, Nuri Çelik, Nurşen Caniklioğlu, Talat Canbolat and Ercüment Özkaraca, *İş Hukuku Dersleri* (35th ed., Beta 2022) 4-5; Sarper Süzek, *İş Hukuku* (21st ed., Beta 2021) 8 ff; Ali Güzel, 'Fabrikadan İnternet'e İşçi Kavramı ve Özellikle Hizmet Sözleşmesinin Bağımlılık Unsuru Üzerine Bir Deneme' in *Prof. Dr. Kemal Oğuzman'a Armağan* (İş Hukuku ve Sosyal Güvenlik Hukuku Türk Milli Komitesi, Türk Tarih Kurumu Basımevi 1997) 83 ff

2 Ali Güzel, 'İş Hukukunda Yetki ve Özgürlük' (2016) 15 (1) Prof. Dr. Turhan Esener'e Armağan İstanbul Kültür Üniversitesi Hukuk Fakültesi Dergisi, 93, 95 ff; Deniz Ugan Çatalkaya, *İş Hukukunda Ölçülülük İlkesi* (Beta 2019) 57 ff

3 Ali Güzel, Deniz Ugan Çatalkaya and Hande Heper, 'Droits et libertés fondamentaux du citoyen-salarié en droit du travail' (2022) (71) Annales de la Faculté de Droit d'Istanbul 221, 225 ff

4 See, Çelik, Caniklioğlu, Canbolat and Özkaraca (n1) 352; Süzek (n1) 413; Ömer Ekmekçi and Esra Yiğit, *Bireysel İş Hukuku Dersleri* (3rd ed., On İki Levha 2021) 300; Güzel, Ugan Çatalkaya and Heper (n3) 239 ff; Şükran Ertürk, *İş İlişkisinde Temel Haklar* (Seçkin 2002) 86

agenda of Turkish labour law doctrine and the judiciary today. In particular, disputes regarding the termination of employment contracts due to romantic relations between employees and their co-workers have been the subject of recent and controversial decisions of the Turkish Court of Cassation and the Courts of Appeal. This issue has also been brought before the Turkish Constitutional Court (TCC) by the right of individual application. It is noteworthy that there are inconsistencies between the approaches adopted by the instance courts and the jurisprudence of the TCC in terms of the protection of the personal rights of employees. In line with the case law of the ECtHR, the TCC has developed an approach towards protecting fundamental rights and freedoms under the state's positive obligations in relations between individuals. In this sense, the TCC jurisprudence is considered to have an essential place in the development of Turkish law. Therefore, to demonstrate the current developments in Turkish labour law - which will reveal the current approach towards the fundamental rights of employees - in this study, after briefly explaining the principles of the individual application system to the Constitutional Court in Turkish law and the concept of the right to private life, the topic is discussed in light of the individual application jurisprudence of the Constitutional Court and the judgments of the Court of Cassation and Courts of Appeal.

II. An Overview of The Right Of Individual Application to The Constitutional Court in Turkish Law

Under Article 11 of the Turkish Constitution, constitutional provisions are fundamental legal rules that bind individuals as well as state organs. Therefore, it is clear that the fundamental rights and freedoms regulated in the Constitution apply not only vertically between the state and individuals but also horizontally between individuals[5]. Moreover, under Article 40 of the Constitution, titled "Protection of fundamental rights and freedoms", anyone whose constitutional rights and freedoms have been violated has the right to request prompt access to the competent authorities. Furthermore, the individual application remedy provides an opportunity for individuals who allege that a fundamental right or freedom has been violated to apply to the Constitutional Court for the enforcement of their right, even if they have been unsuccessful when applying for other judicial remedies[6].

Upon the result of the referendum in 2010, an amendment to the Constitution was adopted, granting the right of individual application to the Constitutional Court regarding fundamental rights and freedoms. According to the additional subclause

5 Bülent Tanör and Necmi Yüzbaşıoğlu, *1982 Anayasasına Göre Türk Anayasa Hukuku* (Updated 20th ed., Beta 2020) 134 ff; Ertürk (n4) 36 et ff; Gaye Burcu Yıldız, 'İşyerinde Yaşanan Gönül İlişkisinin İş Sözleşmesinin İşverence Feshi Açısından Değerlendirilmesi' (2021) XXV (3) Ankara Hacı Bayram Veli University Faculty of Law Review 3, 6; Ugan Çatalkaya (n2) 167

6 Tanör and Yüzbaşıoğlu (n5) 537

included in Article 148, anyone may apply to the Constitutional Court on the ground that one of their fundamental rights and freedoms within the scope of the European Convention on Human Rights, which are guaranteed by the Constitution, has been violated by public authorities. Since the beginning of the 2000s, due to the extraordinary increase in the number of applications made to the ECtHR, the application load has become unbearable, and consequently, the measures to be taken by the Council of Europe concerning some countries, including Turkey, were being discussed[7]. In justification for the 2010 constitutional amendment, it is understood that the Turkish government introduced the individual application remedy as a solution to these disputed measures. In fact, in the amendment preamble, it is stated that the European Court of Human Rights accepted the individual application remedy as an effective remedy for the elimination of rights violations and that this individual application remedy would be beneficial in reducing the number of lawsuits filed against Turkey and the number of violation decisions to be made by the ECtHR[8].

The provision stipulates that the fundamental rights and freedoms guaranteed in the Constitution, which are the subject of individual applications, should also be included in the scope of the European Convention on Human Rights. Therefore, the rights subject to an individual application should be regulated both in the Constitution and the ECHR[9]. Accordingly, under this provision, the Constitutional Court determines that alleged violations of fundamental rights and freedoms, which are regulated in the Constitution but not in the scope of the ECHR, are not within its jurisdiction. Even if the fundamental right subject to the alleged violation is regulated more broadly in the Constitution, the Constitutional Court limits the subject of the complaint with the common protection area of the Constitution and the ECHR and decides in terms of the narrow scope of the norm in the ECHR.

When evaluating individual applications, it is also important to consider the meaning of a right being regulated in the European Convention on Human Rights. Law No. 6216 on Establishment and Rules of Procedures of the Constitutional Court regulates that the expression "being within the scope of the European Convention on Human Rights" also includes additional protocols. Due to this provision, the Constitutional Court accepts that it has the authority to examine complaints based on the ECHR and only the additional protocols to which Turkey is a party and conversely finds applications regarding the rights regulated in the additional protocols to which Turkey is not a party, inadmissible on the grounds of lack of jurisdiction in terms of

7 Serkan Cengiz, 'Avrupa İnsan Hakları Mahkemesi'nin Temel Hak ve Özgürlükleri Koruma Standardı Açısından İki Yıllık Anayasa Mahkemesi Bireysel Başvuru Uygulamasının Değerlendirilmesi' in E Göztepe and MM Alpbaz (eds), *Anayasa Mahkemesine Bireysel Başvuru* (Kamu Hukukçuları Platformu, On Iki Levha 2017) 177

8 *See* the justification of the provision amending Article 148 of the Constitution of Law No. 5982, https://www.anayasa.gov.tr/media/6382/gerekceli_anayasa.pdf

9 Melek Acu, 'Bireysel Başvuruya Konu Edilebilecek Haklar' (2014) (110) Journal of TBB 403, 407

subject matter[10]. Additionally, when evaluating individual applications, the TCC does not only take into account the texts of the conventions but also considers the case law of the ECtHR in line with the fact that the ECHR is a living instrument.

There is also a limitation in terms of the subject of individual applications for legislative and regulatory administrative transactions. In accordance with Law No. 6126, these transactions cannot be the subject of an individual application. Therefore, unlike Federal Germany, which constitutes the classical framework of the individual application remedy, the right of individual application cannot be exercised against a law because it constitutes a personal, direct, and current violation of a fundamental right[11].

The Constitutional Court also acts similarly to the principle of subsidiarity in the ECtHR. In this sense, the Court is not a means of annulment of administrative or judicial decisions as a last and extraordinary remedy; for example, it sends the file to the relevant court to remedy the violation[12]. As a result of this understanding, it is regulated in the Constitution that ordinary legal remedies must be exhausted for the application in question. In other words, as a condition of application, all of the administrative and judicial remedies stipulated in the law must be exhausted before the application is made[13]. The ECtHR has also held that the individual application remedy is a mandatory, effective, and accessible domestic remedy in terms of applications coming from Turkey, and applications made to the ECtHR without first exhausting this remedy are inadmissible, except in exceptional cases[14].

Furthermore, the Constitutional Court adopts the approach that protecting fundamental rights and freedoms in legal relations between individuals is the state's positive obligation and evaluates the violations of rights in court decisions. However, the Court does not deal with material and legal errors in the decisions of the courts unless there is an allegation of arbitrariness in the application; it only examines whether the meaning of the fundamental rights and freedoms used in the interpretation and application of the law is misunderstood in the court decision and the scope of the protection area[15]. In this respect, inspired by the ECtHR criteria regarding the

10 Tolga Şirin, 'Türk Anayasa Mahkemesi'nin Bireysel Başvuru Kararlarının Değerlendirilmesi' in E Göztepe and MM Alpbaz (eds), *Anayasa Mahkemesine Bireysel Başvuru* (Kamu Hukukçuları Platformu, On Iki Levha 2017) 44; Ömer Ekmekçi, H. Burak Gemalmaz, Volkan Aslan and H. Hilal Yılmaz, *Anayasa Mahkemesine Bireysel Başvurunun Temel Esasları ve İş ve Sosyal Güvenlik Hukukuna İlişkin Kararlar* (On Iki Levha 2022) 11 ff

11 İbrahim Ö. Kaboğlu, *Anayasa Hukuku Dersleri (Genel Esaslar)* (Updated and Simplified 16th ed., Legal 2021) 368

12 *See* Tanör and Yüzbaşıoğlu (n5) 539; Ekmekçi, Gemalmaz, Aslan and Yılmaz (n10) 43 ff.; Korkut Kanadoğlu and Ahmet Mert Duygun, *Anayasa Hukukunun Genel Esasları* (2nd ed., On Iki Levha 2021) 483

13 For details *see,* Ekmekçi, Gemalmaz, Aslan and Yılmaz (n10) 13 ff; Kanadoğlu and Duygun (n12) 469. For details regarding the exceptional rules of exhaustion of remedies in the matter of the disputes on mobbing *see also*, Burak Gemalmaz, 'Anayasa Mahkemesine Bireysel Başvuru Esasları ve Başvuruların Değerlendirilmesi' in *Anayasa Mahkemesi Bireysel Başvuru Kararları Çerçevesinde İş Hukukunun Değerlendirilmesi Semineri* (İntes Yayınları 2023) 37 ff

14 *See*, *Ümmühan Kaplan v. Turkey* App. no 24240/07 (ECtHR, 20.3.2012)

15 Kanadoğlu and Duygun (n12) 467; Ekmekçi, Gemalmaz, Aslan and Yılmaz (n10) 43-50. *See also*, Cengiz (n7) 193 ff; Gemalmaz (n13) 43-44

fundamental rights under ECHR Arts 8, 9, 10, and 11, first of all, the TCC evaluates the criteria of whether there is an interference with the right, the interference is conducted in accordance with the law, the interference furthers a legitimate aim, the interference is necessary in a democratic society, and, in this respect, whether the measures are proportional to the legitimate aim pursued and impairs the essence of the right[16].

III. An Overview Of The ECtHR And The Turkish Courts' Approach To The Right To Respect For Private Life In Terms Of An Employee's Private Life

A personal right is an absolute right and covers all material, moral and economic rights of the person[17]. In this respect, a person will be able to demand the recognition and respect of this right from everyone. Personal rights cannot be qualified as *numerus clausus* and include all personal values such as physical presence, life, bodily integrity, physical and mental health, honour and dignity, name and image, trade secrets, credit reputation, and private life.

In general terms, private life contains personal information that a person discloses to others to the extent determined by them[18]. Moreover, as it is an area where a person can act freely without any interference, it emerges as an interest that must be protected within the scope of personal rights.

It is impossible to draw the boundaries of the notion of private life by counting a certain number of elements. The ECtHR has adopted the approach that it would be too restrictive to limit the notion of "private life" to an "inner circle" in which the individual may live their own life as they choose, thus entirely excluding the outside world not encompassed within that circle. According to the ECtHR, Article 8 guarantees a right to "private life" in the broad sense, including the right to lead a "private social life", that is, the possibility for the individual to develop their social identity. In that respect, the right in question enshrines the possibility of approaching

16 Şirin (n10) 67; Gülsevil Alpagut, 'İşyerinde Kamera Gözetlemesi ve AİHM Kararları ile Tespit Edilen Esaslar' in K Doğan Yenisey (ed), *Prof. Dr. Savaş Taşkent'e Armağan* (On İki Levha 2019) 285 ff; Deniz Ugan Çatalkaya, 'Anayasa Mahkemesi Bireysel Başvuru Kararları Çerçevesinde İş Hukuku Uygulamaları' in *Anayasa Mahkemesi Bireysel Başvuru Kararları Çerçevesinde İş Hukukunun Değerlendirilmesi Semineri* (İntes Yayınları 2023) 113-115

17 *See*, İbrahim Aydınlı, 'İşçinin Kişiliğinin Korunmasına Yönelik Düzenlemeler ve Borçlar Kanunu Tasarısının Konuyla İlgili Maddelerinin Değerlendirilmesi' (2005) 19 (6) TÜHİS 21; Emine Tuncay Kaplan, 'Yeni Türk Borçlar Kanunu Hükümlerine Göre İş İlişkisinde İşçinin Kişilik Haklarının Korunması' (2011) (24) Sicil 40, 41

18 Mustafa Dural and Tufan Öğüz, *Türk Özel Hukuku Cilt II - Kişiler Hukuku* (Filiz 2022) 138 ff;. M. Kemal Oğuzman, Özer Seliçi and Saibe Oktay-Özdemir, *Kişiler Hukuku* (Revised 20th ed., Filiz 2021) 208 ff; Ahmet K. Sevimli, *İşçinin Özel Yaşamına Müdahalenin Sınırları* (Legal 2006) 7 ff; Ahmet K. Sevimli, 'İşçinin Özel Yaşam Hakkı Bağlamında İşçi-İşveren İlişkisi' (2008) (10) Sicil 53; Fuat Bayram, 'Türk İş Hukukunda İşçinin Kişilik Hakkını Koruma Borcu' (DPhil Thesis, Marmara Üniversitesi 2011) 26, 258 ff; Ugan Çatalkaya (n2) 284 ff; Cédric Jacquelet, *La vie privée du salarié à l'épreuve des relations de travail* (PUAM 2008) 17 ff; Gilles Auzero, Dirk Baugard and Emmanuel Dockès, *Droit du travail* (35th ed., Dalloz 2022) 917 ff; Elsa Peskine and Cyril Wolmark, *Droit du travail* (15th ed., Dalloz 2022) 235 ff

others to establish and develop relationships with them[19]. The Court considers that the notion of "private life" may include professional activities and that in the course of their working lives, most people have a significant, if not the greatest, opportunity to develop relationships with the outside world[20].

It is noteworthy that the Turkish Constitutional Court displays a similar approach to private life in its case law. The right to respect for private life is guaranteed by Article 20 of the Constitution, stipulating that everyone has the right to demand respect for their private and family life and that the privacy of private or family life shall not be violated. The Constitutional Court perceives the scope of private life as broad as the ECtHR: "*Private life is a broad term not susceptible to exhaustive definition. In the meantime, this notion protects elements such as an individual's material and moral integrity, physical and social identity, name, sexual orientation, sexual life etc. Personal data, self-improvement, and family life also fall within this right*"[21]. By following the case law of the ECtHR, the Constitutional Court accepts that private life can expand into social life, in other words, the public sphere and that under certain conditions, a person may have a legitimate expectation of protecting their privacy in the public sphere[22].

In this respect, when we consider whether an employee's right to private life is protected within the employment relationship and the workplace or whether an employee can have a legitimate expectation in this regard, it compels attention that an employee who works under an employment contract accepts to work under the employer's authority and voluntarily gives up, to a certain extent, their faculty to do whatever they want and the opportunity to exercise some of their rights and freedoms within the scope of this relationship. Moreover, the fact that the execution of work, which is the employee's primary liability arising from the employment contract,

19 *Niemietz v. Germany*, App no 13710/88 ECtHR 16.12.1992) §29; *Peck v. United Kingdom* (Fourth Section) App no. 44647/98 (28.11.2003) §57; *Sidabras v. Lithuania* (Second Section), App nos 55480/00, 59330/00 (27.7.2004) §43; *Özpınar v. Turkey* (Second Section) App no 20999/04 (19.10.2010) §45; *Barbulescu v. Romania* (GC) App no 61496/08 (5.9.2017) §70; *López Ribalda and others v. Spain* (GC), App nos 1874/13, 8567/13 (17.10.2019) §88. *See also* Jean-François Renucci, *Droit européen des droits de l'homme*, *Droits et libertés fondamentaux garantis par la CEDH* (6th ed., LGDJ 2015) 228 ff; Laurence Burgorgue-Larsen, *La convention européenne des droits de l'homme* (2nd ed., LGDJ 2015) 133 ff; Sevimli (n18) 15; Evra Çetin, *İnsan Hakları Avrupa Sözleşmesi'nin 8-11. Maddeleri Bağlamında Çalışanların Hakları* (On Iki Levha 2015) 104 ff; Hakan Keser, 'İşçi Davranışları Kapsamında İş Sözleşmesinin Özel Hayat, Aile Hayatı ve Cinsel Yönelimler Sebebi ile İşverence Feshedilmesi' (2017) (37) Sicil 9, 11; Alpagut (n16) 276 ff; Mustafa Alp and Dilek Dulay Yangın, 'Haklı Yahut Geçerli Fesih Nedeni Olarak İşyerinde Yaşanan Duygusal İlişkiler – Anayasa Mahkemesi ve Yargıtay Kararları Çerçevesinde Değerlendirmeler' (2021) 27 (2) MÜHF-HAD 1380, 1391

20 *Fernández Martínez v. Spain* (GC), App. no 56030/07 (ECtHR, 12.6.2014) §109-110; *Barbulescu v. Romania*, §71; *Lopez Ribalda and others v. Spain,* §91 ff

21 Turkish Const. Court, no 2017/14907, 30.9.2020, §33; similarly, *see,* no 2018/4144, 25.2.2021, §31

22 Turkish Const. Court, no 2013/1614, 3.4.2014, §31-34; similarly, *see,* no 2013/9660, 21.5.2015, §30-33. According to case law of the Constitutional Court: "(…) *It is clear that the concept of private life cannot be reduced to maintaining everyone's personal life as they wish and keeping the outside world separate from this circle. In this respect, Article 20 of the Constitution guarantees a private social life. (…) The privacy area covers the private area where the State cannot interfere or can intervene at a minimum for legitimate purposes. The extent of the individual's right to privacy is, as a rule, his/her private area. However, the right to protection of private life may also extend to the public sphere in some cases because the concept of legitimate expectation makes it possible to protect the privacy of individuals in the public sphere under certain conditions*". *See also*, Alpagut (n16) 286-288

cannot be considered independently of their personality results in the acceptance of the employment contract as a contractual relationship directly related to the personality of the employee, and reveals the *intuitus personae* character of this contract[23].

This nature of an employment contract carries the risk that an employee's personal rights, including their private life, may become open to the employer's intervention. For this reason, the need to protect the employee's private life against the employer's interference arises since it is accepted in the case law of the Constitutional Court that has developed in line with the case law of the ECtHR that private life does not exclude professional life. The Constitutional Court expresses this issue by referring to the case law of the ECtHR as follows: "*According to ECtHR, the professional life cannot be omitted from the concept of private life. Restrictions on professional life on the grounds of private life factors may fall within the scope of Article 8 of the Convention to the extent that it affects the individual's social identity. At this point, it should be noted that most people get the opportunity to develop their relations with the outside world within the framework of their activities in their professional life*"[24].

Indeed, an employee can form personal, emotional bonds in the working environment[25]. Working life should be accepted as a part of an employee's social life. Since the concept of private life cannot exclude professional life, as revealed by the ECtHR and the Constitutional Court case law, an employee's right to private life should also be protected at the workplace. On condition that it does not affect the working environment, workplace order, flow of work and performance, the elements of an employee's private life should be considered as an area that the employer cannot interfere with, even if they are connected to the relations and friendships established in the workplace[26]. On the other hand, one of the subjects of judicial decisions regarding interference with private life in employment relations is romantic relations between co-workers. In these decisions, we come across cases where the employment contracts are terminated due to such relations, without compensation, within the scope of Article 25/II of the Labour Code, as they are considered "*situations that do not comply with the rules of morality and goodwill*". On the other hand, we think that it is not pursuant to act on the assumption that all romantic relationships in the

23 About the intuitus personae character of the employment contract, *see also*, Ali Güzel, 'Ekonomik ve Teknolojik Gelişmelerin Işığında Hizmet Sözleşmesinin "Intuitus Personae" Niteliği Üzerinde Yeniden Düşünmek' in *Halid Kemal Elbir'e Armağan* (İstanbul Üniversitesi Hukuk Fakültesi 1996) 167 ff; Marie-Annick Peano, 'L'intuitus personae dans le contrat de travail' (1995) *Dr. soc.* 129; Bayram (n18) 73 ff; Fuat Bayram, 'Borçlar Kanunu Tasarısı Işığında İşverenin İşçinin Kişiliğini Koruma Borcu' in *İş Hukuku ve Sosyal Güvenlik Hukuku Türk Milli Komitesi 30. Yıl Armağanı* (2006) 11 ff; Ugan Çatalkaya (n2) 272 ff

24 Turkish Const. Court, no. 2018/4144, 25.2.2021, §22; similarly, *see*, no. 2017/14907, 30.9.2020, §24. *See also*, Alp and Dulay Yangın (n19) 1383 ff; Keser (n19) 12

25 Hediye Ergin, 'İşyerinde Gönül İlişkisinin İş Sözleşmesinin Feshine Etkisi' (2016) (35) Sicil 67, 68; Alp and Dulay Yangın (n19) 1381; Yusuf Yiğit, 'Yargıtay Kararları Işığında İşyerinde Yaşanan Duygusal (Romantik) İlişkilerin İşverenin İş Sözleşmesini Fesih Hakkına Etkisi' (2020) 5 (1) Çankaya Üniversitesi Hukuk Fakültesi Dergisi 3773, 3774

26 *See*, Sevimli, (n18) 238; Erhan Birben, 'İşçinin Özel Yaşamı Nedeniyle İş Sözleşmesinin Feshi' in Tankut Centel (ed), *İş Hukukunda Genç Yaklaşımlar II* (On Iki Levha 2016) 139; Keser (n19) 21 ff

workplace will negatively affect the workplace and should be regarded as a cause of termination. Therefore, we consider it essential to evaluate the approach of the Turkish judicial bodies regarding disputes created by such employer interventions, which violate the employee's right to private life and right to work.

IV. Turkish Court Of Cassation And Courts Of Appeal's Approach To The Employee's Right To Respect For Private Life And Romantic Relationships In The Workplace

A. Immediate Termination with Just Cause on the Grounds of Immorality, Breach of Integrity and Loyalty

Article 419 of the Turkish Code of Obligations provides a general provision regarding the processing of employees' data by employers. According to this article, an employer can only process an employee's data to the extent that it is related to the employee's ability to work or is necessary to execute the employment contract. In other words, an employer does not need to be aware of any information regarding an employee's private life unless it is related to the work performed or unless it is compulsory for the execution of the work[27]. Therefore, it would be against the law for an employer to have this information, to attempt to obtain it and, of course, to use such information about an employee's private life as the basis for a work-related decision even though it does not affect the work. Otherwise, the employee's right to private life guaranteed by the Constitution will be violated. For example, information regarding the marital status, sexual orientation, and romantic or sexual relations of an employee and with whom they have relations is undoubtedly an area which remains in the employee's private life and, therefore, cannot be interfered with by the employer.

An element related to an employee's private life may adversely affect their performance, the workplace, the work's functioning, and the workplace's order. In that case, it may be possible to terminate the employment contract, either immediately with just cause or with notice and a valid reason, depending on whether this negativity renders the employment relationship unbearable or not[28]. At this stage, the employer is required to prove the negativity on which the termination is based. Accepting the contrary will violate an employee's fundamental right again.

27 *See*, Çelik, Caniklioğlu, Canbolat and Özkaraca (n1) 367; Aydınlı (n17) 28-29; Ahmet Sevimli, 'Veri Koruma İlkeleri Işığında Türk Borçlar Kanunu Madde 419' (2011) (24) Sicil 120, 134 ff; Alpagut (n16) 292, 309 ff; Ugan Çatalkaya (n2) 292 ff

28 Sevimli (n18) 281-282; Keser (n19) 16, 20 ff; Ergin (n25) 70 ff; Yıldız (n5) 35; Alp and Dulay Yangın (n18) 1381, 1389; Yiğit (n25) 3781-3782. (For details related to the valid reasons and just causes for termination and the difference between these terminations *see*, Çelik, Caniklioğlu, Canbolat and Özkaraca (n1) 506 ff, 604 ff, 63; Sarper Süzek, 'İşçinin Yetersizliği ve Davranışları Nedeniyle Geçerli Fesih' in *Prof. Dr. Can Tuncay'a Armağan* (Legal 2005) 565 ff, 576 ff; Ekmekçi and Yiğit (n4) 679 ff; Keser (n19) 15 ff, 30; Yiğit (n25) 3786 ff; Ugan Çatalkaya (n2) 473, 489, 492)

However, in some of the decisions of the Court of Cassation on this matter, it is unclear whether the judge sufficiently compels the employer to prove this negativity[29]. Moreover, the Court of Cassation considers a romantic relationship between co-workers a reason for termination with just cause.

In a concrete case subject to a decision of the Court of Cassation, the Court evaluated whether the termination of the contract of the complainant employee was based on a just cause[30]. In his defence, the employer claimed that the employee, who was married with three children, had a romantic relationship with a married employee who worked at the same workplace, and that this situation caused trouble in the workplace. When the employer wanted to take the employee's statement, he accepted his relationship but refrained from giving a defence statement. The Court of First Instance decided to accept the case and reinstated the employee. According to the Court's reasoning, the employer could not prove that the relationship of the complainant employee caused negativity in the workplace.

Moreover, the Court of First Instance decided that a relationship between co-workers cannot be considered a valid reason for termination, and if the contrary is accepted, the employee's freedom to work will be restricted. Upon the appeal of the defendant's attorney against this decision, the Court of Appeal rejected the claim. However, the Court of Cassation held that the behaviour of the employee -married with three children- harmed the regular functioning of the work and the working environment and constituted a breach of integrity and loyalty. The Court of Cassation decided that the reinstatement claim should be rejected on the grounds that the trust relationship between the employer and employee was damaged, the termination of the employment contract did not interfere with the employee's private life, and therefore, the termination was based on a just cause.

From our standpoint, unless an employer demonstrates that a relationship between co-workers harms the functioning of the workplace, an employee should not suffer the heaviest sanction of termination (immediate and without compensation) for just cause. Considering the existence of a relationship between co-workers as the sole reason for termination constitutes a violation of an employee's right to private life. Nevertheless, the Court of Cassation interprets a situation where other employees notice the relationship between co-workers as a reason for termination. Moreover, we find it unacceptable that the Court emphasizes an employee's marital status, marriage and children, and refers to the immorality of their relationship[31].

29 Ergin (n25) 71

30 Court of Cassation, 9th Division, 15.4.2019, 2018/10504, 2019/8673. *See also*, Çelik, Caniklioğlu, Canbolat and Özkaraca (n1) 631; Alp and Dulay Yangın (n19) 1411; Yiğit (n25) 3793

31 Similarly, the emphasis on the marital status by the Court of Cassation draws the attention of the doctrine: Ergin (n25) 74-75; Alp and Dulay Yangın (n19) 1387; Keser (n19) 26

In a concrete case subject to another decision of the Court of Cassation, the complainant employee, who worked as a driver at the workplace, claimed that the employer had terminated his employment contract without just cause[32]. The employer, on the other hand, claimed that the termination was based on a just cause. The employer brought up issues which raised suspicion that there was a relationship between the complainant employee and his co-worker (S.B.), who both took leave until noon on the same day for different reasons and then returned to the workplace at similar times. According to the investigation conducted at the workplace, the employer alleged that the complainant and his co-worker, both of whom were married to other people, were behaving remarkably sympathetically to each other on the shuttle bus and got off the shuttle at the same stop in the evenings, even though they did not live at the same address; entered the men's locker room together at the workplace; and that, to have a conversation with S.B., the complainant pulled his truck in front of the kitchen where S.B. was working. Although other employees warned the complainant employee, the situation did not change. After the employer learned about the situation on 11.2.2014, S.B. accepted it. The employer also claimed that the complainant's defence statement was requested, and upon his refusal to give a statement, his employment contract was terminated without notice and compensation under Article 25/II (e) and (c) of the Labour Code No. 4857.

It should be noted that Article 25 of the Labour Code regulates immediate termination with just cause if an employee sexually harasses another employee (25/II, c) or in case of behaviour which is contrary to integrity and loyalty, such as abusing an employer's trust, stealing, or revealing an employer's professional secrets (25/II, e)[33].

According to the first instance court, the subcontractor employee (S.B.), declared that she was in a relationship with the complainant and did not complain that she had been sexually harassed or molested. Besides, any report that the employer kept regarding the complainant's delay in the performance of work during his working period was not submitted to the case file, and no action was taken due to the relationship between the co-workers and their leave on the same day. For these reasons, the Court concluded that the late arrival of each employee to work on the following working day can only be considered as a behaviour that may damage the trust between the employer and the employee. Considering the principle of proportionality, the Court decided that the termination was based on a valid reason, not just cause, so the complainant should have received severance and notice pay.

Upon appeal of the first instance court's decision, the Court of Cassation stated that the fact that his co-workers had noticed, as a result of his attitude and behaviour

32 Court of Cassation, 9th Division, 27.6.2019, 2017/11196, 2019/14430.

33 For details, *see*, Çelik, Caniklioğlu, Canbolat and Özkaraca (n1) 620 ff; Süzek (n1) 694 ff; Ekmekçi and Yiğit (n4) 702 ff

at the workplace, that the complainant had an affair with a female employee, created negativity in the workplace. The Court of Cassation also accentuated that the behaviour of the complainant was offending good morals and concluded that the termination was based on a just cause. To the Court of Cassation, the first instance court's judgment regarding severance and notice pay was faulty. That is why the decision was reversed. In our opinion, the conclusion reached by the Court and the emphasis on "acts offending good morals" cannot be considered correct. The Court of Cassation's emphasis on immorality is also criticized in the doctrine[34].

Suppose that the aspects of an employee's private life were not seen as appropriate according to the value judgment and moral sentiment of society, their co-workers or their employer. Beyond any doubt, this cannot be considered a reason for termination. Thus, it is also indicated in the justifications of Law no 4857, that the reasons arising from the employee's incompetence or behaviour may cause termination only if they cause negativities in the workplace. If the employee's behaviour or attitude which is not approved socially or ethically does not have any negative effect on the employment relationship, it can not be considered a valid reason for termination[35].

For example, although it is morally disapproved in some circles for a female to have a child out of wedlock, it is clear that this is a matter entirely related to the employee's private life and does not concern the workplace, the functioning of the work and the employer. In this respect, it cannot be a reason for the termination or any employer's work-related decision[36]. Therefore, we believe that the approach of the Court of Cassation in the given decision is open to criticism.

At this point, we wish to emphasize that the Court of Cassation's decisions are of great importance in forming an accurate and uniform jurisprudence, as they also shape the approach of the courts of appeal on the subject.

For instance, in one decision, the Court of Appeal showed a similar approach to the Court of Cassation.[37] In this concrete case, the complainant employee, who was married with three children, was working as a maintainer. The employer terminated his employment contract after he posted during working hours an affectionate photo taken with his co-worker (Z.S.) on his Facebook account, who worked as an occupational health and safety expert at the same workplace. The court of first instance concluded that the termination of the employment contract did not interfere with the employee's private life and was based on a just cause because the complainant's

34 Yıldız (n5) 11; Alp and Dulay Yangın (n19) 1411

35 *See also*, Süzek (n28) 576 ff; Keser (n19) 18; Alp and Dulay Yangın (n19) 1385

36 Similarly, *see also*, Birben (n26) 152; Eda Manav, *İş Hukukunda Geçersiz Fesih ve Geçersiz Feshin Hüküm ve Sonuçları* (Turhan 2009) 244

37 Regional Court of Appeal (Sakarya), 9th Division, 4.11.2020, 2019/2883, 2020/1383, Şahin Çil, *İş Hukuku Yargıtay İlke Kararları 2019- 2021* (8th ed., Yetkin 2021) 830-831

behaviour was contrary to integrity and loyalty and damaged the trust relationship between the parties to the employment contract. Upon the complainant's appeal, the court of appeal decided to reject the claim on the merits.

B. The Fact that A Relationship between Co-Workers Has A Negative Influence on the Workplace

It is also possible to encounter disputes where a romantic relationship between employees negatively affects the order in the workplace and the flow of work. Therefore, in that case, the employer can terminate the employment contracts of these employees with just cause or valid reason[38].

Some cases draw attention in terms of the hierarchical relationships between employees: In one dispute before the Court of Appeal, the employee claimed that the employer had terminated their employment contract unfairly[39]. The employer, on the other hand, pleaded that the claimant had been warned more than once for reasons such as leaving the workplace during working hours without permission, breaking the rules, and using profanity towards other personnel. The employer also alleged that the claimant had developed an intimate relationship with another employee (K1), who worked in the same department. K1 had complained to the claimant about some colleagues with whom they did not get along well, and demotivated and intimidated the personnel with threats. The claimant then used his position to get these people dismissed by providing a negative view of them. Likewise, according to the employer's allegation, K1 and the claimant employee were seen together in a position friendlier than regular colleagues at the workplace.

In this case, the Court of Appeal decided that the termination was based on a just cause because of a breach of integrity and loyalty, taking into account that the claimant was in the position of a supervisor of the person with whom they had a romantic relationship. The Court also considered that the claimant was using their authority for personal purposes and that K1 was using their superior's powers to threaten other colleagues.

In our opinion, in this case, it is appropriate to consider whether the relationship between co-workers has harmful effects on the workplace and to pay attention, especially to the hierarchical position of the employees and its impacts on the work. Indeed, a romantic relationship between a supervisor and a subordinate in the workplace may cause the supervisor to treat the person with whom they are in a relationship in a privileged position whilst making decisions about promotions and rewards. This discrimination will affect the other employees' work environment and

38 Keser (n19) 21; Ergin (n25) 70 ff; Yiğit (n25) 3789, 3791; Alp and Dulay Yangın (n19) 1382

39 Regional Court of Appeal (Ankara), 6th Division, 9.10.2018, 2017/3072, 2018/2130.

the peace at work[40]. However, we should add that, in this case, the employer must also prove the existence of discrimination, as mentioned above. Without such concrete proof, the mere allegation that other employees had doubts about this issue should not have constituted a valid reason for the termination of the supervisor's employment contract[41]. It should be added that a romantic relationship between a supervisor and a subordinate may also be an issue that needs attention from another perspective, whether the supervisor abuses their powers over their subordinate. Undoubtedly, the supervisor's abuse of management authority and attempts to establish a relationship with their subordinate that goes beyond the working relationship is a situation that can disrupt the peace of the working environment.

In some decisions, the Court of Cassation does not decide on concrete and objective criteria such as the hierarchical position among the employees and its impact on the workflow. Besides, the Court of Cassation does not require the first instance court to make the necessary research and determination on the issue. For this reason, it should be noted that the jurisprudence of the Court is not getting steady[42]. Regrettably, the matters that do not constitute a persuasive precedent, such as an employee's marital status and the level of their relationships, are emphasized in the decisions.

In another dispute subject to a decision of the Court of Cassation[43], there was a romantic relationship between the customer relations manager -the complainant- and the bank branch manager. According to the decision of the first instance court, it was against the natural flow of life to wait for two adults to report their romantic relationship to the bank's executives. Besides, there is no such requirement in the Constitution or laws. Thus, the court decided that the termination was unjustified, considering that this would only concern the spouses and relatives of these two adults, even though it was subjectively possible to disapprove of a relationship between a married person and their co-worker. The Court of Cassation, on the other hand, concluded that because the employee did not provide information about the relationship when the employer requested an explanation, the employer could not be expected to continue the employment contract. In our opinion, it is not accurate for the Court of Cassation to consider the existence of a relationship with the branch manager - without any concrete evidence about impartiality or discrimination- and the failure to furnish information on this matter alone as a valid reason for termination[44]. We must admit that the decision of the first instance court is more accurate and shows that the issue remains in the employee's private life.

40 Birben (n26) 150; Alp and Dulay Yangın (n19) 1397; Yiğit (n25) 3778

41 Yıldız (n5) 23

42 For other examples of decisions with regard to romantic relaitonships between a supervisor and a subordinate *see*, Alp ve Dulay Yangın (n19) 1397 ff; Ergin (n25) 75

43 Court of Cassation, 22nd Division, 19.1.2015, 2014/35211, 2015/79

44 Yıldız (n5) 23; Alp and Dulay Yangın (n19) 1399

In another concrete case subject to a decision of the Court of Cassation[45], the complainant, who worked in a bank, was dismissed because he had a relationship with another employee and they kissed at the workplace. The complainant filed a lawsuit claiming that the employer had terminated his employment contract without just cause. The employer pleaded that the termination was justified because, according to the records of the internal correspondence used in the bank, the complainant had asked a married employee of the bank to meet out of the office after working hours and on weekends and, despite her refusal, he physically harassed her. The court of first instance determined that the reason for the termination was the complainant's attempt to establish a relationship with another employee and that he confirmed this in his statement of complaint. However, the complainant indicated that he did not know at the beginning that the female employee was married and that she did not refuse him. He also added that she did not want to break up when he intended to because she was unhappy in her marriage. He affirmed that he kissed her to say goodbye when he was assigned to another branch. Since there was no other employee or customer in the workplace during the kissing incident, it was not the subject of any complaint. The employer discovered the situation from the security camera footage.

Upon examining the correspondences on the computer, the first instance court determined that there was no evidence that the female employee was uncomfortable with the complainant's behaviour. Likewise, the court, taking into account the other issues mentioned and the kissing incident, decided that it would not be compatible with the principle of proportionality to accept that the termination was based on just cause or valid reason.

The Court of Cassation, on the other hand, reversed the decision and found that the employer's termination was based on just cause as follows: "*The private life and the rule of privacy do not cover act committed in the workplace and publicly against another employee. Although it is not fully clarified whether the female employee consents to the behaviour subject to the termination, it is in itself incompatible with integrity and loyalty the fact that the employee experiences an incident in the workplace as described above with another employee who is also married*".

We understand from the decision that the complainant worked as a deputy manager at the bank. If one of the employees in an emotional relationship is hierarchically superior to the other, this can affect the superior's objective behaviour, for example, in terms of the execution of work, distribution of tasks, or performance evaluation. Moreover, it can occur that an employee cannot refuse or is harassed when their supervisor insists on meeting outside the workplace and having a romantic relationship. In these circumstances, it can be concluded that the employer can terminate the

45 Court of Cassation, 9th Division, 12.2.2019, 2015/30145, 2019/3397; *see also*, Yiğit (n25) 3793

contract with just cause or valid reason. However, in the concrete dispute, these two elements were not mentioned, and there was no need for research and evidence in this direction in the Court of Cassation's reasoning. On the contrary, the kissing of two employees in the workplace was considered a just cause for termination on its own.

Moreover, the Court of Cassation, while evaluating the kissing incident in the workplace as a severe cause rendering the employment relationship unbearable, did not consider whether the incident disrupted the work by causing trouble, or if the other employees and customers witnessed the incident.

In some other decisions, the negative impacts of a romantic relationship in the workplace, such as a complaint e-mail sent to the managers, or a dispute in the workplace, were considered grounds for termination, and not only the existence of the relationship itself[46]. From our standpoint, this approach can be regarded as more appropriate. We should point out that there are also decisions in which this approach is demonstrated.

In this direction, for example, in a dispute before the Court of Appeal[47], the complainant, a cabin chief, after learning that her ex-boyfriend, who worked as a pilot at the same airline, had a new girlfriend, encouraged this woman to report the pilot to the employer with false accusations. Since some e-mails were sent to the company's senior executives, the Court of First Instance and the Court of Appeal concluded that the termination of the complainant's employment contract was based on a just cause.

In another dispute resolved by the Court of Appeal[48], upon hearing of a romantic relationship between two employees of the same branch, the employer changed their workplace. On the day of the incident, when the complainant, who worked as a store manager, met the female employee in front of the store, the complainant's wife came, and after a noisy verbal argument, the complainant left the workplace with his wife. Considering that people became alarmed and the employees had to calm down the customers in the store, the court of first instance concluded that the incident had affected the workflow and disrupted the order in the workplace. On the other hand, because of the employee's more than 17 years working at the same workplace and his efforts during the incident to end the discussion, the court decided that the complainant's behaviour was not so severe that it collapsed the trust relationship between him and the employer. The Court of Appeal upheld the court of first instance's decision, considering that the termination was based on a valid reason, not a just cause.

46 For other concrete case examples *also see*, Alp and Dulay Yangın (n19) 1403 ff; Keser (n19) 23 ff; Yiğit (n25) 3790 ff

47 Regional Court of Appeal (Istanbul), 28th Division, 11.7.2019, 2018/1615, 2019/1384

48 Regional Court of Appeal (Istanbul), 27th Division, 24.2.2017, 187/181

Another dispute[49] concerned the termination of a complainant's employment contract with just cause, on the ground that a former employee, who had an affair with the complainant, tried to kidnap her from the front of the workplace. The negative impact on the workplace of an incident that had occurred after the relationship had started at the workplace was, in this case, determined as a valid reason for termination by the Court of Cassation. In another decision[50], the Court of Cassation considered as a just cause for termination the fact that the complainant had insisted on becoming lovers with a female employee again, despite the woman's refusal. The Court described the complainant's behaviour as an interference according to Article 25 of the Labour Code.

There are also decisions that we find accurate and where the employer, who claims that a romantic relationship between employees hurts the work, is required to prove their allegation. Indeed, in a dispute subject to a Court of Cassation decision[51], the employment contract was terminated with just cause because the workflow and environment were affected by the claim that there was a romantic relationship between the complainant and her co-worker K1. K1 was married, and according to the employer's statement, K1's sister called the workplace and insulted the secretary on the phone, putting the secretary down as the complainant. Then, when the sister wanted to speak with the complainant, the complainant refused. The employer terminated the complainant's contract based on the disturbances in the workplace, stating that other employees were aware of this situation, and the court of first instance found the termination justified. The Court of Cassation, on the other hand, decided that the termination was invalid and that the complainant should be reinstated, considering the witness statements that the two employees were not in any state or attitude that would disturb the work environment, and the lack of evidence indicating that the complainant was disrupting the work.

In a dispute resolved by the Court of Appeal[52], the complainant employee, who was in the process of a divorce, established an intimate relationship with a co-worker. After an e-mail from the complainant's spouse to the complainant's employer about this relationship and the texting between the co-workers, the employer terminated the complainant's employment contract with just cause based on the company's disciplinary board regulation. The employer alleged that "the act committed does not comply with integrity and loyalty, rules of morality and goodwill" for reasons such as the relationship being known and spoken about by other employees and was causing some disturbance at the workplace and damaging the company's reputation. The Court of Appeal concluded that the termination was invalid, considering that the

49 Court of Cassation, 9th Division, 14.2.2017, 2016/4182, 2017/1911

50 Court of Cassation, 22nd Division, 2.4.2012, 2011/13073, 2012/6143

51 Court of Cassation, 22nd Division, 21.6.2012, 2011/18241, 2012/14160

52 Regional Court of Appeal (Istanbul), 30th Division, 6.7.2020, 2019/1151, 2020/1063

employer could not prove the disturbance in the workplace and that the messages between people remained within the scope of private life. The court also considered that upon becoming aware of the contents of the text messages by e-mail, the employer did not explain what action was taken against the other employee. The Court also found that the termination of only the complainant's contract was against the principle of equality.

In an old decision[53], the Court of Cassation revealed that a relationship between co-workers had nothing to do with the work, as long as it did not cause negativity in the workplace, with the following statement, which we find very accurate: "*According to the information, document in the case file and especially the defendant's defence, the complainant's employment contract was terminated because it disrupted work ethics, work discipline and safety in the workplace. From the testimonies heard during the trial, it is understood that a romantic relationship occurred outside the workplace between the complainant woman and another male employee working in the same workplace. This action of the complainant has nothing to do with the work and the workplace*."

As it is especially emphasized in the decisions of the Constitutional Court, which will be given below, within the contractual relationship between an employer and employee, the protection of the employee's private life against the employer's unfair interventions depends directly on the court's ability to provide a fair balance between the parties' interests. In this respect, the method followed by the court, the evaluation of the existence of the intervention, its legitimate justification, the fact that the court conducts sufficient research on the issues that will illuminate the case, and the control over whether the interference with a fundamental right is proportional to the aim, is crucial. Otherwise, it should be concluded that the court is insufficient to fulfil its positive obligations in terms of the protection of a fundamental right. For example, justifying sanctions like termination by the employer following allegations based on hearsay or gossip made by other employees will violate the employee's right to private life[54]. Besides, the fact that some elements have no impact on the working environment and are entirely within the scope of private life, and sometimes even unreal events which turn into the justification of an employer's decisions, will also be a violation of the employee's right to private life.

V. Turkish Constitutional Court's Approach To The Employee's Right To Respect For Private Life And Romantic Relationships In The Workplace

The Constitutional Court takes the criteria in the European Convention on Human Rights and the ECtHR judgments regarding Article 8 of the Convention as a reference

53 Court of Cassation, 9th Division, 25.12.1997, 18665/22471

54 Ergin (n25) 78; Keser (n19) 23; Alp and Dulay Yangın (n19) 1409

in individual applications regarding disputes in which the employee faces sanctions such as disciplinary punishment or termination due to romantic relationships. In line with the view that the state must effectively protect the right to respect for private life even between private persons, in these applications, the Constitutional Court determines whether the fundamental rights and freedoms of the employees have been violated in court decisions in the context of Article 20 of the Constitution, titled "right to respect for private life"[55].

When the jurisprudence of the Constitutional Court is examined, in this regard, it is seen that first of all, individual applications regarding members of the Turkish Armed Forces (TAF) come before the Constitutional Court. Although these decisions do not fall within the scope of labour law, the issue of how the Constitutional Court handles the romantic relationships of public officials and which criteria it evaluates are important in terms of the compatibility of the approach of the Court of Cassation with the decisions of the ECtHR. Therefore, in the study, firstly, the individual application decisions regarding the members of TAF will be discussed, and then the decisions regarding the applications of the employees within the scope of labour law will be evaluated.

A. Members of The Army Being Sanctioned To Leave The Turkish Armed Forces Due To Romantic Relationships

In these applications, the Constitutional Court has emphasized that the public officials' expectation regarding respect for their private life while performing their jobs is legitimate and justified. At the same time, the Court has stated that the administration has a wide margin of appreciation, regarding military service, which has its characteristics, and people who accept a certain status by choosing a military profession also accept that certain restrictions can be applied to their fundamental rights and freedoms by military discipline. That being said, the Court also accentuates that, even though the administration has a wide margin of appreciation in terms of regulatory authority due to the requirements of military service, it should not be forgotten that public officials also benefit from the guarantees outlined in the Constitution regarding fundamental rights and freedoms in their working life. Thus, in this context, the regulations which limit the right to respect for private life must comply with the criteria regulated in Article 13 of the Constitution[56]. In addition, the Court has stated that, for the interference with the private life of persons serving in the military to be lawful, it must be demonstrated that the disciplinary punishment applied was a compulsory measure arising from a social need. Also, the Court of Constitution states that the courts are expected to explain, with sufficient and relevant

55 Alp and Dulay Yangın (n19) 1391-1392

56 Turkish Const. Court, *Ergün Özlük*, no. 2015/17513, 18.7.2019, §48; *Z.A*, no. 2015/6302, 12.9.2019, §56

justification, the negative reflections of the action subject to intervention on the profession performed and the inconveniences that may arise in terms of ensuring military discipline and the proper execution of public service. These explanations should be addressed by taking into account the diversity in lifestyles that is a result of the changes and developments that have occurred in the social structure over time[57].

According to the Court, it is clear that the sanction of dismissal from the TAF has a significant impact on the economic future of individuals, as they are deprived of their basic source of livelihood as well as their professional life. In this respect, to be able to say that the restriction on the right to privacy is appropriate and proportionate to the requirements of a democratic society, it must be an exceptional measure of last resort, taking into account the effects and consequences on those performing military service, and the envisaged sanction must be proportionate to the action[58].

For example, in this regard, the Constitutional Court has evaluated the dismissal of applicants who were dismissed due to their living together as husband and wife without being legally married, which is regulated as a disciplinary offence under the title of "dismissal from the armed forces" in the TAF Disciplinary Law, and a dismissal offence in the Military Penal Code, in terms of these criteria[59]. The court dwelled on that, during the administrative process, how the action, which was attributed to the applicant, affected the proper performance of the duty and military discipline, and the reason it was considered to be contrary to general morality, was not justified. In the decision, it was emphasized that, in court's decisions, while the concrete event was examined in terms of whether the elements of the disciplinary offence occurred, and research and evaluation were made only for the determination of these issues, the reflections of the applicant's act on his profession, however, which remained in the field of privacy, could not be revealed[60].

In addition, taking into account the right to privacy in judicial decisions, the TCC has determined that: the grounds regarding the connection of the sanctioned act with the requirements of military service and the reasons why it would disrupt military discipline are not specified; the restriction on the aforementioned right, which is a necessary, compulsory and proportional measure to be implemented to ensure the continuity of military service and discipline, is not demonstrated; and a fair balance has not been established between the public interest followed by the rule and the rights and freedoms of the individual[61]. In the concrete case, even though the applicant insisted on living with a woman as husband and wife, it is clear that the punishment of direct

57 *Ergün Özlük*, §50; *Z.A*, §58

58 *Ergün Özlük*, §53; *M.O*., no. 15.1.2020, 2016/11733, §37

59 *Z.A*, §40 ff

60 *Z.A*, §59

61 *Ergün Özlük*, §52

dismissal from the profession had a heavy consequence compared to the applicant's action since it was understood that how the aforementioned act was reflected in the profession performed could not be shown[62]. Therefore, the Constitutional Court decided that the right to privacy had been violated.

In another decision, the Constitutional Court decided to the contrary and did not accept that the dismissal of the applicant from the armed forces was a violation of privacy, considering that he had committed a disciplinary offence of "moral weakness" due to his relationship with a civilian nurse, who was working within the same clinic and who was also the wife of another member of the armed forces. In the decision, the court examined whether the applicant's private life had an impact on his professional life in the concrete case, and determined that the aforementioned actions exceeded the limits of private life and had reflections on the task, such as the complaint of the nurse's spouse and their attempts to match their shift dates[63]. The Court also stated that, in these circumstances, in the personnel system where very strict military discipline rules and hierarchy apply, the evaluation of the actions which are attributed to the applicant as a factor which negatively affects the institutional discipline and reputation, and the imposition of disciplinary sanctions due to these actions, can be considered as a necessary intervention in a democratic society.

In the decision, it was concluded by the court that there was no interference with the requirements of a democratic society and the principle of proportionality in the dismissal of the applicant. This was due to his acts being contrary to the general moral structure of society to such a degree that would harm his duty, and his social and family life; and the reasons for his actions to spread to the institution he worked for were found to be sufficient and convincing[64]. In the same vein, in a previous application, the TCC determined, taking into account the facts that: the applicant had a relationship with a woman who worked in the night clubs which the applicant was in charge of inspecting, that this woman got pregnant from this relationship, and she had complained to the applicant's institution (TAF) about this relationship; that there were sufficient and convincing reasons for the effects of the applicant's actions on his professional life. Therefore, it was decided by the Supreme Court that it was necessary and proportionate in a democratic society to dismiss the applicant because of his acts which were contrary to the general moral structure of society to such a degree that would harm his duty, social and family life[65]. In our opinion, the Constitutional Court has introduced important criteria in its decisions. However, although it can be accepted that the administration's margin of appreciation may be wider when it comes to intervening in the private lives of TAF officers, we believe that the duties

62 *Ergün Özlük*, §53; *Z.A*, §62

63 *M.O*., §40

64 *M.O.,* §42

65 Turkish Const. Court, *İ.A.,* no. 2016/3423, 14.9.2017, §31

that they've performed in the TAF should also be taken into consideration in these evaluations in line with the principle of proportionality. Otherwise, it may lead to unlawful interference in the private life of military officers. Therefore, it would be appropriate to consider this criterion in the decisions of the Constitutional Court.

B. Termination of Employment Contracts Due To Romantic Relations With Co-Workers

Three applications were brought before the Constitutional Court claiming that the applicant's right to private life was violated due to the immediate termination of their employment contracts because they had romantic relations with co-workers at the workplace.

In the examination of the application of H.Ç. dated 23 September 2020[66], the Constitutional Court explained which criteria should be considered. In this context, the Court stated that the employer may impose restrictions on certain behaviours and actions that fall within the scope of the employee's private life, as a rule, for reasons that can be considered justified and legitimate, such as the effective conduct of business, and occupational health and safety. The Court also emphasized that the employer's authority and rights are not unlimited; the fundamental rights and freedoms granted to the employee - the right to respect for private life in the concrete case - are also protected within the workplace boundaries, and at the same time, restrictive and mandatory workplace rules should not harm the essence of the basic rights of employees. In this context, the Court stated to accept that the employer could terminate the employment contract, based solely on the reason that the employee had a relationship with another employee working at the same workplace, would not comply with the employee's rightful expectation that, in a democratic society, his fundamental rights and freedom should also be respected in the workplace and that this relationship should be carried out. The Court concluded that it was necessary to examine whether the relationship affects occupational health and safety[67]. In this regard, the Court emphasized that the employer must demonstrate the continuation of the employment contract cannot be expected from the employer's point of view, with the negative effects of the existing relationship on the conduct of the business. According to the Constitutional Court, while the reflection of the romantic relationship in the workplace or the functioning of the business is examined by the courts of first instance in disputes on this issue; an evaluation should be made by considering the capacity of the workplace, the duty and record of the employee, and who made the relationship public. In addition, the reasons should be set forth adequately; the conflicting interests between the employer and the employee should be balanced

66 Turkish Const. Court, *H.Ç.* no. 2017/14907, 30.9.2020, O.G. 9.12.2020, 31329

67 *H.Ç.,* §42. *Also see*, Alp and Dulay Yangın (n19) 1392; Yıldız (n5), 30-31

fairly, taking into account whether the termination of the employment contract is by the legitimate aim of the employer and is proportionate[68].

In the concrete case, the TCC emphasized that the reasons stated by the employer were not justified/proven. First of all, according to the Court, although it was determined that the applicant had a relationship with an employee/co-worker named V.B., and the employer terminated the applicant's employment contract because the employer had suffered damage as a result of a bomb threat which was thought to have been made by V.B.'s wife over the phone, it was later understood that the notification was not made by V.B.'s wife, so it was determined that the applicant was not at fault regarding the damage caused by this notification in the workplace, and the employer could not prove the damage in question. Moreover, apart from the aforementioned denunciation, it was not revealed that the relationship between the two co-workers caused negativity in the workplace. Subsequently, the Constitutional Court stated that the statement of only one of the employees who were alleged to have had an affair at the workplace was taken and the existence of the relationship was accepted based on this one-sided statement. Finally, the TCC stated that the employer did not provide sufficient evidence that the romantic relationship between the two co-workers from the workplace was made public by the applicant, that the relationship hurts the workplace, and that these negativities had reached a level where the employer's employment contract could not be expected to continue; and the court of first instance had rendered a verdict without investigating this[69]. Therefore, with this decision, the Constitutional Court accepted that the private relationship of the two employees could result in the termination of the employment contract only if it was proven that the private relationship of the two employees led to concrete problems in the workplace and that these negativities reach a level that would prevent the employer from continuing the contractual relationship.

The Constitutional Court evaluated Esra Ünlü's application by considering the same criteria in its decision dated 25 February 2021[70]. In the concrete case subject to the application, a message which was sent to the phone of the regional manager of the applicant, who worked as a store manager, was reflected on the company e-mail account due to a system installed on the phone of the regional manager by the company. Upon examination of this e-mail, the applicant's employment contract was terminated for just cause, as it was determined that her romantic relationship with her co-worker, who was married and her superior, was contrary to business ethics. The court of first instance stated that the claim that this romantic relationship caused negativities in the workplace could not be proved by the employer. On the contrary, the testimonies of witnesses showed that they did not know about this relationship

68 *H.Ç.,* §43. *Also see*, Alp and Dulay Yangın (n19) 1392

69 *H.Ç.,* §42-43. *Also see*, Alp and Dulay Yangın (n19) 1393

70 Turkish Const. Court, *Esra Ünlü*, no. 2018/4144, 25.2.2021. *Also see*, Alp and Dulay Yangın (n19) 1394

and did not cause unrest in the workplace. However, the court of appeal ruled that such a relationship could make the employment contract unbearable for the employer, even though the relationship was over, and reversed the decision of the court of first instance, ruling that the contract was terminated for a valid reason.

The Constitutional Court stated that the employer could not prove how the aforementioned relationship caused problems in the workplace. On the contrary, it was determined that the relationship had ended before the termination of the contract and that this relationship was not known to the employer and did not cause any negative effects in the workplace. It was concluded that the right to respect private life had been violated since sufficient research had been done on its reflection on the workplace and an event-specific justification had been presented. According to the Court, an examination as to whether the termination of the employment contract was appropriate and proportionate to the employer's purpose and it cannot be said that a prudent process of decision-making was made to establish a fair balance between the interests of the employer and the employee.

The Constitutional Court adopted again the same criteria in its decision in 2022[71] and accepted the right to respect the private life of the employee was violated. In the relevant dispute, the applicant is a security officer at the Izmir Social Security Institution Provincial Directorate, whose employer is a private security company. His contract was terminated for just cause because he had an affair with a married female officer working in this institution. The local court dismissed the case, and the Court of Appeal did not accept the applicant's request for reemployment, because although the love affair did not cause termination with just cause, it would cause termination with valid reason. On the other hand, the female civil servant, who was dismissed for the same reason, filed a lawsuit for the annulment of the administrative act and was reinstated because the court of first instance cancelled the transaction. After all, the alleged relationship was within the scope of private life.

The Constitutional Court emphasized that the employer did not provide any concrete information regarding the negative impact of this relationship in the workplace, only the fact that the female civil servant who was alleged to have a romantic relationship was also dismissed and the administrative court's concrete determination of the romantic relationship, even though he reinstated it, was cited as the reason. However, the administrative court's decision, shown as the only basis, decided that the female officer should be reinstated, even though there was a love affair. In the trial process, the employer did not reveal that this relationship had negative effects on the workplace, and no research was conducted by the courts on whether this love affair was reflected in working life. Therefore, the Constitutional

71 Turkish Const. Court, II. Division, *Dursun Haydar Daş*, no. 2018/22633, 22.9.2022

Court concluded that a meticulous judgment was not made to establish a fair balance between the interests of the employer and the employee, considering whether the termination of the employment contract was appropriate and proportionate to the employer's purpose, and that the right to respect for private life was violated[72].

In the aforementioned decisions, it is seen that the romantic relationship between the employee and his/her co-workers cannot be a just and valid reason for the termination of the employment contract.

VI. Conclusion

From our perspective, the romantic relationships of an employee -whether with a co-worker or not- are related to the employee's private life, and the fact that these relationships are only experienced with a co-worker will not authorize the employer to intervene in this matter, even if it is against the morality of society. For this reason, we think that statements such as "immorality and morals", and "immoral lifestyle", which are included in the decisions of judicial authorities regarding the relations of employees with their colleagues/co-workers, cannot be accepted as grounds for termination. Also, it is clear that, as in the aforementioned decisions, it is not appropriate to deal with issues of whether the employees are married or not, whether their marriage is at a stage of divorce, whether they are happy or unhappy, and the extent of their romantic relationships (measures such as texting or meeting outside, after working hours, in the evening, etc.)[73].

The only reason for an issue regarding the employee's private life to be used as a basis for the employer's decision to terminate the employment contract may be that it affects the workplace and the conduct of the work. The fact that the romantic relationship affects the work or causes negativity in the workplace should be interpreted objectively as a disruption related to occupational health and safety and the conduct of the work. Otherwise, the fact that this relationship arouses the curiosity of other employees in the workplace, that it is talked about, that other employees find this situation unethical, and that they do not approve, should not be considered a reason under any circumstances. For this reason, in the courts' decisions of first instance, appeal, and cassation in Turkish law, it would be appropriate to confine ourselves to research and determination as to whether the relationship is objectively related to the conduct of the work. While making this examination, criteria such as the capacity of the workplace, the duty and record of the employee, and the hierarchical structure between the parties (co-workers), as stated in the decisions of the Constitutional Court, can be considered[74].

72 *Dursun Haydar Daş,* 32-35

73 *Also see*, Alp and Dulay Yangın (n19) 1413; Yıldız (n5) 36

74 *See*, Alp and Dulay Yangın (n19) 1410; Yıldız (n5) 34 ff

It should be accepted that the objective proof of the aforementioned romantic relationship causing negativity at work, or in the workplace, will not be sufficient in determining that the interference with the employee's private life complies with the law. It is necessary to investigate whether the principle of proportionality accepted by the ECtHR and the TCC is applied, or in other words, whether the termination of the employment contract is appropriate and proportional to the legitimate aim of the employer; and whether the conflicting interests between the employer and the employee are balanced fairly[75]. In this perspective, the decisions of the Constitutional Court are important in terms of protecting the employee's romantic relationships within the scope of the right to respect for private life. The Constitutional Court accepts that to interfere with the fundamental rights and freedoms of the employees due to the romantic relations of the employees with their colleagues, this relationship must only lead to negativity in the workplace due to the fault of the employee and this negativity must be proven by the employer, and this approach is also compatible with the contemporary principles of labour law[76].

Basing a termination on an issue that is completely within the scope of private life is also a violation of the employee's right and freedom to work. Especially in cases where employees' contracts are unfairly terminated on the grounds of relations between married co-workers, the employees' opportunities to find a job again are considerably reduced, and an employee's right to work is violated because they are prevented from earning a living by obtaining a job freely. Therefore, in our opinion, in cases where the employment contract is unfairly terminated due to the employee's romantic relationships, the right to work as well as the right to respect for private life is violated. Although "the duty and the right to work" are stipulated in Article 49 of the Turkish Constitution, and the right to work is not regulated directly in the European Convention on Human Rights, establishing a relationship between the right to work and private life and examining indirectly the violation of the right to work within the scope of ECHR Art. 8 "right to respect for private and family life", it should also be examined in judicial decisions whether these unjust terminations interfere with the right to work and freedom as well as the right to private life.

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75 Ugan Çatalkaya (n2) 492 ff

76 Alp and Dulay Yangın (n19) 1412-1413; Yıldız (n5) 33-34

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RESEARCH ARTICLE

Einberufung der Hauptversammlung und die Vollversammlung nach deutschem Recht

Convocation of General Meetings and Plenary Meetings Under German Law

Aydın Alber Yüce*

Zusammenfassung

Die Einberufung einer Hauptversammlung beseitigt die Benachteiligung der Aktionäre bei der Ausübung ihrer Rechte. Denn auf diese Weise erfahren die Aktionäre sowohl, wann die Hauptversammlung stattfinden wird, als auch, ob sie an der Hauptversammlung teilnehmen oder nicht, da sie im Voraus über die auf der Hauptversammlung zu behandelnden Themen informiert werden. In den meisten Fällen ist es nicht erforderlich, dass die Aktionäre an der betreffenden Hauptversammlung teilnehmen, weil sie an den dort zu erörternden Themen nicht interessiert sind. Um diese Entscheidung treffen zu können, muss die Hauptversammlung jedoch einberufen und die Tagesordnung bekannt gegeben werden. In einigen Fällen müssen diese Verfahrensregeln für die Einberufung der Hauptversammlung nicht angewendet werden. Der Verzicht auf die vorgenannten Anforderungen ist insbesondere dann relevant, wenn alle Aktionäre gemeinsam anwesend sind; in diesem Fall wird eine "Vollversammlung" abgehalten. Wenn nämlich alle Aktionäre anwesend sind und keiner der Aktionäre dem Verfahren zur Vollversammlung widerspricht, können die erschienenen Aktionäre in der Vollversammlung Beschlüsse fassen, solange die Tatsache, dass alle Aktionäre anwesend sind, gewahrt bleibt.

Schlüsselwörter

Aktiengesellschaft, Aktionär, Hauptversammlung, Einberufung, Vollversammlung

Abstract

The convocation of a general meeting (GM) prevents shareholders from being at a disadvantage when exercising their rights. Shareholders are informed in advance of the topics to be discussed at a general meeting, so they know when the meeting will take place and whether they will attend. In most cases, shareholders are not necessarily required to attend a GM because they may not have an interest in the topics that will be discussed there. Nevertheless, a GM must be convoked and an agenda announced in order to be able to make this decision. Some cases do not require applying these procedural rules for convening a GM. In particular, these aforementioned requirements can be waived if all shareholders are present together; in this case, a plenary meeting is held. This can occur when all shareholders are present and none of the shareholders object to the procedures for a plenary meeting. The shareholders that are present can pass resolutions at a plenary meeting as long as all shareholders remain present.

Keywords

Stock corporation, shareholder, general meeting, convocation, plenary meeting

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Extended Summary

Joint stock company is a capital company and at the same time, the capital of a joint stock company is divided into shares. Unlike sole proprietorships, this feature of a joint stock company brings it closer to a multi-partner structure. In other words, having many stakeholders is the nature of a joint stock company. In a multi-shareholder company, shareholders may have different opinions regarding the course and administration of the company's affairs. Shareholders should have the opportunity to put these different opinions into practice, or at least to concretize them.

In German law, a general meeting of the joint stock company is how shareholders are able to influence the process of the company's affairs. General assembly meetings can be stated as the place where shareholders are able to exercise their rights arising from holding shares in the joint stock company, especially their administrative rights.

A general assembly is one of the organs of a joint stock company, the other organs being the board of directors and the supervisory board. While the board of directors is the administrative and representative body of the joint stock company, the general assembly is the board where shareholders exercise their administrative rights, as mentioned earlier. In order for shareholders to exercise these rights, they must come together, and this gathering is called a general assembly meeting.

Because a board of directors manages a joint stock company, shareholders are generally unfamiliar with the company's affairs. This unfamiliarity with the affairs of the company results in shareholders being uninformed about such things as when general assembly meetings are to be held or whether an extraordinary general assembly meeting is required. This ignorance has created a new need.

In order to convene a general assembly, a call for a meeting must be made. Calling (convoking) a general assembly meeting prevents stakeholders from being disadvantaged in terms of exercising their rights. This is because convocation allows shareholders to both learn when the general shareholders' meeting will be held and to decide on whether or not to participate in the general shareholders' meeting, as they are informed in advance about the issues that will be discussed at the general shareholders' meeting. In most cases, shareholders are not required to attend a general assembly meeting that has been called, as they may not have an interest in the issues that are to be discussed at the meeting. However, in order to make this decision, the general assembly meeting must be called and the agenda must be announced.

This study discusses the legal provisions that exist in German law regarding a number of procedural issues, including how a general assembly meeting is to be called, when the call has to take place, and the persons who are allowed to make the call. In particular, many conditions must occur in order to enable participation in a

general assembly meeting, such as the invitation to the general assembly meeting needing to be sent to shareholders a specific period of time before the meeting, the agenda needing to be announce beforehand, and the place and time of the meeting to also be determined in advance.

In some cases, these procedural rules regarding the convening of the general assembly do not need to be applied. The elimination of these aforementioned requirements is particularly relevant when all shareholders are present together, in which case a plenary meeting can be held. Indeed, if all the shareholders are together and none of the shareholders object to the procedure for convening a plenary meeting, these shareholders are able to adopt resolutions in the capacity of a general assembly as long as all the shareholders remain together.

Some essential and indispensable conditions must occur for the convening of an uncalled general assembly meeting (plenary meeting). First of all, the assembled shareholders must have already been convened in the form of a general assembly. In this sense, a general meeting of shareholders cannot be convened if the shareholders have come together only by chance and in a manner completely devoid of corporative purposes (e.g., during a vacation). Again, all shareholders or their representatives must be present in order for a general assembly meeting to be convened without the application of the rules regarding the convocation. Another condition in this regard is that none of the shareholders or their representatives are to object to the general assembly meeting being held in this manner. Moreover, waiving the application of the rules regarding the call for shareholders' meetings requires that the will of all shareholders to adopt resolutions among themselves be maintained throughout the meeting. Because no interest is found worth protecting due to the fact that all shareholders are together, the shareholders are not expected to adhere to the agenda of a general assembly meeting. In such a case, an item may be added to the agenda by unanimous vote, and adopting resolutions regarding new items remains possible as long as the meeting quorum of 100% is maintained.

EINLEITUNG

Die Aktiengesellschaft ist eine Kapitalgesellschaft, und das Kapital einer Aktiengesellschaft ist gleichzeitig in Aktien aufgeteilt. Dieses Merkmal der Aktiengesellschaft bringt sie näher an eine Mehrpersonengesellschaft, im Gegensatz beispielsweise zu einer Personengesellschaft. Mit anderen Worten: Es liegt in der Natur der Aktiengesellschaft, dass sie viele Aktionäre hat. In einer Aktiengesellschaft mit mehreren Anteilseignern können die Aktionäre unterschiedliche Meinungen über den Verlauf und die Verwaltung der Unternehmensangelegenheiten haben. Die Aktionäre sollten die Möglichkeit haben, diese unterschiedlichen Meinungen in die Praxis umzusetzen oder zumindest zu konkretisieren.

Nach deutschem Recht haben die Aktionäre über die Hauptversammlung der Aktiengesellschaft die Möglichkeit, auf den Gang der Unternehmensgeschäfte Einfluss zu nehmen. Es lässt sich feststellen, dass die Aktionäre ihre Rechte, die sich aus ihrer Beteiligung an der Aktiengesellschaft ergeben, insbesondere ihre Verwaltungsrechte, in den Hauptversammlungen ausüben.

Die Hauptversammlung ist eines der Organe der Aktiengesellschaft. Die anderen Organe der Gesellschaft sind der Vorstand und der Aufsichtsrat. Während der Vorstand das Verwaltungs- und Vertretungsorgan der Aktiengesellschaft ist, ist die Hauptversammlung, wie bereits erwähnt, ein Gremium, in dem die Verwaltungsrechte der Aktionäre ausgeübt werden. Um diese Rechte ausüben zu können, müssen die Aktionäre zusammenkommen, und diese Versammlung wird als „Hauptversammlung" bezeichnet.

Die Aktiengesellschaft wird vom Vorstand verwaltet, so dass die Aktionäre mit den Angelegenheiten der Gesellschaft nicht wirklich vertraut sind. Diese Unkenntnis über die Angelegenheiten der Gesellschaft führt dazu, dass die Aktionäre nicht darüber informiert sind, wann Hauptversammlungen abgehalten werden müssen, z. B. ob eine außerordentliche Hauptversammlung erforderlich ist. Diese Unwissenheit hat ein neues Bedürfnis geschaffen. Um eine Hauptversammlung zu veranstalten, muss eine Einberufung erfolgen.

Die Einberufung einer Hauptversammlung beseitigt die Benachteiligung der Aktionäre bei der Ausübung ihrer Rechte. Denn auf diese Weise erfahren die Aktionäre sowohl, wann die Hauptversammlung stattfinden wird, als auch, ob sie an der Hauptversammlung teilnehmen oder nicht, da sie im Voraus über die auf der Hauptversammlung zu behandelnden Themen informiert werden. In den meisten Fällen ist es nicht erforderlich, dass die Aktionäre an der betreffenden Hauptversammlung teilnehmen, weil sie an den dort zu erörternden Themen nicht interessiert sind. Um diese Entscheidung treffen zu können, muss die Hauptversammlung jedoch einberufen und die Tagesordnung bekannt gegeben werden.

Das Aktiengesetz enthält Vorschriften zu einer Reihe von Verfahrensfragen, darunter die Form der Einberufung der Hauptversammlung, die Dauer der Einberufung und die Personen, die die Einberufung vornehmen dürfen, und diese werden in dieser Studie erörtert. Um die Teilnahme an der Hauptversammlung zu ermöglichen, gibt es eine Reihe von Voraussetzungen, wie z.B. die ausschließliche Einladung der Aktionäre zur Hauptversammlung innerhalb einer bestimmten Frist, die Bekanntgabe der Tagesordnung und die vorherige Festlegung von Ort und Zeit der Versammlung.

In einigen Fällen müssen diese Verfahrensregeln für die Einberufung der Hauptversammlung nicht angewendet werden. Der Verzicht auf die vorgenannten Anforderungen ist insbesondere dann relevant, wenn alle Aktionäre gemeinsam anwesend sind; in diesem Fall wird eine „Vollversammlung" abgehalten. Wenn nämlich alle Aktionäre anwesend sind und keiner der Aktionäre dem Verfahren zur Vollversammlung widerspricht, können die erschienenen Aktionäre in der Vollversammlung Beschlüsse fassen, solange die Tatsache, dass alle Aktionäre anwesend sind, gewahrt bleibt.

Für die Durchführung einer Vollversammlung gibt es einige wesentliche und unerlässliche Voraussetzungen. Zunächst einmal müssen die versammelten Aktionäre in Form einer Hauptversammlung zusammengekommen sein. In diesem Sinne kann eine Hauptversammlung nicht ordnungsgemäß durchgeführt werden, wenn die Aktionäre nur zufällig und ohne jeglichen korporativen Zweck zusammengekommen sind, zum Beispiel während eines Urlaubs. Auch in diesem Fall müssen alle Aktionäre oder ihre Vertreter anwesend sein, damit eine Hauptversammlung (Vollversammlung) ordnungsgemäß stattfinden kann, ohne dass die Vorschriften über die Einberufung Anwendung finden. Eine weitere Voraussetzung ist, dass keiner der Aktionäre oder ihrer Vertreter der Durchführung der Hauptversammlung auf diese Weise widerspricht. Außerdem setzt der Verzicht auf die Anwendung der Vorschriften über die Einberufung von Hauptversammlungen voraus, dass der Wille aller Aktionäre, untereinander Beschlüsse zu fassen, während der gesamten Dauer der Versammlung aufrechterhalten wird. Da es kein schützenswertes Interesse daran gibt, dass alle Aktionäre zusammenkommen, ist nicht zu erwarten, dass sich die Aktionäre an die Tagesordnung der Hauptversammlung halten werden. In einem solchen Fall kann ein Punkt durch einstimmigen Beschluss auf die Tagesordnung gesetzt werden, und es ist immer möglich, Beschlüsse zu neuen Punkten zu fassen, solange das Quorum der Vollversammlung (100%) eingehalten wird.

Die vorliegende Studie befasst sich vor allem mit dem Verfahren zur Einberufung der Hauptversammlung einer Aktiengesellschaft, den Personen, die einberufen können, den Gründen für die Einberufung und der Dauer der Einberufung. Der

zweite Untersuchungsschwerpunkt ist die Vollversammlung, die es ermöglicht, auf die verfahrensrechtlichen Voraussetzungen der Einberufung zu verzichten, wenn alle Aktionäre erschienen sind. Die Bedingungen einer Vollversammlung ohne Einberufung und ihre Funktionalität werden ebenfalls näher untersucht.

I. HAUPTVERSAMMLUNG ALS ORGAN DER AKTIENGESELLSCHAFT

Aktiengesellschaften fehlt wie allen juristischen Personen die Fähigkeit des Menschen, persönlich zu handeln, z. B. Rechte zu erwerben und Verbindlichkeiten einzugehen. Stattdessen nutzen juristische Personen, einschließlich Aktiengesellschaften, ihre Organe, um Rechte zu erwerben und Verpflichtungen einzugehen. Diese Organe sind im Grunde bei allen juristischen Personen gleich: ein Leitungsorgan und eine Versammlung, in der die Personen, die die Gemeinschaft bilden, zusammenkommen. Diese Unterscheidung spiegelt sich in den Aktiengesellschaften wider, und nach deutschem Recht gibt es in Aktiengesellschaften drei obligatorische Organe: den Vorstand, den Aufsichtsrat und die Hauptversammlung.

Die Hauptversammlung[1] einer Aktiengesellschaft ist im Gesetz nicht definiert. In der Praxis ist eine solche Definition nicht erforderlich. In zahlreichen Artikeln des Aktiengesetzes werden jedoch verschiedene Aufgaben der Hauptversammlung als Organ der Aktiengesellschaft genannt, und die Stellung der Hauptversammlung der Aktiengesellschaft innerhalb des Unternehmens wird als Ergebnis ihrer Bewertung in ihrer Gesamtheit verstanden. Demnach ist die Hauptversammlung einer Aktiengesellschaft ein Organ der Gesellschaft, in dem die Aktionäre ihre Rechte aus ihrem Aktienbesitz ausüben. Da die Aktionärsstellung in Aktiengesellschaften von Bedeutung ist, ist derjenige, der auf dem Aktionärssitz platz genommen hat, in der Regel auch derjenige, der die Rechte aus dem Aktienbesitz in der Hauptversammlung ausübt.

Die Hauptversammlung hat aufgrund ihrer Funktionen mehr als eine Bedeutung. Die Hauptversammlung ist nicht nur ein Organ, sondern auch eine Versammlung; sie findet an einem bestimmten Ort, zu einer bestimmten Zeit und an einem bestimmten Datum statt, damit die Aktionäre ihre Gedanken über die Zukunft des Unternehmens äußern können[2]. Die Hauptversammlung ist nicht nur ein Entscheidungsgremium,

1 Die Hauptversammlung wird im schweizerischen Recht als „Generalversammlung" bezeichnet und die Verwendung in der Literatur wurde auf diese Weise entwickelt. In dieser Studie wird die Verwendung im deutschen Recht als Basis angesehen. Auch einige deutsche Literaturquellen verwenden den Begriff „Universalversammlung", Hartwin Bungert, '§ 35 Zuständigkeit Der Hauptversammlung', *Münchener Handbuch des Gesellschaftsrechts Bd. 4* (5th edn, Verlag C H Beck 2020) para 82. .

2 Jens Koch, *Aktiengesetz Kommentar Begründet von Uwe Hüffer* (17th edn, Verlag C H Beck 2023) paras 6, § 118; Dietmar Kubis, 'AktG § 118 Allgemeines', *Münchener Kommentar zum AktG*, vol 3 (5th edn, Verlag C H Beck 2022) para 1; Christian Hofmann, 'AktG § 118 Allgemeines', *beck-online.GROSSKOMMENTAR GesamtHrsg: Henssler Hrsg: Spindler/Stilz Stand: 01.07.2023* (Verlag C H Beck 2023) para 7.

sondern auch eine regelmäßige Zusammenkunft der Aktionäre und des Verwaltungsorgans des Unternehmens und hat die Möglichkeit, die finanzielle Lage des Unternehmens zu beeinflussen[3].

Die Aktionäre einer Aktiengesellschaft können aus verschiedenen Gründen zusammengekommen sein. Aus diesem Grund sollten nicht alle Versammlungen, bei denen Aktionäre zusammenkommen, als Hauptversammlungen angesehen werden. So ist beispielsweise eine Versammlung, die nur von bestimmten Aktionären einberufen wird, um bestimmte Fragen untereinander zu klären, keine Hauptversammlung[4] *(Scheinversammlung)*. Auch die Nichteinhaltung der gesetzlichen Bestimmungen über die Einberufung von Hauptversammlungen, z. B. die Nichterfüllung dieser Anforderung, wenn die Einberufung einer Hauptversammlung erforderlich ist, stellt keine Hauptversammlung dar[5]. Wie aus den vorstehenden Ausführungen hervorgeht, handelt es sich bei der Hauptversammlung nicht um eine gewöhnliche Sammlung von Personen, die sich in der Position von Aktionären befinden, und die Abhaltung der Hauptversammlung ist an die Erfüllung bestimmter, im Gesetz festgelegter besonderer formaler Bedingungen geknüpft[6].

Die Hauptversammlung ist ein Organ der Aktiengesellschaft; daher werden die Aktionäre, die sie bilden, und die juristische Persönlichkeit der Gesellschaft als getrennt betrachtet, und die Aktionäre können nicht gleichzeitig als die Hauptversammlung angesehen werden[7]. Dies liegt daran, dass die an der Hauptversammlung teilnehmenden Aktionäre jederzeit wechseln können. Die Hauptversammlung ist das Zentrum der Aktionärsdemokratie, aber diese Eigenschaft stattet sie nicht mit der Kompetenz aus, ihre Beschlüsse umzusetzen, da die Hauptversammlung kein dauerhaftes Organ ist und nur langsam funktioniert[8]. In dieser Hinsicht ist die Hauptversammlung auf den Vorstand der Aktiengesellschaft angewiesen, um ihre Beschlüsse durchzusetzen[9].

Das alte und überholte Konzept, wonach die Hauptversammlung ein übergeordnetes Organ im Aktienrecht ist, wurde durch den Grundsatz der Funktionstrennung zwischen den Organen ersetzt. Nach diesem Prinzip haben Vorstand, Aufsichtsrat und Hauptversammlung jeweils die Befugnisse, Pflichten und Verantwortlichkeiten, in einem exklusiven Bereich zu handeln, in den die anderen nicht eingreifen

3 Florian Drinhausen, 'AktG § 118 Allgemeines', *Hölters | Weber, Aktiengesetz Kommentar* (4th edn, C H Beck/Verlag Vahlen 2020) para 1.

4 Kubis (n 2) para 1.

5 ibid.

6 Drinhausen (n 3) para 6.

7 Hofmann (n 2) para 7; Sebastian Herrler, 'AktG § 118 Allgemeines', *Grigoleit, Aktiengesetz* (2nd edn, Verlag C H Beck 2020) para 1.

8 Hofmann (n 2) para 7; Herrler (n 7) para 1.

9 Christoph Binge and Ulrich Thölke, '§ 25 Stellung Der Hauptversammlung Im Organisationsgefüge', *Münchener Anwaltshandbuch Aktienrecht* (3rd edn, Verlag C H Beck 2018) para 2.

können[10]. Obwohl die Hauptversammlung befugt ist, wichtige Entscheidungen für die Aktiengesellschaft zu treffen, insbesondere Satzungsänderungen, macht dies die Hauptversammlung nicht zu einem übergeordneten Organ, beispielsweise gegenüber dem Vorstand[11]. In diesem Zusammenhang kann gesagt werden, dass die Vertretung der Aktiengesellschaft gegenüber Dritten und die Leitung der Gesellschaft selbst nicht in den Zuständigkeitsbereich der Hauptversammlung gehören[12].

II. EINBERUFUNG DER HAUPTVERSAMMLUNG IN AKTIENGESELLSCHAFTEN

Die Aktiengesellschaft hat in den meisten Fällen eine Mehrgesellschafterstruktur. Die Tatsache, dass die Aktionäre weit von den Unternehmensangelegenheiten entfernt sind, macht es erforderlich, dass sie über bestimmte Fragen informiert werden. Eine der Informationsfragen ist die Frage, wann die Hauptversammlungen abgehalten werden. Da es sich um eine interne Sache des Unternehmens handelt, können die Aktionäre nur erfahren, wann die Hauptversammlungen abgehalten werden, wenn sie darüber informiert werden. Dies geschieht durch Einberufung. Das Ziel der im Folgenden zu erörternden Bestimmungen zur Erleichterung der Teilnahme an der Hauptversammlung einer Aktiengesellschaft besteht darin, die Ausübung der Aktionärsrechte zu gewährleisten und zu verhindern, dass in der Hauptversammlung gewöhnliche, zufällige Entscheidungen getroffen werden[13]. Die Einberufung der Hauptversammlung, das Recht der Minderheit, eine Hauptversammlung einzuberufen, die Einberufungsfrist und ähnliche Fragen sind in den Artikeln § 121 und § 127a des Aktiengesetzes geregelt. Informationen zu diesen Punkten werden im Folgenden gegeben.

A. Gründe für die Einberufung der Hauptversammlung

1. Im Allgemeinen

Die Hauptversammlung einer Aktiengesellschaft ist kein ständig arbeitendes und funktionierendes Organ wie der Vorstand, so dass die Funktionsweise dieses Organs die Einberufung der Aktionäre, die es bilden, erfordert[14]. Die Einberufung der Hauptversammlung einer Aktiengesellschaft ist ein verfahrensrechtlicher Vorgang, der nicht den Charakter eines Rechtsgeschäfts hat und der es ermöglicht, dass die

10 Hofmann (n 2) para 8.

11 ibid; Herrler (n 7) para 1.

12 Herrler (n 7) para 2; Drinhausen (n 3) para 5.

13 Andrea Ruppert, 'C. Einberufung Der Hauptversammlung und Mitteilungspflichten', *Praxis der Hauptversammlung (Erfolgreiche Vorbereitung und Durchführung)* (4th edn, RWS Verlag Kommunikationsforum GmbH 2018) para 80. Eine vergleichbare Rechtsprechung findet sich in: OLG München, Urteil vom 22.3.2023 – 7 U 1995/21, OLG München: Fehlerhafte Wahl des Versammlungsortes bei zerstrittenen GmbH-Gesellschaftern, NZG 2023, 946.

14 Jörg Pluta, '§ 121', *Heidel (Hrsg.) - Aktienrecht und Kapitalmarktrecht* (3rd edn, Nomos Verlag 2011) para 1.

Hauptversammlung, die ein Organ der Gesellschaft ist, durch die Versammlung der Aktionäre gebildet wird[15]. Die Gründe für die Einberufung einer Hauptversammlung einer Aktiengesellschaft sind in § 121/1 AktG geregelt: „*Die Hauptversammlung ist in den durch Gesetz oder Satzung bestimmten Fällen sowie dann einzuberufen, wenn das Wohl der Gesellschaft es fordert*". Diese Tatbestände, die eine Einberufung der Generalversammlung erfordern, sind nicht abschließend[16]. Insbesondere bei der Betrachtung von außerordentlichen Hauptversammlungen zeigt sich, dass die Gründe, die eine außerordentliche Hauptversammlung erforderlich machen, sehr unterschiedlich sein können.

Die Gründe für die Einberufung, die hier alternativ zueinander aufgeführt sind, verpflichten auch die zur Einberufung berechtigten Personen[17]. Die Hauptversammlung einzuberufen ist nicht nur ein Recht, sondern auch eine Pflicht, denn wenn die Hauptversammlung nicht einberufen wird, obwohl es einen Grund gibt, der ihre Einberufung erforderlich macht, schadet dies dem Unternehmen. Wenn beispielsweise die Mehrheit der Vorstandsmitglieder der Gesellschaft infolge eines Unfalls stirbt, muss die Hauptversammlung einberufen werden, um neue Vorstandsmitglieder zu wählen. Wird die Hauptversammlung trotz dieses Erfordernisses nicht einberufen, entsteht eine Geschäftsführungslücke. Der Gegenstand, der in der Hauptversammlung zu behandeln ist, muss nicht zwingend im Gesetz enthalten sein; es reicht aus, wenn eine Gesetzesbestimmung den Berechtigten zur Einberufung einer Hauptversammlung verpflichtet, und sei es auch nur „mittelbar"[18]. Wenn der Vorstand beispielsweise bei einer Verschlechterung der Finanzlage der Gesellschaft die Generalversammlung zu einer Sitzung einberuft und Maßnahmen zur Verbesserung der Finanzlage verlangt, besteht eine implizite Verpflichtung in dieser Richtung.

Die Einberufung der Hauptversammlung einer Aktiengesellschaft hat in der Regel außer den Einberufungskosten keine Auswirkungen auf die Gesellschaft. Hiermit kann die Hauptversammlung auch dann einberufen werden, wenn es keinen Grund für die Einberufung der HV gibt[19]. Die in der Hauptversammlung gefassten Beschlüsse können nicht allein wegen des Fehlens eines solchen Grundes für ungültig erklärt werden[20]. Ist die Hauptversammlung jedoch nicht verpflichtet, einen Beschluss zu fassen, besteht auch keine Verpflichtung zur Einberufung einer Hauptversammlung[21].

15 Florian Drinhausen, 'AktG § 121 Allgemeines', *Hölters | Weber, Aktiengesetz Kommentar* (4th edn, C H Beck/Verlag Vahlen 2020) para 3.

16 ibid 5.

17 Oliver Rieckers, 'AktG § 121 Allgemeines', *beck-online.GROSSKOMMENTAR-Aktiengesetz: Stand: 01.07.2023* (Verlag C H Beck 2023) para 5; Pluta (n 14) para 8.

18 Rieckers (n 17) para 5; Sebastian Herrler, 'AktG § 121 Allgemeines', *Grigoleit, Aktiengesetz* (2nd edn, Verlag C H Beck 2020) para 4.

19 Koch (n 2) paras 3, § 121.

20 ibid.

21 Herrler (n 18) para 3.

Das heißt, die Hauptversammlung kann nicht zu einer Sitzung über Gegenstände einberufen werden, für die sie nicht beschlussfähig ist[22].

2. Einberufung der Generalversammlung auf Grund einer gesetzlichen Bestimmung

Die Hauptversammlung kann aus vielen Gründen zu einer Versammlung einberufen werden. Der erste Grund, der einem in den Sinn kommt und der die zur Einberufung der Hauptversammlung befugten Personen zur Handlung bewegen sollte, ist, dass eine gesetzliche Bestimmung eine solche Einberufung verlangt. Hierfür lassen sich viele Beispiele anführen. So sind z.B. die Pflicht zur Prüfung und Vorlage des Jahresabschlusses nach § 175 AktG, der Verlust der Hälfte des Grundkapitals durch Bilanzverlust nach § 92 AktG, das Verlangen der Minderheit auf Einberufung einer Hauptversammlung aufgrund der in § 122 AktG enthaltenen Ermächtigung oder die Erörterung der Abberufung des Vorstands im Zusammenhang mit der Diskussion des Jahresabschlusses alles Situationen, die die Einberufung der Hauptversammlung aufgrund einer gesetzlichen Vorschrift erfordern[23].

Die Einberufung der Hauptversammlung kann auch aufgrund eines von der Hauptversammlung selbst vorgenommenen Rechtsakts erfolgen. Die Hauptversammlung kann auch einen Termin für eine weitere Tagung festlegen und die Einberufung einer neuen Sitzung beschließen[24]. Der Vorstand nimmt in diesem Fall die weiteren Verfahrenshandlungen, insbesondere die Einberufung der Sitzung, gemäß dem Einberufungsbeschluss der Generalversammlung vor[25].

In der Tat ist es nicht einfach, alle rechtlichen Gründe aufzuzählen, die die Einberufung einer Hauptversammlung erforderlich machen. Es ist auch schwer vorstellbar, dass sie alle ausdrücklich im Gesetz enthalten sind. Aber auch wenn das Gesetz die Einberufung der Hauptversammlung nicht ausdrücklich vorschreibt, ist die Einberufung der Hauptversammlung implizit erforderlich, wenn die in einer Rechtsvorschrift vorgesehene Maßnahme einen Beschluss der Hauptversammlung beinhaltet[26]. Wenn zum Beispiel die Verwendung des Jahresgewinns, eine Kapitalerhöhung oder eine Satzungsänderung beabsichtigt ist, bedarf es für die Durchführung dieser Maßnahmen ebenfalls der Einberufung einer Hauptversammlung.

22 AG Montabaur, Beschluss vom 19.06.2012 - HRB 20744, BeckRS 2012, 14971.

23 Rieckers (n 17) para 7; Dietmar Kubis, 'AktG § 121 Allgemeines', *Münchener Kommentar zum AktG*, vol 3 (5th edn, Verlag C H Beck 2022) para 6; Koch (n 2) paras 3, § 121.

24 Rieckers (n 17) para 6; Uwe Bohnet, '§ 26 Vorbereitung Der Hauptversammlung', *Schüppen/Schaub, Münchener Anwaltshandbuch Aktienrecht* (3rd edn, Verlag C H Beck 2018) para 43.

25 Rieckers (n 17) para 6.

26 Drinhausen (n 15) para 8; Bohnet (n 24) para 43.

3. Einberufung der Generalversammlung auf Grund einer Satzungsbestimmung

Die Bestimmungen in der Satzung einer Aktiengesellschaft, die die Einberufung der Generalversammlung vorschreiben, sind in der Regel als Wiederholung der gesetzlichen Bestimmungen formuliert[27]. Dies ist darauf zurückzuführen, dass die aktienrechtlichen Vorschriften für Aktiengesellschaften zwingend sind (vgl. AktG § 23/5) und daher die Grenzen der Kompetenzverteilung zwischen den Organen genau festgelegt sind[28]. Um den Aktionären die Ausübung ihrer Rechte zu erleichtern, kann die Satzung jedoch vorsehen, dass die Hauptversammlung leichter einberufen werden kann, indem sie weniger strenge Bedingungen als die gesetzlich vorgeschriebenen aufstellt[29]. Eine Satzungsänderung, die den Zeitraum zwischen der Einberufung der Hauptversammlung und dem Versammlungstag verlängert, gilt beispielsweise als Erleichterung in diesem Sinne. Oder es handelt sich um eine Vereinfachung, um sicherzustellen, dass die Aktionäre auf den Hauptversammlungen mit geringeren formalen Anforderungen vertreten sind.

Die Einberufung einer Hauptversammlung auf der Grundlage einer Satzungsbestimmung ist nur in den Bereichen möglich, in denen das Gesetz die Einberufung einer Hauptversammlung vorsieht[30]. Die Geschäftsführung der Aktiengesellschaft und ihre Vertretung gegenüber Dritten ist beispielsweise eine Angelegenheit, die in die Zuständigkeit des Vorstands fällt. Es ist einfach undenkbar, dass die Hauptversammlung mit der Frage der Ernennung eines Geschäftsführers zusammentritt, was in diesen ausschließlichen Bereich des Vorstands eingreifen würde. Es ist auch nicht möglich, dass die Satzung die Hauptversammlung ermächtigt, einen Beschluss über eine andere Aufgabe zu fassen, die nur vom Vorstand ausgeführt werden kann.

4. Einberufung der Hauptversammlung zum Wohl der Gesellschaft

Mitunter kann es aus Gründen, die nicht im Gesetz oder in der Satzung aufgeführt sind, erforderlich sein, die Generalversammlung zu einer Sitzung einzuberufen. Angesichts des Geschäftsverlaufs der Gesellschaft kann es erforderlich sein, eine Hauptversammlung einzuberufen und einen Beschluss über die auf der Tagesordnung stehenden Angelegenheiten zu fassen. Die Einberufung der Hauptversammlung zu einer Sitzung zum Wohle des Unternehmens ist in der Praxis selten[31].

Die Frage, wie wichtig der Grund für die Einberufung der Hauptversammlung ist, kann strittig sein, wenn die Hauptversammlung aus einem Grund einberufen werden

27 Koch (n 2) paras 4, § 121; Kubis (n 23) para 8.

28 Drinhausen (n 15) para 9; Herrler (n 18) para 5; Rieckers (n 17) para 9; Bohnet (n 24) para 44.

29 Bohnet (n 24) para 44; Koch (n 2) paras 4, § 121; Rieckers (n 17) para 9.

30 ibid.

31 Ruppert (n 13) para 89.

muss, der nicht im Gesetz oder in der Satzung festgelegt ist. Mit anderen Worten, es ist auch ein Zweifel daran, ob der Grund für die Einberufung der Hauptversammlung so wichtig ist, dass die Versammlung tatsächlich einberufen werden muss. Es ist klar, dass der Vorstand in dieser Angelegenheit ein Ermessensrecht hat, und der Vorstand entscheidet, ob er die Hauptversammlung einberufen werden muss oder nicht[32]. Es gibt jedoch auch andere Personen, die zur Einberufung der Hauptversammlung befugt sind, und wenn diese Personen der Ansicht sind, dass die Einberufung der Hauptversammlung im Interesse des Unternehmens erforderlich ist, werden sie von ihrem gesetzlich eingeräumten Recht Gebrauch machen. Bei einer in dieser Hinsicht vorzunehmenden Bewertung kann die Hauptversammlung zu einer Sitzung einberufen werden, wenn der Vorstand dies für erforderlich hält[33].

Der Begriff des Wohls der Gesellschaft sollte in einem breiteren Sinne verstanden werden, nicht unbedingt im Sinne eines finanziellen Vorteils. Die Hauptversammlung einer Aktiengesellschaft kann nach einer einberufenen Sitzung ohne Beschlussfassung enden. Es kann nicht behauptet werden, dass die Hauptversammlung nicht zu einer Sitzung einberufen werden kann, nur weil sie keinen Beschluss fasst. Die Hauptversammlung kann manchmal dazu dienen, Meinungsverschiedenheiten zwischen den Organen der Gesellschaft beizulegen[34]. Das Wohl der Gesellschaft ist jedoch im Allgemeinen dann gegeben, wenn die Beschlussfassung der Hauptversammlung für die Aufrechterhaltung des internen und externen Funktionierens der Gesellschaft im Einklang mit dem Gesetz erforderlich ist[35]. Zum Beispiel wird die Informierung von Gesellschaftsorganen und Aktionären als im Interesse der Gesellschaft liegend angesehen, solange die Angelegenheit in die Zuständigkeit der Hauptversammlung fällt[36].

5. Andere Gründe

Der Vorstand kann beschließen, eine Hauptversammlung einzuberufen, um die Meinung der Aktionäre zu erfahren oder sie über bestimmte Themen zu informieren[37] *(Fakultative Einberufung)*. Auch wenn es in der Praxis nicht üblich ist, dass die Hauptversammlung nur zum Zweck der Informationsvermittlung einberufen wird, ist es rechtlich und wirtschaftlich nicht zu beanstanden, dass die Hauptversammlung nur ohne Beschlussfassung einberufen werden kann, um den Meinungsaustausch unter den Aktionären zu ermöglichen[38].

32 ibid 90; Kubis (n 23) para 9; Bohnet (n 24) para 45; Herrler (n 18) para 6.

33 Ruppert (n 13) para 91.

34 Bohnet (n 24) para 45; Herrler (n 18) para 6.

35 Herrler (n 18) para 6.

36 Ruppert (n 13) para 91.

37 Rieckers (n 17) para 11; Kubis (n 23) para 10.

38 Rieckers (n 17) para 11.

Es ist auch zu klären, ob die Einberufung einer Hauptversammlung auf der Grundlage eines schuldrechtlichen Vertrags verlangt werden kann. Diesbezüglich lässt sich sagen, dass die Rechtsgeschäfte, die der Zustimmung der Hauptversammlung einer Aktiengesellschaft bedürfen, die Parteien dieser Geschäfte ermächtigen, die Einberufung einer Hauptversammlung zu verlangen[39]. Denn die Parteien, die die Gültigkeit eines Rechtsgeschäfts an die Zustimmung der Hauptversammlung binden, akzeptieren implizit, dass ein Beschluss der Hauptversammlung erforderlich ist, um dieses Geschäft wirksam werden zu lassen[40].

Die Minderheit in Aktiengesellschaften kann ebenfalls Einfluss auf die Einberufung einer Hauptversammlung haben. In Aktiengesellschaften kann die Minderheit in bestimmten Fällen auch vom Vorstand die Einberufung einer Hauptversammlung verlangen. Gemäß AktG § 122/1 und 3, die Hauptversammlung ist einzuberufen, wenn Aktionäre, deren Anteile zusammen den *zwanzigsten Teil des Grundkapitals* erreichen, die Einberufung schriftlich unter Angabe des Zwecks und der Gründe verlangen; das Verlangen ist an den Vorstand zu richten. Die Satzung kann das Recht, die Einberufung der Hauptversammlung zu verlangen, an eine andere Form und an den Besitz eines geringeren Anteils am Grundkapital knüpfen. Die Antragsteller haben nachzuweisen, dass sie seit mindestens 90 Tagen vor dem Tag des Zugangs des Verlangens Inhaber der Aktien sind und dass sie die Aktien bis zur Entscheidung des Vorstands über den Antrag halten[41]. Wird dem Verlangen nicht entsprochen, so kann das Gericht die Aktionäre, die das Verlangen gestellt haben, ermächtigen, die Hauptversammlung einzuberufen oder den Gegenstand bekanntzumachen[42]. Zugleich kann das Gericht den Vorsitzenden der Versammlung bestimmen. Auf die Ermächtigung muß bei der Einberufung oder Bekanntmachung hingewiesen werden. Gegen die Entscheidung ist die Beschwerde zulässig. Die Antragsteller haben nachzuweisen, dass sie die Aktien bis zur Entscheidung des Gerichts halten.

B. Berechtigte Personen zur Einberufung der Hauptversammlung

1. Der Vorstand als Organ der Gesellschaft

Die Personen, die eine Hauptversammlung einberufen können, sind in § 121 AktG genannt. Nach dieser Vorschrift, Die Hauptversammlung wird durch den Vorstand einberufen, der darüber mit einfacher Mehrheit beschließt. Personen, die in das Handelsregister als Vorstand eingetragen sind, gelten als befugt. Das auf

39 Kubis (n 23) para 11.

40 ibid.

41 Ein Beispiel für eine Gerichtsentscheidung finden Sie hier. OLG Düsseldorf, Beschluß vom 16. 1. 2004 - I-3 Wx 290/03, OLG Düsseldorf: Einberufung einer Hauptversammlung auf Verlangen einer Aktionärsminderheit, FGPrax 2004, 87 ff.

42 Siehe ein Beispiel für eine Gerichtsentscheidung: OLG München, Beschluss vom 9. 11. 2009 - 31 Wx 134/09, FGPrax 2010, 46 ff.

Gesetz oder Satzung beruhende Recht anderer Personen, die Hauptversammlung einzuberufen, bleibt unberührt. Die Einberufung der Hauptversammlung einer Aktiengesellschaft durch den Vorstand setzt also voraus, dass ein nach dem Gesetz oder den Bestimmungen der Satzung gebildeter Vorstand vorhanden ist[43].

Der Vorstand gilt als die Hauptinstanz für die Einberufung der Hauptversammlung zu einer Sitzung. Die Einberufung der Hauptversammlung ist nicht nur ein Recht, sondern auch eine Pflicht für den Vorstand[44]. Dies hat zur Folge, dass der Vorstand, der es versäumt, die Hauptversammlung einzuberufen, wenn dies erforderlich ist, rechtlich verantwortlich wird.

In den Bereichen, in denen das Gesetz den Vorstand direkt ermächtigt, ist ein Unterschied zwischen den Personen, die den Vorstand bilden, und diesem Gremium festzustellen. Da der Vorstand direkt als Organ der Gesellschaft bezeichnet wird, ist es den Mitgliedern des Vorstands und sogar dem Präsidenten des Vorstands nicht möglich, die Hauptversammlung einzuberufen, auch wenn für diese Personen eine Gefahr im Sinne der Haftungsbestimmungen besteht[45]. Beispielsweise kann auch in Fällen, in denen der Vorstand aus zwei Mitgliedern besteht, die Hauptversammlung nicht von einem dieser beiden Mitglieder zu einer Sitzung einberufen werden[46]. Auch hier ist ein Vorstandsbeschluss erforderlich. In Fällen, in denen kein Beschluss gefasst werden kann, kann die Anwendung von AktG § 111/3 in Frage kommen[47].

In einer Aktiengesellschaft führt der Vorstand nicht alle seine Geschäfte durch Beschlussfassung. Im Allgemeinen muss der Vorstand einer Aktiengesellschaft Entscheidungen in Angelegenheiten treffen, die ihn haftbar machen können. Dies gilt auch für die Fälle, in denen die Einberufung der Hauptversammlung obligatorisch ist. Der Vorstand erfüllt seine Pflicht zur Einberufung der Hauptversammlung, indem er einen entsprechenden Beschluss fasst und die notwendigen Vorbereitungsmaßnahmen trifft[48]. Die Durchführung der erforderlichen Vorbereitungshandlungen kann jedoch nach der Beschlussfassung des Vorstands an ein Mitglied des Vorstands delegiert werden[49]. Außerdem können ein oder mehrere Mitglieder des Vorstands beauftragt werden, die von der Hauptversammlung gefassten Beschlüsse nach der Hauptversammlung auszuführen[50].

43 Pluta (n 14) para 11.

44 Ruppert (n 13) para 94; Herrler (n 18) para 3; Koch (n 2) paras 3, § 121.

45 Herrler (n 18) para 7; Kubis (n 23) para 15.

46 Ruppert (n 13) para 98.

47 ibid.

48 Kubis (n 23) para 15.

49 Rieckers (n 17) para 12; Koch (n 2) paras 6, § 121; Kubis (n 23) para 15.

50 Pluta (n 14) para 12.

Der Vorstand, der über die Einberufung der Hauptversammlung entscheidet, muss gemäß den gesetzlichen und satzungsmäßigen Bestimmungen einberufen werden und die Einberufung der Hauptversammlung mit einem einfachen Quorum beschließen[51]. Diese Einberufung können auch Personen vornehmen, die zwar als Vorstand abberufen wurden, aber noch als Vorstandsmitglieder im Handelsregister eingetragen sind[52]. Analog zu dieser Situation kann ein Einberufungsbeschluss auch von Vorstandsmitgliedern gefasst werden, die noch nicht im Handelsregister eingetragen sind, aber z. B. von der Hauptversammlung ordnungsgemäß gewählt wurden[53].

2. Der Aufsichtsrat als Organ der Gesellschaft

Der Aufsichtsrat kann, obwohl es sich um eine Ausnahmegenehmigung handelt, auch die Hauptversammlung zu einer Sitzung einberufen[54]. Nach § 111 Absatz 3 AktG, der die Rechte und Pflichten des Aufsichtsrats regelt, hat der Aufsichtsrat die Hauptversammlung einzuberufen, wenn das Wohl der Gesellschaft es erfordert. Für einen Beschluss genügt die einfache Mehrheit. Die Befugnis des Aufsichtsrats zur Einberufung der Hauptversammlung ist nicht so weit gefasst wie die des Vorstands. Vielmehr ist der Aufsichtsrat befugt, die Hauptversammlung einzuberufen, wenn der Vorstand nicht in der Lage oder nicht willens ist, eine Hauptversammlung einzuberufen, z. B. wenn die in der Hauptversammlung zu treffende Entscheidung für die Mitglieder des Vorstands nachteilig wäre[55]. Darüber hinaus kann der Aufsichtsrat die Hauptversammlung einberufen, wenn der Vorstand für den Abschluss eines Rechtsgeschäfts die Zustimmung der Hauptversammlung benötigt, diese aber nicht einberufen wurde[56].

Ist die Einberufung der Hauptversammlung durch den Aufsichtsrat zu veranlassen, so hat dieser im Namen der Gesellschaft und auf deren Kosten die zur Einberufung der Hauptversammlung erforderlichen Maßnahmen zu treffen und durchzuführen[57]. Der Aufsichtsrat kann dabei Hilfspersonen ernennen, die die für die Durchführung der Generalversammlung erforderlichen Vorbereitungen treffen[58].

3. Andere Personen

Das Recht, eine Hauptversammlung einzuberufen, kann gemäß AktG § 121/3 letzter Satz auch anderen Personen als dem Vorstand (und dem Aufsichtsrat)

51 Koch (n 2) paras 6, § 121; Kubis (n 23) paras 16, 18.

52 Bohnet (n 24) para 54; Ruppert (n 13) para 96.

53 Ruppert (n 13) para 96; Pluta (n 14) para 14.

54 Koch (n 2) paras 6, § 121.

55 Kubis (n 23) para 21. Siehe auch, Herrler (n 18) para 3.

56 Kubis (n 23) para 21.

57 ibid 23.

58 Ruppert (n 13) para 102.

aufgrund der Satzung oder des Gesetzes zustehen. Personen, die nach dem Gesetz oder der Satzung das Recht haben, eine Hauptversammlung einzuberufen, benötigen ebenfalls eine Begründung. Mit anderen Worten: Die Person, die die Einberufung der Hauptversammlung beantragt, muss die Themen, die auf der Hauptversammlung behandelt werden sollen, festgelegt und in ihren Antrag aufgenommen haben[59]. Da die Personen, die das Recht zur Einberufung der Versammlung ausüben, dieses Recht persönlich ausüben müssen, ist es nicht möglich, das Recht zur Einberufung der Versammlung auf eine andere Person zu übertragen[60]. Wenn das Gesetz oder die Satzung jedoch ausdrücklich vorsieht, dass andere Personen, die nach Gesetz oder Satzung zur Einberufung der Hauptversammlung befugt sind, diese Befugnis an Dritte delegieren können, kann die Befugnis zur Einberufung der Hauptversammlung auch von den Personen ausgeübt werden, denen die Befugnis delegiert wurde[61].

Beispiele für Personen, die die Hauptversammlung auf der Grundlage einer gesetzlichen Vorschrift zu einer Hauptversammlung einberufen können, sind die Liquidatoren[62] oder die Minderheit[63]. Das Pfandrecht oder das Nießbrauchsrecht der Aktionäre an ihren Aktien gibt diesen nicht das Recht, bei den zuständigen Organen die Einberufung der Hauptversammlung zu verlangen[64].

Auch bestimmte Aktionäre oder Aktionärsgruppen können Personen sein, die die Hauptversammlung aufgrund einer Satzungsbestimmung einberufen können[65]. Die Satzung kann auch bestimmten Mitgliedern des Vorstands oder des Aufsichtsrats das Recht einräumen, eine Hauptversammlung einzuberufen[66].

4. Die Folgen der Rechtswidrigkeit

Die Einberufung einer Hauptversammlung durch Personen, die nicht zur Einberufung befugt sind, stellt einen Rechtsverstoß dar. Unter solchen Umständen werden auch die Beschlüsse, die von einer von Unbefugten einberufenen Hauptversammlung gefasst werden können, rechtlich ungültig. Daher sollte die Rechtsgültigkeit solcher Beschlüsse geprüft werden. Das Gesetz sieht hier als Rechtsfolge die Nichtigkeit vor. Nach AktG § 241/1, erster Unterabsatz, ein Beschluß der Hauptversammlung ist außer in den Fällen des § 192 Abs. 4, §§ 212, 217 Abs. 2, § 228 Abs. 2, § 234 Abs. 3 und § 235 Abs. 2 nur dann nichtig, wenn er in einer Hauptversammlung gefaßt

59 Kubis (n 23) para 24.

60 Herrler (n 18) para 9; Kubis (n 23) para 24.

61 Herrler (n 18) para 9.

62 AktG § 268/2: „*Im übrigen haben die Abwickler innerhalb ihres Geschäftskreises die Rechte und Pflichten des Vorstands. Sie unterliegen wie dieser der Überwachung durch den Aufsichtsrat*".

63 Kubis (n 23) para 25.

64 Ruppert (n 13) para 105.

65 Koch (n 2) paras 8, § 121; Kubis (n 23) para 26.

66 Pluta (n 14) para 15; Kubis (n 23) para 26.

worden ist, die unter Verstoß gegen § 121 Abs. 2 und 3 Satz 1 oder Abs. 4 und 4b Satz 1 einberufen war.

C. Die Zeit der Einberufung

Ein Mindestzeitraum muss zwischen dem Datum der Einberufung zur Hauptversammlung und dem Datum der Versammlung liegen. Das AktG § 123/1 legt die Frist fest, innerhalb derer die Hauptversammlung einzuberufen ist. Nach dieser Vorschrift, die Hauptversammlung ist mindestens dreißig Tage vor dem Tage der Versammlung einzuberufen. Der Tag der Einberufung ist nicht mitzurechnen. Die Nichtberücksichtigung des Einberufungstag soll den Aktionären eine vorteilhaftere Rechtsposition in Bezug auf die Teilnahme an der Hauptversammlung verschaffen.

D. Inhalt der Einberufung zur Hauptversammlung

1. Die Firma

Die Aktionäre müssen über die Einberufung der Hauptversammlung informiert werden. Diese Informationen ermöglichen es den Aktionären, die Hauptversammlung der Gesellschaft, an der sie beteiligt sind, von anderen Einberufungen zu unterscheiden und zu entscheiden, ob sie an der Versammlung teilnehmen wollen oder nicht. Die Firma der einladenden Gesellschaft gehört zu den Informationen, die in der Einberufung der Hauptversammlung enthalten sein müssen. Die Einberufung muss die Firma enthalten (AktG § 121/3). Durch die Aufnahme des Firmennamens in die Einladung zur Hauptversammlung haben die Aktionäre die Möglichkeit, die Einladung der Gesellschaft, deren Aktionäre sie sind, zu erkennen[67]. In der Praxis empfiehlt es sich daher, die Firma der Gesellschaft in der Einladung zur Hauptversammlung in großer Schrift zu schreiben[68]. Die in der Einladung zur Hauptversammlung zu enthaltende Firma muss so verwendet werden, wie sie zum Zeitpunkt der Einladung im Handelsregister eingetragen ist[69].

Praktische Gründe können manchmal dazu führen, dass der Handelsname einer Aktiengesellschaft in Bekanntmachungen abgekürzt wird. Die in der Einberufung zur Hauptversammlung zu verwendenden Abkürzungen müssen klar und verständlich sein (z.B. AG: Aktiengesellschaft), so dass sie von jedermann verstanden werden können, und sie müssen daher korrekt sein, um die Aktionäre nicht daran zu hindern, die Gesellschaft zu identifizieren[70].

67 Rieckers (n 17) para 26; Kubis (n 23) para 32.

68 Kubis (n 23) para 32.

69 Rieckers (n 17) para 26.

70 ibid.

2. Der Sitz der Gesellschaft

Die Einberufung muss den Sitz der Gesellschaft enthalten (AktG § 121/3). Hat die Gesellschaft mehr als einen Sitz, so ist jeder von ihnen in der Einberufung der Hauptversammlung anzugeben[71]. Unwesentliche Ungenauigkeiten in Bezug auf den Sitz der Gesellschaft führen jedoch nicht zur Ungültigkeit der Einberufung, es sei denn, sie verhindern die Identifizierung der aufrufenden Gesellschaft[72]. Wenn der Firmenname bereits den Hauptsitz des Unternehmens enthält, führt die fehlende Angabe des Hauptsitzes ebenfalls nicht zur Ungültigkeit des Einberufungsverfahrens[73].

Wie beim Firmennamen sollte der Sitz der Aktiengesellschaft so verwendet werden, wie er zum Zeitpunkt der Einberufung im Handelsregister eingetragen ist[74].

3. Zeit und Ort der Hauptversammlung

a. Zeit der Hauptversammlung

Eine Hauptversammlung einer Aktiengesellschaft kann ordentlich oder außerordentlich einberufen werden. Die ordentliche Hauptversammlung wird mindestens einmal im Jahr innerhalb einer bestimmten Frist nach Abschluss des Geschäftsjahres abgehalten, um die ordentlichen Angelegenheiten des Unternehmens zu diskutieren[75]. Außerordentliche Hauptversammlungen werden nur in besonderen Fällen abgehalten, da viele Kosten anfallen, insbesondere die Einberufung[76]. In dieser Hinsicht sind die beiden wichtigsten Elemente für die Einberufung der Hauptversammlung einer Aktiengesellschaft der Zeitpunkt und der Ort, an dem die Versammlung stattfinden wird. Die Einberufung der Hauptversammlung muss die Zeit und Ort der Hauptversammlung enthalten (AktG § 121/3). Die Einberufung muss in der Form von Tag-Monat-Jahr erfolgen[77]. Darüber hinaus muss auch der Zeitpunkt der Hauptversammlung angegeben werden, und die Tatsache, dass ein Unternehmen seine Hauptversammlung üblicherweise über Jahre hinweg zur gleichen Zeit abhält, entbindet nicht von dieser Verpflichtung[78]. Außerdem sollte der Zeitrahmen der Hauptversammlung als Tag und Uhrzeit des Beginns der Versammlung und nicht als Dauer der Versammlung angesehen werden[79]. Wenn die Hauptversammlung mehr als

71 Herrler (n 18) para 11; Kubis (n 23) para 33; Rieckers (n 17) para 27.

72 Kubis (n 23) para 33; Rieckers (n 17) para 27.

73 Kubis (n 23) para 33.

74 Rieckers (n 17) para 27.

75 Thomas Raiser and Rüdiger Veil, *Recht Der Kapitalgesellschaften* (5th edn, Verlag Franz Vahlen 2010) paras 16, 22; Ruppert (n 13) para 81.

76 Raiser and Veil (n 77) paras 16, 22.

77 Kubis (n 23) para 34; Rieckers (n 17) para 28.

78 Kubis (n 23) para 34.

79 Koch (n 2) paras 9, § 121.

einen Tag dauert, sollte dies ebenfalls in der Einberufung angegeben werden[80, 81]. Es gibt jedoch keine solche Verpflichtung, da es schwierig ist, im Voraus zu bestimmen, wie lange die Hauptversammlung dauern wird[82]. Wenn jedoch die voraussichtliche Dauer der Hauptversammlung nach dem Inhalt der Tagesordnungspunkte definitiv mehr als einen Tag betragen wird, sollte dies in der Einberufung angegeben werden[83].

b. Ort der Hauptversammlung

Die Hauptversammlung findet nach dem Gesetz (AktG 121/5) am Ort des Sitzes der Gesellschaft statt, soweit die Satzung nichts anderes vorsieht. Zum Beispiel kann in der Satzung ein Ort als Versammlungsort festgelegt werden, der für die Aktionäre leichter zu erreichen ist als der Sitz der Gesellschaft[84]. In der Satzung kann ein einziger Ort für die Abhaltung der Hauptversammlung bestimmt werden, es können aber auch mehrere Orte für die Abhaltung der Versammlung festgelegt werden, je nach der Entscheidung des Vorstands, der die Einberufung vornimmt[85]. Die Angabe des Ortes, an dem die Hauptversammlung stattfindet, oder die Angabe einer Verwaltungseinheit (z. B. Freiburg im Breisgau) reicht nicht aus; es ist erforderlich, die Anschrift des Ortes anzugeben, an dem die Hauptversammlung tatsächlich stattfinden wird[86]. Der Ort, an dem das Treffen stattfinden soll, muss mit Angaben wie Viertel, Straße, Gasse, Hausnummer und Wohnungsnummer beschrieben werden[87].

Bei der Einberufung der Hauptversammlung kommt es darauf an, den Aktionären die Möglichkeit zu geben, im Rahmen der Grundsätze von Treu und Glauben an der Versammlung teilzunehmen. Diesbezüglich sollten Maßnahmen getroffen werden, die verhindern, dass die Adresse der Versammlung mit anderen Adressen verwechselt wird und die Aktionäre den Ort der Hauptversammlung nicht finden können. Zu diesem Zweck sollten beispielsweise die Abkürzungen, die in der Anschrift im Einladungstext enthalten sind, nicht verwendet werden, wenn dies zur Vermeidung von Verwechslungen erforderlich ist[88].

Geringfügige Änderungen können in Bezug auf den Ort, an dem die Hauptversammlung abgehalten wird, vorgenommen werden. So gilt es beispielsweise

80 ibid.

81 Wurde im Voraus beschlossen, dass die Hauptversammlung mehr als einen Tag dauert, ist es auch möglich, alle Beratungen, Abstimmungen und Beschlüsse je nach Verlauf der Sitzung an einem Tag abzuschließen, und der Abschluss einer Sitzung, die zuvor für zwei Tage geplant war, an einem Tag beeinträchtigt nicht die Rechtsgültigkeit der Beschlüsse (Rieckers (n 17) para 28.).

82 Herrler (n 18) para 11; Rieckers (n 17) para 28; Pluta (n 14) para 19.

83 LG Mainz, Urteil vom 14. 4. 2005 - 12 HK O 82/04, NZG 2005, 819 ff.

84 OLG München, Urteil vom 22.3.2023 – 7 U 1995/21, OLG München: Fehlerhafte Wahl des Versammlungsortes bei zerstrittenen GmbH-Gesellschaftern, NZG 2023, 946.

85 Kubis (n 23) para 92.

86 Koch (n 2) paras 9, § 121.

87 Herrler (n 18) para 11; Rieckers (n 17) para 29.

88 Rieckers (n 17) para 29.

nicht als wesentliche Änderung in diesem Sinne, wenn der Raum, in dem die Versammlung stattfindet, in einen benachbarten Raum verlegt wird, weil er aufgrund der unvorhersehbaren Anwesenheitsquote nicht ausreicht. Eine solche Änderung stellt keinen Verstoß gegen die Pflichten des Vorstands in Bezug auf die Durchführung der Hauptversammlung dar. Ein ähnliches Beispiel ist der Fall, wenn der Saal, in dem die Versammlung stattfindet, geändert wird, weil er aufgrund einer Störung in der Tonanlage unbrauchbar geworden ist. In beiden Fällen muss der Vorstand jedoch die erforderlichen Warnhinweise und Schilder für die Aktionäre anbringen, die später an der Versammlung teilnehmen werden.

4. Die Tagesordnung

Eine Tagesordnung für eine Hauptversammlung einer Aktiengesellschaft ist eine Auflistung der Themen, die auf der Versammlung behandelt werden sollen, und der Reihenfolge, in der sie behandelt werden[89]. Die Tagesordnung ist in Einberufung anzugeben (AktG § 121/3). Die Tagesordnung sollte in der Einberufung zur Hauptversammlung angegeben werden, damit die Aktionäre im Voraus über die auf der Hauptversammlung zu erörternden Angelegenheiten informiert werden und ihre Wahl, ob sie an der Versammlung teilnehmen oder nicht, bzw. ihre Entscheidung, über die auf der Versammlung zu erörternden Angelegenheiten auf der Grundlage ihrer persönlichen Einschätzung klären können[90]. Vereinfacht gesagt, ermöglicht die Bekanntgabe der Tagesordnung vor der Versammlung den Aktionären, sich auf die Hauptversammlung vorzubereiten[91].

In diesem Zusammenhang sollten allgemeine Formulierungen unter den Informationen auf der Tagesordnung vermieden werden. Wenn beispielsweise eine Satzungsänderung vorgenommen werden soll, sollte auf der Tagesordnung nicht einfach nur „Satzungsänderung" stehen, sondern klar und deutlich „die in Artikel 10 Absatz 3 der Satzung vorgesehene Änderung", damit die Aktionäre der Gesellschaft sich für diese Frage interessieren und zur Hauptversammlung kommen[92]. Allerdings heißt es in einigen Urteilen[93], dass die bloße Angabe der Art der Tagesordnungspunkte, z. B. „Satzungsänderung" oder „Ernennung von Vorstandsmitgliedern" oder „Kapitalerhöhung", ausreichend ist. Es ist daher unzulässig, völlig abstrakte Schlüsselwörter zu verwenden, die nicht dem Informationszweck und der Informationspflicht entsprechen.

Die Aufnahme von Tagesordnungspunkten mit der Überschrift „Verschiedenes" in die Tagesordnung der Hauptversammlung wird nicht empfohlen, da auf der

89 ibid 32.

90 Koch (n 2) paras 9, § 121.

91 Rieckers (n 17) para 31. Siehe auch: BGH, Urt. V. 14.7.2020 – II ZR 255/18 (OLG München), BGH: Unwirksame Hauptversammlungsbeschlüsse infolge Bekanntmachungsfehler, NZG 2020, 1106 ff.

92 Koch (n 2) paras 9, § 121.

93 LG Hannover (3. Kammer für Handelssachen), Urteil vom 12.10.2022 – 23 O 63/21, Abs. 48, BeckRS 2022, 31268.

Grundlage solcher Tagesordnungspunkte kein Beschluss gefasst werden kann[94]. Auf der Grundlage solcher Tagesordnungspunkte ist es jedoch in der Praxis möglich, die Meinung der Aktionäre zu verschiedenen Themen auch außerhalb eines HV-Beschlusses zu erfahren[95].

5. Bei börsennotierten Aktiengesellschaften

Die Aktionärsstruktur von Publikumsaktiengesellschaften macht es erforderlich, besondere Regeln auf sie anzuwenden. Bei börsennotierten Aktiengesellschaften sind in der Einberufung der Hauptversammlung einige zusätzliche Angaben erforderlich. Für nicht börsennotierte Aktiengesellschaften sind solche Informationen nicht erforderlich, und das Ziel ist es, diese nicht börsennotierten Unternehmen zu entlasten, indem sie von bestimmten zusätzlichen Verfahren befreit werden[96]. Gemäß AktG § 121/3, das die Ausübung der Stimmrechte in Aktiengesellschaften erleichtern soll[97], bei börsennotierten Gesellschaften hat der Vorstand oder, wenn der Aufsichtsrat die Versammlung einberuft, der Aufsichtsrat in der Einberufung ferner anzugeben:

1. die Voraussetzungen für die Teilnahme an der Versammlung und die Ausübung des Stimmrechts sowie gegebenenfalls den Nachweisstichtag nach § 123 Absatz 4 Satz 2 und dessen Bedeutung;

2. das Verfahren für die Stimmabgabe;

a) durch einen Bevollmächtigten unter Hinweis auf die Formulare, die für die Erteilung einer Stimmrechtsvollmacht zu verwenden sind, und auf die Art und Weise, wie der Gesellschaft ein Nachweis über die Bestellung eines Bevollmächtigten elektronisch übermittelt werden kann sowie

b) durch Briefwahl oder im Wege der elektronischen Kommunikation gemäß § 118 Abs. 1 Satz 2, soweit die Satzung eine entsprechende Form der Stimmrechtsausübung vorsieht;

3. die Rechte der Aktionäre nach § 122 Abs. 2, § 126 Abs. 1, den §§ 127, 131 Abs. 1; die Angaben können sich auf die Fristen für die Ausübung der Rechte beschränken, wenn in der Einberufung im Übrigen auf weitergehende Erläuterungen auf der Internetseite der Gesellschaft hingewiesen wird;

94 Koch (n 2) paras 9, § 121; Rieckers (n 17) para 32.

95 Koch (n 2) paras 9, § 121.

96 Rieckers (n 17) para 24.

97 Kubis (n 23) para 60. Aufgrund der hohen Anzahl von Aktionären in Publikumsaktiengesellschaften ist es schwierig, diese Personen zu versammeln und an der Hauptversammlung teilnehmen zu lassen. Deshalb sollte die Teilnahme an der Versammlung angesichts der organisatorischen Probleme, die in Aktiengesellschaften auftreten können, und der Schwierigkeiten bei der Ausübung der Aktionärsrechte erleichtert werden (Raiser and Veil (n 77) paras 16, 21.).

4. die Internetseite der Gesellschaft, über die die Informationen nach § 124a zugänglich sind.

E. Bekanntmachung der Einberufung der Hauptversammlung

Gemäß AktG § 121/4 ist die Einberufung ist in den Gesellschaftsblättern bekannt zu machen. Die Frage steht auch im Zusammenhang mit AktG § 25. Das heißt, wenn das Gesetz oder die Satzung vorschreibt, dass die Einberufung der Hauptversammlung in den Gesellschaftsblättern zu veröffentlichen ist (vgl. AktG § 121/4), muss die Einberufung auch im Bundesanzeiger veröffentlicht werden.

Die Einberufung einer Hauptversammlung durch öffentliche Urkunden ist in manchen Fällen nicht erforderlich. Dies kann insbesondere dann der Fall sein, wenn alle Aktionäre namentlich bekannt sind. Die Hauptversammlung kann in diesem Fall gemäß § 121/4 Satz 2 AktG durch eingeschriebenen Brief einberufen werden, soweit die Satzung nichts anderes bestimmt; als Zeitpunkt der Absendung gilt der Tag der Bekanntmachung. Die Mitteilung an die im Aktienregister Eingetragenen genügt.

Das Verfahren für die Bekanntmachung der Einberufung der Hauptversammlung ist nach § 121 Abs. 4 AktG unter Berücksichtigung von § 23 Abs. 5 AktG zwingend vorgeschrieben, und die Satzung darf kein einfacheres Verfahren für die Bekanntmachung der Einberufung vorsehen[98]. Vielmehr kann die Satzung ein strengeres Verfahren als das gesetzlich vorgeschriebene vorsehen, indem sie z.B. vorsieht, dass die Tagesordnung den Aktionären mehrfach in verschiedenen Zeitungen bekannt gemacht werden muss[99]. So sollte es etwa im Sinne des vorangegangenen Sonderfalls nicht möglich sein, die vom Vorstand auf Verlangen der Aktionäre einberufene Hauptversammlung aus externen Gründen fortzusetzen.

F. Rücknahme der Einberufung der Hauptversammlung

Die Einberufung der Hauptversammlung der Aktiengesellschaft kann von dem Organ, das zur Einberufung befugt ist und sie vorgenommen hat, zurückgezogen werden. So kann beispielsweise der Vorstand auf die Einberufung einer Hauptversammlung verzichten, auch wenn diese auf Verlangen der Aktionäre einberufen wird[100]. Im Sinne des vorangegangenen Sonderfalls sollte es z.B. nicht möglich sein, die vom Vorstand auf Verlangen der Aktionäre einberufene Hauptversammlung aus externen Gründen fortzusetzen. Abgesehen davon ist es undenkbar, dass der Vorstand die Einberufung der Hauptversammlung zurückziehen kann, wenn sie auf Verlangen der Aktionäre erfolgt ist. Selbst wenn ein solcher Widerruf erfolgt, sind die von

98 Kubis (n 23) para 75.

99 ibid.

100 BGH, Urt. v. 30.6.2015 – II ZR 142/14 (OLG Frankfurt a.M.), BGH: Kompetenz zur Rücknahme einer einberufenen Hauptversammlung, NZG 2015, 1227 ff.

den Aktionären durch Fortsetzung der Hauptversammlung gefassten Beschlüsse gültig. Die Annahme des Gegenteils verstößt gegen die Rechte der Aktionäre[101]. Die Befugnis des Vorstands, die Einberufung zu widerrufen, sollte jedoch nicht als unbegrenzt angesehen werden. Wenn beispielsweise die auf eine gültige Einberufung durch den Vorstand anwesenden Aktionäre am festgelegten Ort und zur festgelegten Zeit versammelt sind, kann der Vorstand die Einberufung der Hauptversammlung nicht mehr zurückziehen[102].

III. DIE BEDINGUNGEN FÜR EINE VOLLVERSAMMLUNG

A. Vollversammlung im Allgemeinen

1. Begriff

Der Begriff „*Vollversammlung*“ ist im Gesetz nicht definiert. Die Bedingungen, unter denen eine Vollversammlung abgehalten werden kann, und die Rechtsfolgen werden jedoch in Artikel §121/6 AktG geregelt. Nach dieser Vorschrift sind alle Aktionäre erschienen oder vertreten, kann die Hauptversammlung Beschlüsse ohne Einhaltung der Bestimmungen dieses Unterabschnitts fassen, soweit kein Aktionär der Beschlussfassung widerspricht[103]. In einer Vollversammlung können die Tagesordnungspunkte durch einstimmigen Beschluss auf die neue Agenda gesetzt werden; anderslautende Satzungsbestimmungen sind ungültig[104].

Die Vollversammlung ist nach der in Rede stehenden Rechtsvorschriften keine Versammlungsart wie eine ordentliche oder außerordentliche Hauptversammlung. Eine Vollversammlung ist eine Erleichterung, um bestimmte Verfahren zur Einberufung von ordentlichen oder außerordentlichen Hauptversammlungen zu vermeiden[105]. Die Vollversammlung ist ein spezielles Versammlungsverfahren, das es den Aktionären ermöglicht, die Einberufung der Hauptversammlung und einige andere Verfahren zu umgehen, und ist daher kein Konzept für Vorstandssitzungen. Deshalb

101 LG Frankfurt a. M., Urt. v. 12. 3. 2013 – 3-05 O 114/12, LG Frankfurt: Kein Recht des Vorstands zur Absage einer einberufenen Hauptversammlung, NZG 2013, 748 ff.

102 BGH, Urt. v. 30.6.2015 – II ZR 142/14 (OLG Frankfurt a. M.), BGH: Kompetenz zur Rücknahme einer einberufenen Hauptversammlung, NZG 2015, 1227 ff.

103 Dieser im Aktiengesetz §121/6 geregelte Prinzip ist auch im türkischen Handelsgesetzbuch Nr. 6102 enthalten. Gemäß Artikel 416 des türkischen Handelsgesetzbuchs können alle Aktionäre oder ihre Vertreter - vorbehaltlich der Bestimmungen über die Teilnahme an der Hauptversammlung und die Durchführung von Hauptversammlungen - eine Vollversammlung durchführen und Beschlüsse fassen, solange die Quorumzahl erreicht ist, ohne das Verfahren der Einberufung einzuhalten, es sei denn, einer von ihnen widerspricht.

104 Dieser im Aktiengesetz §121/6 übernommene Rechtsgrundsatz ist auch im schweizerischen Obligationenrecht enthalten. Nach Artikel 701 (Absatz 1 und 2) dieses Gesetzes, die Eigentümer oder Vertreter sämtlicher Aktien können, falls kein Widerspruch erhoben wird, eine Generalversammlung ohne Einhaltung der für die Einberufung geltenden Vorschriften abhalten. In dieser Versammlung kann über alle in den Geschäftskreis der Generalversammlung fallenden Gegenstände gültig verhandelt und Beschluss gefasst werden, solange die Eigentümer oder Vertreter sämtlicher Aktien daran teilnehmen (*Universallversammlung*).

105 Koch (n 2) paras 19-§121; Pluta (n 14) para 48; Bohnet (n 24) para 84.

ist die Vollversammlung ein spezifisches Verfahren für Hauptversammlungen, und es gibt kein solches Verfahren wie die Einberufung von Vorstandssitzungen.

Eine genauere Betrachtung von § 121/6 AktG zeigt, dass die Vollversammlung für Aktiengesellschaften mit einer geringen Anzahl von Aktionären wichtiger ist. In Anbetracht der Schwierigkeit, alle Aktionäre zusammenzubringen, besonders bei Publikumsgesellschaften[106] mit einer großen Anzahl von Aktionären, ist es verständlich, dass diese Methode eher für Gesellschaften mit einem engen Aktionärskreis geeignet ist[107].

Der Verzicht auf einen Teil der Vorschriften über die Einberufung der Hauptversammlung bei der Vollversammlung ist das Ergebnis des Wunsches des Gesetzgebers, für Aktiengesellschaften mit einem engen Aktionärskreis, bei denen persönliche Merkmale gegenüber denen einer Kapitalgesellschaft überwiegen, eine besondere Praxis vorzusehen. Der Grund für dieses besondere Erfordernis liegt darin, dass einige der Bedingungen, die für Publikumsaktiengesellschaften als notwendig erachtet werden, zu einer Formalität und Bürokratie führen würden, die für Aktiengesellschaften mit wenigen Aktionären nicht erforderlich ist[108]. Bereits bei der zeitlichen Umsetzung der aktienrechtlichen Vorschriften ist festzustellen, dass diese Regeln bei Aktiengesellschaften mit kleinen Aktionärskreisen nicht eingehalten werden[109]. Der Verzicht auf die Anwendung der Bestimmungen über die Einberufung der Hauptversammlung bei der Vollversammlung wird damit begründet, dass in einer Situation, in der alle Aktionäre zusammen sind, kein Interesse mehr besteht, das durch die aufgegebenen Bestimmungen geschützt werden soll.

2. Erscheinungsformen der Vollversammlung

Die Hauptversammlung von Aktiengesellschaften wird als ordentliche oder außerordentliche Versammlung abgehalten. Die ordentliche Hauptversammlung wird jedes Jahr zu einem bestimmten Zeitpunkt abgehalten. Die außerordentliche Hauptversammlung hingegen legt keinen Termin fest, da der „außerordentliche Grund", der den Zeitpunkt der Versammlung angibt, kein vorhersehbarer Grund ist. Wenn man über die Art und Weise nachdenkt, wie die Vollversammlung zustande gekommen ist, fallen einem beide Methoden ein, nämlich dass diese Versammlungen entweder ordentlich oder außerordentlich sein können. Mit anderen Worten, die ordentliche oder außerordentliche Hauptversammlung einer

106 Die Vorschriften des AktG über die Einberufung der Hauptversammlung wurden mit Blick auf Gesellschaften mit mehreren Aktionären und insbesondere auf Publikumsaktiengesellschaften erlassen ('Entwurf Eines Gesetzes Für Kleine Aktiengesellschaften Und Zur Deregulierung Des Aktienrechts', *Deutscher Bundestag — 12. Wahlperiode, Drucksache 12/6721* (1994) 9.).

107 Rieckers (n 17) para 109.

108 ibid; 'Entwurf Eines Gesetzes Für Kleine Aktiengesellschaften Und Zur Deregulierung Des Aktienrechts' (n 106) 9.

109 'Entwurf Eines Gesetzes Für Kleine Aktiengesellschaften Und Zur Deregulierung Des Aktienrechts' (n 106) 9.

Aktiengesellschaft kann in Form einer Vollversammlung abgehalten werden. In der Praxis überwiegt jedoch die eine dieser beiden Möglichkeiten die andere. Die Gründe, die zur Einberufung einer außerordentlichen Hauptversammlung führen, sind in der Regel dringlich, unvorhersehbar und erfordern ein sofortiges Eingreifen. Ordentliche Hauptversammlungen hingegen werden jedes Jahr zu einem bestimmten Zeitpunkt einberufen, auch wenn keine außergewöhnlichen Umstände vorliegen. Die Tagesordnung für ordentliche Hauptversammlungen ist standardisiert. Außerordentliche Hauptversammlungen hingegen können aus unvorhersehbaren Gründen einberufen werden, z. B. wenn plötzlich ein Posten im Vorstand frei wird. Daher wird eine Vollversammlung eher die Form einer außerordentlichen Hauptversammlung annehmen.

B. Voraussetzungen

Die Vollversammlung hat eine Struktur, dass alle Aktionäre erscheinen müssen und keiner von ihnen der Durchführung der Vollversammlung widersprechen bzw. das Quorum von 100 % während der gesamten Versammlung aufrechterhalten werden muss. Im Folgenden werden die Einzelheiten dieser grundlegenden Voraussetzungen erörtert.

1. Hauptversammlungscharacter

a. Form der Versammlung der Aktionäre

Die Aktionäre müssen in einer Weise zusammenkommen, die für eine Hauptversammlung charakteristisch ist, damit die in einer Vollversammlung gefassten Beschlüsse die gleiche Wirkung haben wie die in anderen Hauptversammlungen gefassten Beschlüsse[110]. Auch wenn sich alle Aktionäre versammelt haben, bedeutet dies nicht, dass jede Versammlung von Aktionären ohne Einberufung stattfinden kann. So können beispielsweise vier Aktionäre, die sich in einem Hotel im Urlaub befinden, keine Vollversammlung abhalten, indem sie sich in der Hotellobby zu einer Hauptversammlung verabreden. Ebenso wenig kann von diesen Gesellschaftern, die sich zufällig in einem Einkaufszentrum treffen, erwartet werden, dass sie sich in ein Café setzen und eine Vollversammlung abhalten, um über Fragen der Gesellschaft zu beschließen. Kurz gesagt, die Aktionäre müssen innerhalb einer bestimmten rechtlichen Disziplin zusammenkommen und über die Einsicht zur Teilnahme an einer Gesellschaftsversammlung nachdenken. Diese Voraussetzung wirft ein weiteres Fragezeichen auf. Die Frage ist nämlich, wie die Aktionäre über eine nicht einberufene Generalversammlung informiert werden sollen.

110 Herrler (n 18) para 42; Rieckers (n 17) para 109; Koch (n 2) paras 20-§121.

Es gibt viele Möglichkeiten, wie die Aktionäre über eine Vollversammlung informiert werden können. So können beispielsweise drei Aktionäre einer Fünf-Aktionärs-Gesellschaft, die sich am Hauptsitz der Gesellschaft befinden, die beiden anderen Aktionäre telefonisch anrufen und sie auffordern, zum Hauptsitz der Gesellschaft zu kommen, wenn sie einen Beschluss der Hauptversammlung fassen müssen, während sie die Unternehmensgeschäfte besprechen. Die Entscheidung der Aktionäre über eine Whatsapp-Gruppe des Unternehmens, sich am nächsten Tag zu treffen, ist eine weitere Lösung, die in dieser Richtung in Betracht gezogen werden kann. Tatsächlich hat jedes Kommunikationsmittel, das zu diesem Zweck verwendet werden kann, die gleiche Rechtsfolge. Für die Vollversammlung kann auch die Möglichkeit in Erwägung gezogen werden, dass einige der gesetzlich vorgeschriebenen Verfahrensregeln für Hauptversammlungen nicht angewandt werden (z. B. eine Frist von drei Tagen zwischen dem Datum der Einberufung und dem Datum der Hauptversammlung) und dass alle Aktionäre tatsächlich an der Versammlung teilnehmen, indem sie dieser Einberufung folgen und die Tagesordnung einsehen. Damit ein Beschluss auf diese Weise gefasst werden kann, darf natürlich, wie im Gesetz vorgeschrieben, kein Aktionär nach Beginn der Versammlung Einwände gegen das Verfahren und den Ablauf erheben.

b. Ziel der Versammlung der Aktionäre

Ein weiterer einflussreicher Punkt dafür, ob eine Vollversammlung abgehalten werden kann oder nicht, ist der Grund, der die Aktionäre, die ohne Einberufung zusammenkommen, in einer physischen oder digitalen Umgebung zusammenführt. Wie bereits erwähnt, muss die Versammlung der Aktionäre eine Hauptversammlungscharacter darstellen. Jede Aktionärsversammlung bedeutet nicht, dass die Anwesenheit der Aktionäre aus irgendeinem Grund ausreicht, um die Hauptversammlung zu konstituieren[111]. Vielmehr muss der Grund, der die Aktionäre zusammenführt, einen gesellschaftsrechtlichen Charakter haben. So bedeutet beispielsweise das rein zufällige Zusammentreffen von Aktionären in einem Nachtclub nicht, dass diese physische Situation eine Vollversammlung ermöglicht. Diese Tatsache sollte jedoch nicht zu sehr eingeschränkt werden. Wenn die Aktionäre beispielsweise, wenn auch nur zufällig, am Sitz der Gesellschaft versammelt sind, kann die Hauptversammlung ohne Einberufung abgehalten werden. Wichtig ist hier, dass die Aktionäre vorausschauend handeln, um die Angelegenheiten des Unternehmens zu erörtern und die Bedingung des Zusammenseins zu erfüllen. Aus diesem Grund kann ein virtuelles oder physisches Zusammensein von Aktionären nicht als Hauptversammlung angesehen werden, unabhängig davon, ob es zufällig oder geplant ist, es sei denn, die Aktionäre haben das Ziel, die Angelegenheiten der Gesellschaft zu berühren.

111 Koch (n 2) paras 20-§121.

c. Protokollierung der Vollversammlung

i. Im Allgemeinen

Die Voraussetzungen für die Pflicht zur Niederschrift über die Versammlung, den Inhalt und die Führung des Protokolls sind in der Vollversammlung nicht anders als in der Hauptversammlung. Wie bei einer durch Einberufung stattfindenden Hauptversammlung muss daher auch bei der Vollversammlung die Sitzung in einer Niederschrift dokumentiert werden. Da die Durchführung einer Vollversammlung bei börsennotierten Unternehmen jedoch nur sehr selten möglich ist, wird die Frage im Hinblick auf nicht börsennotierte Aktiengesellschaften behandelt.

Die Niederschrift über die Hauptversammlungen ist in §130 AktG geregelt[112]. Nach dieser Vorschrift sind die Beschlüsse der Hauptversammlung in einer Niederschrift zu protokollieren, die von einem Notar zu erstellen ist, der am Versammlungsort anwesend sein muss. Diese Vorschrift gilt nicht für Aktiengesellschaften, deren Aktien nicht börsennotiert sind. Bei diesen Gesellschaften reicht eine vom Aufsichtsratsvorsitzenden verfasste und unterzeichnete Niederschrift aus, es sei denn, ein Quorum von ¾ oder mehr ist für die Hauptversammlung erforderlich[113]. Die Belege und Nachweise für den Verlauf der Sitzung und die gefassten Beschlüsse sind als Anlage zu der Niederschrift zu verwahren. Außerdem bedarf es zum Nachweis der Gültigkeit des Dokuments weder einer Zeugenaussage noch einer Unterschrift.

ii. Zirkularbeschlüsse

Die Hauptversammlung ist das wichtigste Instrument zur Einflussnahme der Aktionäre auf die Zukunft der Gesellschaft. Der Vorstand einer Aktiengesellschaft, die einen fremden Vermögensgegenstand verwaltet, muss sicherstellen, dass die Aktionäre zusammenkommen und Einfluss auf die Geschäftsführung nehmen können, von der sie weit entfernt sind. Dazu ist es erforderlich, dass die Aktionäre in Form einer „Versammlung" zusammenkommen. Aktionäre, die in Form einer Versammlung („Hauptversammlung") zusammenkommen, können durch ihr Rederecht zu den Tagesordnungspunkten sowohl ihre Meinung äußern als auch andere Aktionäre mit ihren Äußerungen beeinflussen. Werden jedoch in Form von Zirkularbeschlüssen Beschlüsse gefasst, ist dieses Diskussionsumfeld nicht möglich. Die Tatsache, dass die Vollversammlung das Format einer Hauptversammlung erfordert, verhindert daher die Beschlussfassung in Form von Zirkularbeschlüssen[114, 115].

112 Prüfen Sie auch Artikel 422 des türkischen Handelsgesetzbuches und Artikel 702 des Schweizerischen Obligationenrechtes.

113 In diesem Fall wird zusätzlich zu der Bedingung, dass alle gemeinsam anwesend sind und keine Widersprüche erheben, auch die Voraussetzung verlangt, dass der Vorsitzende des Aufsichtsrates anwesend sein muss und seine Widersprüche nicht erhoben werden.

114 Herrler (n 18) para 42; Rieckers (n 17) para 109; Koch (n 2) paras 20-§121.

115 Diese nach deutschem Recht begründete Auffassung lässt sich unseres Erachtens auch auf das türkische Recht übertragen. Im schweizerischen Recht hingegen ist die Frage anders gelöst. Nach dem dritten Absatz von Artikel 701 des

d. Verlauf der Hauptversammlung

Die Vollversammlung kann sich in Bezug auf den Ablauf von einer ordentlichen einberufenen Hauptversammlung teilweise unterscheiden. Allerdings haben diese Differenzen keine rechtliche Begründung, sondern sind vielmehr den Gründen für die Durchführung einer Vollversammlung angepasst. So kann beispielsweise wegen der Dringlichkeit der zu beschließenden Frage auf eine ausführliche Erläuterung der Tagesordnungspunkte verzichtet werden, sofern alle Aktionäre auch damit einverstanden sind. Ein Beispiel hierfür ist insbesondere die Möglichkeit, vom Grundsatz der Einhaltung der Tagesordnung abzuweichen, auf die im Folgenden gesondert und detailliert eingegangen wird. Ansonsten gibt es keinen wesentlichen Unterschied zwischen der Hauptversammlung und der Vollversammlung, was das Recht der Aktionäre auf Meinungsäußerung zu den Tagesordnungspunkten, das Recht auf Einholung und Prüfung von Informationen und die von der Versammlungsleitung angebotenen Möglichkeiten zur Meinungsäußerung zu den Tagesordnungspunkten in der Vollversammlung betrifft. Sind alle Aktionäre einverstanden, kann jedoch auf einen vertiefenden Meinungsaustausch zu den Tagesordnungspunkten verzichtet werden.

2. Vollständige Präsenz

a. Am Anfang der Versammlung

Die erste Voraussetzung für die Vollversammlung, die in § 121/6 AktG festgelegt ist, ist die Anwesenheit aller Aktionäre. Diese Bereitschaft bedeutet, dass alle Aktionäre, die das Grundkapital vertreten, persönlich oder durch einen Vertreter anwesend sein müssen[116]. Durch diese Anwesenheit aller Aktionäre und das ihnen einzuräumende Widerspruchsrecht wird eine Beeinträchtigung der Aktionärsrechte durch die Vollversammlung verhindert. Wenn alle Aktionäre anwesend sind und ein Widerspruchsrecht haben, entfallen die rechtlichen Interessen, die durch die Einberufung der Versammlung und andere Verfahrensvorschriften geschützt werden müssen.

Die Anwesenheit aller Aktionäre ist für den Beginn der Versammlung sehr wichtig. Dadurch wird es möglich, die Meinung der Aktionäre darüber zu erfahren, ob die Versammlung in Form einer Vollversammlung abgehalten werden kann oder nicht.

Die Voraussetzung für die Durchführung einer Vollversammlung ist nicht, dass die Aktionäre stimmberechtigt sind, sondern dass sie bei der Versammlung erscheinen[117].

schweizerischen Obligationenrechts: Eine Generalversammlung kann ebenfalls ohne Einhaltung der für die Einberufung geltenden Vorschriften abgehalten werden, wenn die Beschlüsse auf schriftlichem Weg auf Papier oder in elektronischer Form erfolgen, sofern nicht ein Aktionär oder dessen Vertreter die mündliche Beratung verlangt.

116 Bungert (n 1) para 82; Rieckers (n 17) para 110; Thomas Liebscher, 'AktG § 121 Allgemeines', *Henssler/Strohn, Gesellschaftsrecht* (5th edn, Verlag C H Beck 2021) para 30.

117 Bungert (n 1) para 82.

Dementsprechend müssen auch die nicht stimmberechtigten Aktien durch die Aktionäre vertreten werden, die sich zu einer Vollversammlung versammeln. Das heißt, dass alle Aktionäre, unabhängig davon, ob sie stimmberechtigt sind oder nicht, an der Vollversammlung teilnehmen müssen, damit diese stattfinden kann[118].

b. Im Verlauf und am Ende der Versammlung

Bei der Anwesenheit aller Aktionäre hätte beschlossen werden können, die Hauptversammlung in Form einer Vollversammlung abzuhalten, nachdem sich kein Aktionär dagegen gewandt hat. Das Quorum für eine Vollversammlung liegt demnach bei 100 %. Dieses Quorum kann sich, wie bei einberufenen Hauptversammlungen, im Verlauf der Vollversammlung ändern. Wenn für die Erörterung einer bestimmten Tagesordnungspunkte in den Vollversammlungen von Aktiengesellschaften ein besonderes Sitzungsquorum erforderlich ist, dann muss dieses Quorum bis zum Zeitpunkt der Beschlussfassung aufrechterhalten werden, um die Sache erörtern und beschließen zu können. Wenn das ursprüngliche Quorum zum Zeitpunkt der Beschlussfassung nicht vorhanden ist, bedeutet dies, dass der betreffende Beschluss nicht gesetzeskonform gefasst werden kann. Bei einer Vollversammlung liegt das Quorum bei 100 %. Dieses Quorum muss während der gesamten Versammlung eingehalten werden. Daher müssen die Aktionäre, die zu Beginn der Versammlung keine Einwände erhoben haben, diese Verhaltensweise bis zum Ende der Versammlung fortsetzen. Wird das Quorum von 100 % unterschritten, ist eine Beschlussfassung in einer Vollversammlung nicht mehr möglich.

c. Elektronische Teilnahme

i. Virtuelle Hauptversammlung im Allgemeinen

Die elektronische Teilnahme an den Hauptversammlungen von Aktiengesellschaften, die Unterbreitung von Vorschlägen zu den Tagesordnungspunkten, die Abgabe von Stellungnahmen dazu und die Stimmabgabe als Voraussetzung für die Ausübung der Aktionärsrechte haben die gleichen Folgen wie die physische Teilnahme an der Hauptversammlung. Die elektronische Teilnahme an der Hauptversammlung ist in § 118a AktG geregelt[119]. Nach dieser Vorschrift kann die Satzung vorsehen oder den Vorstand dazu ermächtigen, vorzusehen, dass die Versammlung ohne physische Präsenz der Aktionäre oder ihrer Bevollmächtigten am Ort der Hauptversammlung abgehalten wird (virtuelle Hauptversammlung). Die virtuellen Vollversammlungen haben vor allem, während der Covid-19-Pandemie große Bedeutung erlangt, da die physische Zusammenkunft von Menschen mit Nachteilen verbunden sein kann.

118 Rieckers (n 17) para 110; Liebscher (n 115) para 30.

119 Beachten Sie auch Artikel 1527 des türkischen Handelsgesetzes und Artikel 701c ff. des Schweizerischen Obligationenrechts.

Die Aktionäre tendieren aufgrund der angekündigten Tagesordnungspunkte der Hauptversammlungen dazu, an den Versammlungen zu den Themen teilzunehmen, an denen sie interessiert sind, da sie die Interessen ihres eigenen Aktienbesitzes betreffen. Unter bestimmten Umständen kann es jedoch vorkommen, dass Aktionäre aus verschiedenen Gründen nicht an den Hauptversammlungen teilnehmen können, selbst wenn sie über die sie betreffenden Tagesordnungspunkte abstimmen möchten. Dies kann insbesondere aufgrund von Schwierigkeiten bei der physischen Teilnahme an der Hauptversammlung der Fall sein. So kann ein Aktionär, der sich zum Zeitpunkt der Hauptversammlung im Ausland aufhalten muss, möglicherweise nicht gegen eine von ihm nicht gewünschte Kapitalerhöhung stimmen. Die Nutzung elektronischer Hilfsmittel für die Teilnahme an Hauptversammlungen kann solche Probleme verhindern. Wie sich in der Praxis gezeigt hat, hat die Teilnahme der Aktionäre an den Hauptversammlungen auf elektronischem Wege zu einem Anstieg des auf den Hauptversammlungen vertretenen Kapitals geführt, weil diese Praxis inzwischen weit verbreitet ist[120]. Der Beitrag dieser Situation zur Aktionärsdemokratie ist nicht zu verneinen.

Die Kosten, die den Aktionären entstehen können, sind einer der Gründe für die geringe Teilnahme an Hauptversammlungen in Aktiengesellschaften mit einer großen Aktionärsgemeinschaft. Für die Teilnahme an Hauptversammlungen, die an einem anderen Ort als ihrem Wohnsitz stattfinden, müssen die Aktionäre zahlreiche Kosten aufbringen, insbesondere für die Übernachtung[121]. Diese Kosten können dazu führen, dass die finanziellen Rechte, die sich aus dem Aktienbesitz ergeben können, im Vergleich zu den Ergebnissen des Vergleichs in Frage gestellt werden. Die Bewertung kann dazu führen, dass die Aktionäre beschließen, nicht an den Hauptversammlungen teilzunehmen. Virtuelle Hauptversammlungen beseitigen all diese abschreckenden Kosten und steigern, wie bereits erwähnt, den Anteil des bei Hauptversammlungen von Aktiengesellschaften vertretenen Kapitals. Diese Bequemlichkeit ist besonders für Kleinaktionäre wichtig[122].

Die weitgehende Internationalisierung des Gesellschaftsrechts erleichtert die internationale Mobilität des Kapitals. Insbesondere die bereits erwähnten physischen Hindernisse für die Teilnahme an Hauptversammlungen können durch virtuelle Hauptversammlungen überwunden werden. Natürlich sind auch sprachliche Verständigungsprobleme und die Schwierigkeit, Investitionen im Ausland zu verfolgen, Hindernisse bei internationalen Hauptversammlungen.

120 Nikolaos Paschos, 'AktG § 118a Virtuelle Hauptversammlung', *beck-online.GROSSKOMMENTAR GesamtHrsg: Henssler Hrsg: Spindler/Stilz Stand: 01.01.2023* (Verlag C H Beck 2023) para 15.

121 ibid.

122 ibid.

Bei den Hilfsmitteln für virtuelle Hauptversammlungen kommt jede Hard- und Software in Betracht, die für die Audio- und Videoübertragung genutzt werden kann. Die Aktionäre brauchen für ihre Meinungsäußerung in erster Linie eine Tonübertragung und daher ein Mikrofon. Für eine bessere Kommunikation wäre auch eine Kamera erforderlich, da auch eine Bildübertragung notwendig ist. Die entsprechende Software, wie z. B. WhatsApp, Microsoft Teams, Zoom oder Google Meet, ist für elektronische Hauptversammlungen geeignet. Die wichtigste Anforderung ist, dass die zu verwendenden Mittel eine Fernkommunikation ermöglichen müssen, da die Aktionäre nicht in der Lage sind, zusammenzukommen[123].

ii. Elektronische Teilnahme an der Vollversammlung

aa. Elektronische Teilnahme einzelner Aktionäre

Einige Aktionäre, die nicht physisch an der Vollversammlung teilnehmen oder teilnehmen können, könnten ein Einberufungsverfahren nicht für erforderlich halten, um auf eine dringende Notlage der Aktiengesellschaft auf Ebene der Hauptversammlung zu reagieren. Für diese Aktionäre ist die Teilnahme an der Vollversammlung auf elektronischem Wege eine der bequemsten Lösungen. Bei dieser Möglichkeit können einige Aktionäre auf elektronischem Wege an einer Hauptversammlung teilnehmen, während andere Aktionäre anwesend sind[124]. Obwohl es den Aktionären auch möglich ist, durch einen Vertreter an der Vollversammlung teilzunehmen, kann es sein, dass der Aktionär zur Wahrung seiner Interessen auch auf elektronischem Wege persönlich an der Versammlung teilnehmen möchte. Der Aktionär, der auf elektronischem Wege an der Vollversammlung teilnimmt, wird so behandelt, als sei er auf der Versammlung tatsächlich erschienen.

Die elektronische Teilnahme an der Vollversammlung ist nur in Echtzeit und mit vollständiger zweiseitiger Audio- und Videoübertragung möglich[125]. Andernfalls ist es z.B. nicht zulässig, dass ein Aktionär eine Video- oder Tonaufzeichnung erstellt, in der er seine Meinung zu den ihm mitgeteilten Tagesordnungspunkten äußert, oder gar seine Zustimmung zur Vollversammlung in dieser Aufzeichnung gibt.

bb. Elektronische Teilnahme aller Aktionäre

Eine Vollversammlung kann auf elektronischem Wege von allen Aktionären in gleicher Weise durchgeführt werden, wenn es nicht möglich ist, dass alle Aktionäre zusammenkommen, aber eine Hauptversammlung aufgrund einer dringenden Situation notwendig ist und die Aktionäre in dieser Angelegenheit übereinstimmen.

123 Jochen Hoffmann, 'AktG § 118 Allgemeines', *Spindler/Stilz, Aktiengesetz*, vol I (4th edn, Verlag C H Beck 2019) para 35.

124 Koch (n 2) paras 20-§121.

125 Drinhausen (n 15) para 46.

Eine solche virtuelle Vollversammlung unterscheidet sich wahrscheinlich von einer Hauptversammlung. Der wesentlichste dieser Unterschiede ist das Protokoll der Vollversammlung. Da dieses Protokoll physisch dokumentiert werden muss, sind beispielsweise Videoaufzeichnungen von Aktionären bei einer Zoom-Versammlung oder Chat-Kommunikation oder jede andere elektronische Form der Zustimmung der Aktionäre nicht zulässig. Wie bereits erwähnt, ist es auch nicht erlaubt, dass die in einer elektronischen Vollversammlung gefassten Beschlüsse später schriftlich niedergelegt und unterzeichnet werden (Zirkularbeschlüsse). Wenn die technischen Hilfsmittel es zulassen, kann in einer elektronischen Vollversammlung jedoch die Unterzeichnung eines elektronischen Dokuments mit einer elektronischen Signatur und damit die Erstellung eines Protokolls als Lösung in Betracht gezogen werden.

cc. Außerordentliche elektronische Hauptversammlung

Die Vollversammlung kann auf elektronischem Wege stattfinden, unabhängig von den zu erörternden Tagesordnungspunkten, den zu fassenden Beschlüssen, den teilnehmenden Personen und der Art der Durchführung der Versammlung[126] (ordentlich oder außerordentlich). Wie schon erwähnt, kann die Vollversammlung sowohl ordentlich als auch außerordentlich einberufen werden, wobei die außerordentliche Form häufiger ist. Das Ergebnis der Kombination dieser beiden Möglichkeiten ist, dass die Vollversammlung elektronisch und in außerordentlicher Form abgehalten werden kann. Beispielsweise ist eine Hauptversammlung offensichtlich erforderlich, wenn eine Aktiengesellschaft ihr Grundkapital erhöhen muss, um an einer bestimmten Tenderaktion teilnehmen zu können, oder wenn die Aktionäre einen Beitrag zum Ausgleich von Bilanzdefiziten leisten müssen. Wenn die Aktionäre der Gesellschaft über die ganze Welt verbreitet sind und sich nicht physisch an einem bestimmten Ort versammeln können, wird die elektronische Hauptversammlung zu einem wichtigen funktionellen Instrument. Die Hauptversammlung wird in einer solchen Situation ohne Einberufung abgehalten, da es sich um einen Notfall handelt. Insbesondere in dringenden Fällen, in denen die Stimmen aller Aktionäre erforderlich sind, können die Hauptversammlungen ohne Einberufung und auf elektronischem Wege abgehalten werden. In solchen Fällen können in der Vollversammlung Beschlüsse über alle Punkte gefasst werden, die in den Hauptversammlungen mit Einberufung beschlossen werden können.

dd. Einräumbare Rechte an Aktionäre in der Virtuellen Vollversammlung

Hauptversammlungen, bei denen die Aktionäre physisch zusammenkommen, und virtuelle Hauptversammlungen unterscheiden sich natürlich in Bezug auf ihren Ablauf und ihre Bedingungen. Dieser Unterschied wirkt sich auch auf die

126 Koch (n 2) paras 6, §118a.

Beteiligungsmöglichkeiten der Aktionäre aus, die an der Versammlung teilnehmen. Dies gilt auch für die virtuelle Vollversammlung, wofür einige Beispiele angeführt werden können. Beispielsweise ist es bei einer Versammlung, bei der die Aktionäre physisch anwesend sind, möglich, dass die Aktionäre lange Diskussionen führen, Anträge, Einwände und Gegenanträge stellen und dass die Gesellschaftsorgane Erklärungen zu den Themen abgeben, zu denen sie befragt werden. In der virtuellen Vollversammlung sind diese Spielräume jedoch begrenzt. Zunächst einmal ist eine solch umfassende Rechtsausübung aus zeitlicher Sicht nicht möglich. Die elektronischen Fernkommunikationsmittel können solche langen Diskussionen nur bis zu einem gewissen Punkt ermöglichen. Ein weiteres Beispiel ist die Anfechtung von Hauptversammlungsbeschlüssen. Bei physischen Vollversammlungen lassen sich die im Protokoll der Hauptversammlung zu protokollierenden Punkte und die Einwände gegen diese Themen leicht ermitteln. Da es bei einer virtuellen Vollversammlung jedoch keine physischen Dokumente gibt, ist es nicht so einfach, die darin festgehaltenen Fragen einzusehen und zu widersprechen wie bei einer physischen Versammlung. Zum Schutz der Interessen der Aktionäre ist es daher erforderlich, diese Rechte in der virtuellen Vollversammlung zu beschränken.

Die Frage ist, auf welche Weise eine solche Beschränkung der Aktionärsrechte erfolgen kann. Denkbar ist zunächst, dass solche Beschränkungen von der Versammlungsleitung vorgenommen werden können, was jedoch im Hinblick auf die Gewährleistung der Einheitlichkeit nicht zulässig ist. Der Grund dafür ist, dass Praktiken, die solche Beschränkungen vorsehen, kohärent und rechtssicher sein müssen. Was also getan werden kann, ist die Beschränkung in der Satzung, die eine konkrete Norm darstellt[127].

In diesem Zusammenhang kann anstelle von Satzungsbeschränkungen in der Satzung angegeben werden, dass den Aktionären in der virtuellen Vollversammlung bestimmte Rechte zustehen. Eine solche Formulierung führt dazu, dass die Rechte, die nicht aufgezählt sind, als eingeschränkt gelten, d.h. nicht vorgesehen sind[128].

Vereinfacht ausgedrückt: Da die Ausübung der Rechte der Aktionäre in den physisch stattfindenden Vollversammlungen von der Erfüllung bestimmter Pflichten abhängt und diese Pflichten in einer virtuellen Vollversammlung nicht ordnungsgemäß erfüllt werden können, wäre es im Interesse der Aktionäre, die Rechte, die ausgeübt bzw. wahrgenommen werden können, zu beschränken[129].

127 Hoffmann (n 122) para 36.

128 ibid.

129 ibid.

ee. Die Verpflichtung zur Gleichbehandlung der Aktionäre

Die Korrelation zwischen der Gleichbehandlung von Aktionären unter gleichen Voraussetzungen und elektronischen Hauptversammlungen kann im Zusammenhang mit der Teilnahme an der Vollversammlung deutlicher werden. Die Aktionäre müssen denselben Praktiken des Verwaltungs- und Vertretungsorgans der Gesellschaft unter denselben Umständen unterliegen[130]. Die unterschiedliche Behandlung von Aktionären mit unterschiedlichem Rechtsstatus widerspricht nicht dem Gleichbehandlungsprinzip[131]. So können die Aktionäre beispielsweise in Bezug auf ihre Beteiligung am Aktienkapital, ihre Gewinnbeteiligung, ihre Stimmrechte oder ihr Bezugsrecht unterschiedlichen Maßnahmen unterworfen sein[132]. Die absolute Gleichbehandlung aller Aktionäre, insbesondere in Bezug auf bestimmte Rechte, umfasst jedoch auch die Teilnahme an den Hauptversammlungen[133].

Die Geschäftsführung einer Aktiengesellschaft, die die Versammlung leitet, darf im Sinne des Gleichbehandlungsgrundsatzes keine ungerechten Unterscheidungen zwischen den Aktionären bei ihrer Teilnahme an der Vollversammlung machen. Zum Beispiel verstößt es gegen die Grundsätze der Gleichbehandlung, wenn der Vorstand einigen Aktionären, die an der Vollversammlung teilnehmen wollen, aufgrund einer sehr dringenden Geschäftsangelegenheit der betreffenden Gesellschaft oder eines sehr wichtigen HV-Beschlusses die Teilnahme an der Vollversammlung auf elektronischem Wege ermöglicht, während er von anderen Aktionären verlangt, dass sie am Ort der Versammlung physisch anwesend sind. Denkbar ist auch, dass der Vorstand eine dem Beispiel entgegengesetzte Haltung einnimmt und versucht, Aktionäre, die auf elektronischem Wege an der Versammlung teilnehmen wollen, auf vielfältige Weise daran zu hindern (z. B. durch die falsche Übermittlung der Zoom-Meeting-ID und des Passworts). Eigentlich gibt es keinen logischen Grund für den Vorstand, eine solche Praxis anzuwenden, wenn er die Vollversammlung durchführen will. Dies liegt daran, dass die Vollversammlung die Teilnahme aller Aktionäre erfordert. Wenn die Geschäftsführung jedoch nicht den Wunsch hat, eine Vollversammlung abzuhalten, ist es auch möglich, dass der Vorstand die Vollversammlung auf diese Weise blockiert. Die Mitglieder des Vorstands tragen in einem solchen Fall zweifelsohne die Verantwortung. Der Vorstand, der zur Gleichbehandlung aller Aktionäre verpflichtet ist, hat daher bei der Einberufung der Generalversammlung sowohl eine Befugnis als auch eine Verantwortung.

130 Andreas Cahn and Michael Schild von Spannenberg, 'AktG § 53a-Gleichbehandlung Der Aktionäre', *beck-online. GROSSKOMMENTAR GesamtHrsg: Henssler Hrsg: Spindler/Stilz Stand: 01.07.2023* (Verlag C H Beck 2023) para 13; Walter G Paefgen, 'AktG § 53a Gleichbehandlung Der Aktionäre', *Henssler/Strohn, Gesellschaftsrecht* (5th edn, Verlag C H Beck 2021) para 1.

131 Bernd R Mayer and Michael Albrecht vom Kolke, 'AktG § 53a-Gleichbehandlung Der Aktionäre', *Hölters/Weber, Aktiengesetz* (4th edn, Verlag C H Beck-Vahlen 2022) para 9; Cahn and von Spannenberg (n 129) para 14; Paefgen (n 129) para 1.

132 Cahn and von Spannenberg (n 129) para 14.

133 Hans Christoph Grigoleit and Richard Rachlitz, 'AktG § 53a-Gleichbehandlung Der Aktionäre', *Grigoleit, Aktiengesetz* (2nd edn, Verlag C H Beck 2020) para 11.

ff. Widerspruch gegen die elektronische Teilnahme an der Vollversammlung

Der Widerspruch der Aktionäre gegen die elektronische Teilnahme an der Vollversammlung kann sich gegen die Teilnahme bestimmter Aktionäre selbst oder gegen die Teilnahme anderer auf diese Weise richten. Zunächst ist festzustellen, dass die Zustimmung eines Aktionärs zur Vollversammlung nicht zwangsläufig bedeutet, dass der Aktionär auch mit der elektronischen Teilnahme einverstanden ist. Der Aktionär kann auch wünschen, an der Vollversammlung physisch teilzunehmen. Wird die physische Teilnahme aus irgendeinem Grund abgelehnt oder ist sie nicht möglich, so dass die elektronische Teilnahme die einzige Alternative ist, die der betreffende Aktionär nicht nutzen möchte, kann die Vollversammlung nicht abgehalten werden.

Der Aktionär kann auch der elektronischen Teilnahme der anderen Aktionäre an der Vollversammlung widersprechen. Ein solcher Widerspruch wäre mit der Natur des Rechts auf Teilnahme an der Vollversammlung unvereinbar und hätte daher keine Wirkung. Der Aktionär hat also nicht das Recht zu verlangen, dass die Vollversammlung in einer rein physischen Form abgehalten wird.

d. Teilnahme eines Vertreters

Die Vertreter der Aktionäre können an den Hauptversammlungen ebenfalls teilnehmen. Eine Vollversammlung ist auch möglich, wenn sich alle Aktionäre durch einen Vertreter vertreten lassen[134].

Die Hauptversammlungen, an denen ein Vertreter teilnehmen kann, können auch in Form einer Vollversammlung abgehalten werden. Gemäß AktG § 121/6 erfüllt die Anwesenheit der Aktionärsvertreter auch die Voraussetzung, dass der Aktionär in der Vollversammlung erscheinen muss. Anders verhält es sich jedoch im Falle einer nicht bevollmächtigten Vertretung. Wird ein Aktionär ohne Vollmacht vertreten, so bedeutet die nachträgliche Ratifizierung der (unbefugten) Vertretung nicht, dass eine ordnungsgemäße Vollversammlung durchgeführt worden ist[135].

e. Keine Teilnahme mit Briefwahl

Die Stimmabgabe, die es den Aktionären ermöglicht, ohne Teilnahme an der Hauptversammlung abzustimmen, nennt man „Briefwahl“. Gemäß AktG § 118/2 kann die Satzung vorsehen, dass die Aktionäre ihre Stimmen ohne Teilnahme an der Hauptversammlung durch Briefwahl oder im Wege elektronischer Kommunikation abgeben können, oder den Vorstand dazu ermächtigen, dies zu tun. Das Wort „Brief“ in dieser Norm ist irreführend; tatsächlich können alle Mittel der Fernabstimmung

134 Drinhausen (n 15) para 46.

135 Rieckers (n 17) para 110.

genutzt werden[136]. Dies schließt elektronische Mittel ein[137]. Der Briefwähler jedoch ist eine Person, die nicht verpflichtet ist, an der Vollversammlung teilzunehmen, so dass es nicht ausreicht, durch Briefwahl an der Vollversammlung teilzunehmen und abzustimmen[138]. Ein solcher Zusammenschluss bedeutet nicht, dass alle Aktionäre anwesend sind[139].

f. Vorübergehende Aussetzung des Rechts auf Teilnahme an der Hauptversammlung

Aktionäre sind in manchen Fällen aufgrund einer gesetzlichen Maßnahme von der Teilnahme an den Hauptversammlungen ausgeschlossen. Der Aktionär kann unter diesen Umständen nicht an der Hauptversammlung teilnehmen und nicht sein Stimmrecht ausüben. Wenn eine Aktiengesellschaft beispielsweise ihre eigenen Aktien erwirbt, gewähren die von der Gesellschaft gehaltenen Aktien der betreffenden Gesellschaft keine Aktionärsrechte[140]. Aus diesem Grund ist es der Aktiengesellschaft nicht möglich, einen Bevollmächtigten für die von ihr gehaltenen Aktien zu ernennen und ihr Stimmrecht aus diesen Aktien in der Hauptversammlung auszuüben. Da der Aktionär in diesen und ähnlichen Fällen von Gesetzes wegen nicht an der Hauptversammlung teilnehmen darf, werden diese Aktionäre bei der Berücksichtigung der vollen Teilnahme im Sinne der Vollversammlung nicht in Betracht gezogen[141]. Wenn der Aktionär jedoch an der Hauptversammlung teilnehmen darf, aber nicht stimmberechtigt ist[142], müssen auch diese Aktionäre bei der Versammlung anwesend sein, um die Vollversammlung in die Lage zu versetzen, gültige Beschlüsse zu fassen[143].

g. Der Alleingesellschafter und die Vollversammlung

Wenn die Zahl der Aktionäre einer Aktiengesellschaft bei einem liegt, gibt es kein rechtliches Interesse, das durch die Vorschriften über die Einberufung von Hauptversammlungen zu schützen wäre. Der Grund dafür ist, dass ein einziger Aktionär die Generalversammlung selbst darstellt. Der Aktionär legt die Tagesordnung fest und fasst die notwendigen Beschlüsse als Hauptversammlung. Bei mehreren Aktionären ist das Gegenteil der Fall. Daher werden die Hauptversammlungen bei

136 Hofmann (n 2) para 54.

137 ibid.

138 Koch (n 2) paras 20-§121; Herrler (n 18) para 42; Drinhausen (n 15) para 46.

139 Rieckers (n 17) para 110.

140 AktG § 71b-Rechte aus eigenen Aktien: "*Aus eigenen Aktien stehen der Gesellschaft keine Rechte zu.*"

141 Rieckers (n 17) para 110.

142 AktG § 136/1-Ausschluß des Stimmrechts: "*Niemand kann für sich oder für einen anderen das Stimmrecht ausüben, wenn darüber Beschluß gefaßt wird, ob er zu entlasten oder von einer Verbindlichkeit zu befreien ist oder ob die Gesellschaft gegen ihn einen Anspruch geltend machen soll. Für Aktien, aus denen der Aktionär nach Satz 1 das Stimmrecht nicht ausüben kann, kann das Stimmrecht auch nicht durch einen anderen ausgeübt werden.*"

143 Drinhausen (n 15) para 46; Koch (n 2) paras 20-§121.

einer Gesellschafterzahl von einem zwangsläufig in Form einer Vollversammlung abgehalten[144].

3. Kein Widerspruch der Aktionäre

a. Im Allgemeinen

Die Grundvoraussetzung für eine gültige Vollversammlung ist, dass kein Aktionär dagegen Widerspruch erhebt. Auch bei Anwesenheit aller Aktionäre kann die Vollversammlung keinen rechtsgültigen Beschluss fassen, wenn auch nur ein Aktionär widerspricht[145]. Die Einräumung eines Widerspruchsrechts für die Aktionäre in der Vollversammlung dient sowohl dem Schutz der Interessen der Aktionäre als auch dem der Aktiengesellschaft[146]. Da es keine angekündigte Tagesordnung für die Vollversammlung gibt, können die Aktionäre ihren Nachteil, nicht darauf vorbereitet zu sein, dadurch ausgleichen, dass sie von ihrem Widerspruchsrecht gegen die in der Vollversammlung zu beratenden und zu beschließenden Angelegenheiten Gebrauch machen. In diesem Zusammenhang kann der Widerspruch gegen eine Vollversammlung auch von Aktionären erhoben werden, die zum Zeitpunkt der Versammlung selbst erscheinen[147].

b. Form des Widerspruchs

Ein Widerspruch gegen den Ablauf der Vollversammlung als Ganzes oder gegen einzelne Beschlüsse der Vollversammlung ist formlos an den Versammlungsleiter zu richten[148]. Dieser Widerspruch kann auch an Personen gerichtet werden, die als Hilfspersonen bei der Durchführung der Vollversammlung tätig sind[149].

Da auch für die Vollversammlung ein Protokoll geführt werden muss, ist dieser Widerspruch im Versammlungsprotokoll zu vermerken[150]. Dagegen halten es einige Autoren in der Lehre nicht für notwendig, die Widersprüche gegen die Durchführung der Vollversammlung zu protokollieren[151]. Nach dieser Auffassung sollte ein in der Vollversammlung zu erhebender Widerspruch nur wegen seiner beweisrechtlichen Bedeutung protokolliert werden. Diese Auffassung ist sogar überzeugender als die erste. Denn wenn der Aktionär der Vollversammlung als Ganzes widerspricht, wird ohnehin kein Protokoll geführt. An dieser Stelle wäre es vernünftig festzustellen, dass

144 Koch (n 2) paras 20-§121; Drinhausen (n 15) para 46.

145 Bungert (n 1) para 82; Rieckers (n 17) para 111; Liebscher (n 115) para 30; Koch (n 2) paras 21-§121.

146 Rieckers (n 17) para 111.

147 ibid.

148 Koch (n 2) paras 21-§121; Herrler (n 18) para 43.

149 Koch (n 2) paras 21-§121.

150 Herrler (n 18) para 43.

151 Koch (n 2) paras 21-§121.

bei einigen der zu fassenden Beschlüsse der Aktionär, der die Einberufung verlangt, verpflichtet ist, seinen Widerspruch in der Niederschrift festzuhalten.

Der Widerspruch muss nicht zwangsläufig unter der Überschrift „Widerspruch" erfolgen, da auch Worte, die einen inhaltlichen Widerstand ausdrücken, als Widerspruch gelten[152]. Das Schweigen oder die Ablehnung aller Beschlüsse reicht jedoch nicht aus, um das Vorliegen eines Widerspruchs zu erkennen[153].

Das Vorliegen eines Widerspruchs, dessen Nichtbeachtung und Nichtaufnahme in das Protokoll kann durch alle Arten von Beweismitteln nachgewiesen werden, da es sich um eine tatsächliche Handlung handelt. Auch die fehlende Unterschrift des widersprechenden Aktionärs unter das Protokoll ist geeignet, das gewünschte Ziel zu erreichen.

c. Widerspruch gegen eine oder mehrere Beschlüsse

Die Aktionäre können der Beschlussfassung im Laufe der Sitzung widersprechen, auch wenn sie an der Vollversammlung teilnehmen. Diese Widersprüche können sich auf einen oder mehrere Beschlüsse beziehen. Der Grund dafür ist, dass die Aktionäre möglicherweise Nachforschungen anstellen und einen Tagesordnungspunkt der Vollversammlung prüfen müssen, den sie nicht durch vorherige Ankündigung vorbereiten konnten. Das Prinzip, dass kein Aktionär der Vollversammlung widersprechen muss, kommt in diesem Fall zum Tragen, und die Aktionäre äußern ihre Widersprüche in Bezug auf die Themen, deren Erörterung und Beschlussfassung sie nicht wünschen. Die trotz des Widerspruchs gefassten Beschlüsse sind wegen Verstoßes gegen AktG § 121/6 ungültig.

d. Widerspruch gegen alle Beschlüsse

Aktionäre können nach ihrer Teilnahme an der Vollversammlung allen Tagesordnungspunkten widersprechen, die ihnen von der Versammlungsleitung mitgeteilt worden sind. Dieser Widerspruch würde darauf hinauslaufen, dass die betreffenden Punkte nicht in der Hauptversammlung erörtert und zu einem späteren Zeitpunkt beschlossen werden sollten. Wenn ein Aktionär seinen Widerspruch nicht zu Beginn der Versammlung vorbringt, kann er dies tun, nachdem er von den Tagesordnungspunkten Kenntnis erhalten hat. Die Vollversammlung könnte in diesem Fall keinen Beschluss fassen und es wäre so, als hätte es nie eine Vollversammlung gegeben. Voraussetzung dafür ist, dass der Aktionär den Widerspruch bis zur Bekanntgabe des Abstimmungsergebnisses durch den Leiter der Vollversammlung erhebt[154].

152 Herrler (n 18) para 43.

153 ibid; Koch (n 2) paras 21-§121.

154 Bungert (n 1) para 83.

Der Widerspruch ist unabhängig davon, ob eine, mehrere oder alle Beschlüsse der Vollversammlung mit einem Widerspruch bedroht sind, an die Person zu richten, die die Vollversammlung leitet[155]. Bei der Sammlung und Protokollierung der Widersprüche kann ein Dritter behilflich sein, der die Vollversammlung unterstützt[156].

e. Letzter Moment für Widerspruch

Die Frist, bis zu der die an der Vollversammlung teilnehmenden Aktionäre ihren Widerspruch erheben können, sollte ebenfalls angegeben werden. Der Aktionär kann von dem Zeitpunkt an Widerspruch erheben, zu dem der künftige Versammlungsleiter die Durchführung der Versammlung verlangt. Nach Beginn der Vollversammlung kann ein Aktionär jedoch letztmalig Widerspruch gegen die Vollversammlung erheben, wenn die Beschlüsse zu den einzelnen Tagesordnungspunkten verkündet und in die Niederschrift aufgenommen werden[157]. Der Widerspruch bezieht sich in diesem Fall nicht auf die Fassung eines bestimmten Beschlusses, sondern auf die Durchführung der Versammlung als Vollversammlung. Möchte also der Aktionär, der der Einberufung zugestimmt hat, nachträglich der Durchführung der Versammlung in Form einer Vollversammlung auf der Basis der Erörterung der Tagesordnungspunkte widersprechen, so muss er dies spätestens bis zu dem Zeitpunkt tun, zu dem bekannt gegeben wird, dass ein Beschluss in eine bestimmte Richtung gefasst worden ist[158].

f. Widerspruch beim Bestehen eines Vertrages zur Vollversammlung

Die Aktionäre können einen schuldrechtlichen Vertrag abschließen, der vorsieht, dass das Verfahren der Einberufung einer Hauptversammlung zugunsten eines schnelleren Prozesses mit einer Vollversammlung aufgegeben wird. Die Einberufung einer solchen Versammlung und der Vertrag zwischen den Gesellschaftern hindert nicht die Ausübung des den Aktionären vom Gesetz eingeräumten Widerspruchsrechts[159]. Die Beseitigung des genannten Widerspruchsrechts durch einen schuldrechtlichen Vertrag würde bedeuten, dass die zwingenden Vorschriften des Gesetzes nach den Bestimmungen des Vertrages zur Anwendung kämen. Zum Schutz der Rechte der Aktionäre bleibt das Widerspruchsrecht also in jedem Fall bestehen, und es wird möglich, eine Einberufung der Hauptversammlung vorzunehmen.

155 Rieckers (n 17) para 111.

156 ibid.

157 Koch (n 2) paras 21-§121.

158 Herrler (n 18) para 43.

159 Rieckers (n 17) para 109.

g. Keine Ratifizierungspflicht für Beschlüsse

Die Aktionäre, die der Durchführung der Vollversammlung und der Unterbreitung der Tagesordnungspunkte zur Abstimmung durch die Versammlungsleitung nicht widersprechen, können für die Beschlüsse in jeder gewünschten Weise stimmen. Ein Aktionär, der gegen einen in der Versammlung vorgelegten Beschlussvorschlag stimmt, trägt folglich die Konsequenzen, wenn der Beschluss in umgekehrter Richtung gefasst wird. Außerdem besteht für denselben Aktionär immer die Möglichkeit, sein Widerspruchsrecht zu nutzen, um die Versammlung zu beenden, so dass sie keinen Beschluss fassen kann. Vereinfacht gesagt, sind die Aktionäre nicht verpflichtet, für die in der Vollversammlung gefassten Beschlüsse zu stimmen[160].

4. Die Anwesenheit des Vorstandes und des Aufsichtsrates

Die Teilnahme an Hauptversammlungen ist auch für andere Personen als Aktionäre möglich. Zum Beispiel haben nach AktG §118/3 die Mitglieder des Vorstandes und des Aufsichtsrates das Recht, an Hauptversammlungen teilzunehmen. Dieses Teilnahmerecht gilt zweifelsohne auch für die Vollversammlung. Auf der anderen Seite ist es auch möglich, dass die Mitglieder des Vorstands oder des Aufsichtsrats nicht an der Vollversammlung teilnehmen oder nicht teilnehmen können, und die damit verbundenen Auswirkungen auf die in der Vollversammlung getroffenen Beschlüsse müssen ebenfalls untersucht werden. In der Literatur wird die Auffassung vertreten, dass es nicht logisch ist, die in der Vollversammlung gefassten Beschlüsse allein deshalb für ungültig zu erklären, weil der Vorstand und der Aufsichtsrat nicht anwesend waren[161]. Das Fehlen der Vorstandsmitglieder kann daher nur dann zur Ungültigkeit der in der Vollversammlung gefassten Beschlüsse führen, wenn die Aktionäre und die Mitglieder des Vorstands dieselben Personen sind. Selbst wenn alle Aktionäre anwesend sind und ein Aktionär aufgrund der Abwesenheit des Vorstands oder des Aufsichtsrats in der Vollversammlung nicht über eine bestimmte Angelegenheit informiert wird, können die gefassten Beschlüsse nicht als rechtsgültig angesehen werden[162]. Um diese Frage zu klären und eine drohende Anfechtung der zu fassenden Beschlüsse zu vermeiden, wird vorgeschlagen, dass Aktionäre, die in Fällen, in denen ein Informationsbedarf besteht, zusammenkommen, sicherstellen sollten, dass der Vorstand und der Aufsichtsrat ebenfalls anwesend sind[163].

160 Bungert (n 1) para 82.

161 Rieckers (n 17) para 112.

162 Liebscher (n 115) para 30.

163 ibid.

5. Kein Rechtsmissbrauch

Die Ausübung von Rechten und die Erfüllung von Pflichten hat im Rahmen der Regeln von Treu und Glauben zu erfolgen. Das Gesetz schützt nicht den Missbrauch eines Rechts. Das Recht der Aktionäre, eine Vollversammlung abzuhalten, ist ebenfalls ein Recht, das nicht missbraucht werden darf. Beispielsweise gilt es als rechtsmissbräuchlich, trotz erfolgter Anmeldung gemäß AktG §20 diese Anmeldung zu ignorieren, um die Beteiligungsquote des neuen Aktionärs zu reduzieren und eine Kapitalerhöhung durch Vollversammlung durchzuführen[164]. Der Wille der an der Hauptversammlung teilnehmenden Aktionäre kann auch negativ beeinflusst werden und die Aktionäre können zur Durchführung einer Vollversammlung gezwungen werden, was ebenfalls einen Rechtsmissbrauch darstellen kann. Dies ist insbesondere dann der Fall, wenn einige der Aktionäre oder der Vorstand der Aktiengesellschaft die Aktionäre zu einer Vollversammlung manipulieren, indem sie bestimmte Tatsachen anders darstellen, als sie der Wahrheit entsprechen. In diesem Sinne können auch Fälle von Willensmängeln bei der Vollversammlung von Bedeutung sein. Ein Beispiel für eine solche Sachlage ist, wenn den Aktionären, die wahrscheinlich eine Einberufung verlangen würden, ein Schaden an ihrem materiellen oder immateriellen Wert angedroht wird, und eine Vollversammlung durchgeführt wird.

C. Nicht ordnungsgemäss einberufene Hauptversammlung

Die Vorteile der Vollversammlung bei Aktiengesellschaften wurden oben bereits erwähnt. Neben diesen Erleichterungen bei der Einberufung ist es auch möglich, dass alle Aktionäre an einer Hauptversammlung teilnehmen könnten, wenn die gesetzlichen Voraussetzungen für die Hauptversammlung nicht ordnungsgemäß erfüllt sind. Als Beispiele für die Missachtung der Vorschriften über die Einberufung können genannt werden: die nicht ordnungsgemäße Bekanntgabe der Tagesordnung, die nicht ordnungsgemäße Einberufung der Versammlung für einen Teil der Aktionäre oder eine erheblich kürzere Frist zwischen dem Zeitpunkt der Einberufung und dem Datum der Hauptversammlung als gesetzlich zulässig. Wenn die Aktionäre trotz solcher Gegebenheiten irgendwie zusammenkommen und bei der Versammlung anwesend sind, ist auch diese Versammlung als Vollversammlung zu betrachten. Mit anderen Worten, die Vollversammlung umfasst nicht nur den vorsätzlichen Verzicht auf die Einberufungsvorschriften, sondern auch die rechtsfehlerhafte Nichtanwendung dieser Vorschriften[165]. Im letzteren Fall, wenn alle Aktionäre anwesend sind und keiner von ihnen der Vollversammlung widerspricht, gibt es kein schützenswertes Interesse der Aktionäre an der Einberufung der Hauptversammlung. Im Übrigen können sich diese

164 Manuel Nodoushani, 'Kein Vollversammlungsprivileg Bei Kollusivem Zusammenwirken von Aktionären' [2009] BGH, Beschluss vom 20.04.2009 – II ZR 148/07 (OLG Schleswig); BeckRS 2009, 17653, GWR 2009 220; Rieckers (n 17) para 109.

165 Drinhausen (n 15) para 45.

Aktionäre immer schützen, indem sie ein Widerspruchsrecht haben, wenn sie nicht auf die Tagesordnungspunkte vorbereitet sind.

IV. DIE RECHTSGÜLTIGKEIT DER BESCHLÜSSE IN DEN VOLLVERSAMMLUNGEN

A. Zum Rechtsverhältnis zwischen der Einberufung der Vollversammlung und der Gültigkeit der Beschlüsse

Die Vollversammlung ist zwar, wie bereits erwähnt, eine Form der Hauptversammlung, bei der auf die Verfahrensregeln für die Einberufung einer Versammlung verzichtet wird, aber die Aktionäre müssen dennoch in irgendeiner Form über die Vollversammlung informiert werden. Da die Personen, die zur Einberufung der Vollversammlung verpflichtet sind, auch für Schäden haften, die der Gesellschaft durch ihre Unterlassung entstehen[166], kann man interpretieren, dass die Benachrichtigung der Aktionäre für eine Vollversammlung durch die Geschäftsführung oder andere Aktionäre erfolgen kann. Daher liegt es im Interesse der Gesellschaft, alle Aktionäre „in irgendeiner Weise" einzuberufen und zu informieren, um eine Vollversammlung zu ermöglichen. Die Vollversammlung kann nämlich auch ohne jeglichen Grund einberufen werden, und die Gesellschaftsangelegenheiten können in einer Vollversammlung behandelt werden[167]. Bei der Vollversammlung besteht kein Zusammenhang zwischen der Form der Einberufung oder der Stellung des Einberufenden innerhalb der Gesellschaft und der Gültigkeit der gefassten Beschlüsse.

Unter Berücksichtigung der Tatsache, dass alle Aktionäre zusammen sind und jeder von ihnen die Vollversammlung jederzeit beenden kann, gibt es kein Interesse, das durch strenge Formvorschriften geschützt werden müsste. Daher berühren die folgenden Rechtsverstöße nicht die Gültigkeit der in der Vollversammlung gefassten Beschlüsse[168]:

- Nichterfüllung oder fehlerhafte Erfüllung der gesetzlichen Voraussetzungen für die Einberufung;

- die räumlichen Umstände des Ortes, an dem die Versammlung stattfinden soll, sind zu ungünstig;

- Die Einberufung der Hauptversammlung durch nicht autorisierte Personen;

- die fehlende Angabe der Tagesordnung.

166 Oliver Rieckers, 'AktG § 121 Allgemeines', *Spindler/Stilz, Aktiengesetz* (4th edn, Verlag C H Beck 2019) para 98.

167 ibid 99.

168 ibid 90.

B. Die Folgen von Widersprüchen der Aktionäre

Widerspricht einer oder mehrere der Aktionäre der Vollversammlung, so kann auf dieser Versammlung kein Beschluss gefasst werden[169]. An diesem Punkt treten einige Möglichkeiten in den Vordergrund. Die erste dieser Möglichkeiten ist der anfängliche Widerspruch gegen die Vollversammlung; in diesem Fall kann kein Beschluss gefasst werden. Zweitens können je nach Verlauf der Versammlung ein oder mehrere Aktionäre gegen die zu erörternden Tagesordnungspunkte Widerspruch einlegen und die Einberufung einer Hauptversammlung zu diesem Zweck verlangen. In diesem Fall sind die Beschlüsse bis zum Zeitpunkt des Widerspruchs rechtsgültig, aber nach dem Widerspruch ist die Versammlung nicht mehr hundertprozentig quorumfähig und es können keine gültigen Beschlüsse gefasst werden[170].

C. Verstoß gegen andere Vorschriften über die Hauptversammlung

Die Vollversammlung gewährt lediglich Verfahrenserleichterungen in Bezug auf die Regeln für die Hauptversammlungen von Aktiengesellschaften. Alle Vorschriften, mit Ausnahme der Einberufung der Hauptversammlung, gelten auch für die Vollversammlung[171]. Wenn also die in einer Hauptversammlung gefassten Beschlüsse für nichtig oder anfechtbar erklärt werden können, insbesondere in Bezug auf das materielle Recht, gelten die gleichen Regeln auch für die Vollversammlung.

FAZIT

Die Studie kommt unter anderem zu dem Schluss, dass die Hauptversammlung der Aktiengesellschaft das Forum ist, an dem die Aktionäre der Aktiengesellschaft ihre Aktionärsrechte ausüben, insbesondere solche administrativer Art. Allerdings ist es ungewiss, ob die Hauptversammlungen abgehalten werden oder nicht, insbesondere was die außerordentlichen Hauptversammlungen betrifft. Informationen wie Zeitpunkt oder Ort der ordentlichen Hauptversammlungen sind den Aktionären unbekannt. Diese Unkenntnis ergibt sich aus der Tatsache, dass die Verwaltung und Vertretung der Aktiengesellschaft dem Vorstand obliegt. Daher sind die Aktionäre von Aktiengesellschaften mit den Angelegenheiten der Aktiengesellschaft nicht vertraut. Deshalb sollten sie über die Durchführung der Hauptversammlungen, die zu den Angelegenheiten der Gesellschaft gehören, informiert werden. Die Bezeichnung für diese Information ist „Einberufung“.

Die Einberufung einer Hauptversammlung unterliegt einer Reihe komplexer Vorschriften in Bezug auf die Personen, die die Einberufung vornehmen dürfen, und andere Verfahrensvorschriften. In einigen Fällen ist es jedoch möglich, diese

169 Bungert (n 1) para 82; Kubis (n 23) para 102; Bohnet (n 24) para 84.

170 Bohnet (n 24) para 84; Liebscher (n 115) para 30.

171 Bungert (n 1) para 83.

Komplexität zu vermeiden, und diese Möglichkeit ist im Gesetz vorgesehen. Insbesondere in einer Situation, in der alle Aktionäre gemeinsam erscheinen und kein Aktionär der Durchführung der Versammlung widerspricht, ist es möglich, eine Vollversammlung abzuhalten. Auch in diesem Fall ist die Durchführung der Vollversammlung an die Erfüllung bestimmter Voraussetzungen geknüpft, die die Vollversammlung erfüllen muss.

Bei Aktiengesellschaften mit mehreren Aktionären ist es schwierig, auf die Einberufung einer Hauptversammlung und die für sie geltenden Regeln zu verzichten. In Aktiengesellschaften mit wenigen Aktionären erfüllt die Vollversammlung jedoch eine wichtige Funktion, die es ermöglicht, in der Hauptversammlung schnell Beschlüsse zu fassen. Bei Einmann-Aktiengesellschaften ist es die Regel, dass die Hauptversammlung in Form einer Vollversammlung abgehalten wird.

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RESEARCH ARTICLE

Prosecuting and Punishing South Africans Who Participate in Foreign Armed Conflicts

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Abstract

Media reports suggested that some South Africans were serving in the Israel Defence Forces in the war between Israel and Hamas in late 2023. The South African government threatened to prosecute them for their participation in the conflict. Section 198(b) of the South African Constitution provides that one of the principles governing national security in South Africa is that "[t]he resolve to live in peace and harmony precludes any South African citizen from participating in armed conflict, nationally or internationally, except as provided for in terms of the Constitution or national legislation." The Regulation of Foreign Military Assistance Act (1998) provides for the circumstances in which a South African citizen or permanent resident can, with authorisation, take part in an armed conflict in a foreign country. Failure to get authorisation or to comply with the condition(s) of the authorisation is an offence. The Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act, which is meant to repeal the Regulation of Foreign Military Assistance Act, is not yet in force. In this article, the author illustrates how South African citizens or permanent residents who participate in foreign armed conflicts can be prosecuted and punished.

Keywords

South Africa, Foreign military assistance, Mercenaries, Extra-territorial jurisdiction

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I. Introduction

Section 198(b) of the Constitution of South Africa (1996) provides that one of the principles governing national security is that "[t]he resolve to live in peace and harmony precludes any South African citizen from participating in armed conflict, nationally or internationally, except as provided for in terms of the Constitution or national legislation." In February 1998, Parliament passed the Regulation of Foreign Military Assistance Act.[1] This Act came into force in September of the same year. The Act, which applies to both natural and juristic persons, has two main objectives. The first objective is the prohibition of mercenary activities. This is under section 2 of the Act which provides that "[n]o person may within the Republic or elsewhere recruit, use or train persons for or finance or engage in mercenary activity." Since coming into force, some people have written on the issue of mercenaries[2] and private security companies which provide security services in foreign countries.[3] It is beyond the scope of this article to repeat that discussion. The second objective of the Act is provided for under section 3 of the Act and the focus of this article is the prohibition of foreign military assistance. In 2006, Parliament passed the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act[4] for the purpose of repealing the Regulation of Foreign Military Assistance Act. However, as at the time of writing, the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act had not yet come into force. This means that the Regulation of Foreign Military Assistance Act is still the applicable law. During the making of this Act, legislators were concerned that hundreds of South Africans had enrolled in the armed forces of countries such as the United Kingdom and Israel.[5] It was also argued that Israel had deployed some of these South Africans in its armed conflicts with Lebanon, Palestine and Syria.[6] Although there are allegations that some South African citizens or permanent residents have participated in mercenary activities contrary to section 2 of the Regulation of Foreign Military Assistance Act[7] and some have been convicted accordingly,[8] there is no reported case

1 Regulation of Foreign Military Assistance Act, Act 15 of 1998.

2 See for example, Shannon Bosch and Marelie Maritz, 'South African Private Security Contractors Active in Armed Conflicts: Citizenship, Prosecution and the Right to Work' (2011) 14 Potchefstroom Electronic Law Journal 71 - 125

3 See for example, Shannon Joy Bosch, 'South Africans offering Foreign Military Assistance Abroad: How real is the Risk of Domestic Prosecution?' [2018] 21 Potchefstroom Electronic Law Journal 1 – 28.

4 Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act No. 27 of 2006.

5 Debates of the National Assembly (Hansard), Third Session, Third Parliament (29 August 2006) 6144.

6 Ibid, 6124 and 6144.

7 See for example, *Thatcher v Minister of Justice and Constitutional Development and Others* 2005 (4) BCLR 388 (C) (the applicant was allegedly the mastermind behind a foiled coup d'état in Equatorial Guinea).

8 See for example, *Rouget v S* [2006] JOL 15962 (T), para 2 "The appellant recruited persons for mercenary military assistance to the government of the Ivory Coast against dissidents in October 2002. He also provided logistical support and equipment to the group so recruited. The persons recruited were offered a three-month contract and, according to their expertise, were contracted as pilots or infantry soldiers." He pleaded guilty, was convicted and sentenced a 5-year prison term which was suspended and also ordered to pay a fine. He paid the fine.

in which a person has been convicted of an offence under section 3 of the Act.[9] However, this situation is likely to change in the next few months or years in the light of the existence of credible media reports that some South Africans were deployed by the Israel Defence Forces in its war against the Palestinian resistance groups.

The latest armed conflict between Israel and the Palestinian resistance groups, which started in October 2023 as part of the larger armed conflict between Israel and Palestine, widely known as the Israel-Hamas war, attracted global political and media attention mainly because of the atrocities committed by both parties. Reputable international human rights organisations[10] and some countries have argued that the atrocities committed by Israel in Gaza amount to war crimes and crimes against humanity.[11] In *South Africa v Israel*,[12] in which South Africa alleged that Israel had violated the Convention against Genocide, the International Court of Justice indicated provisional measures against Israel on the ground that "the facts and circumstances mentioned …are sufficient to conclude that at least some of the rights claimed by South Africa and for which it is seeking protection are plausible."[13] In other words, it was plausible that Israel had committed genocide against Palestinians. After the Hamas attack on 7 October 2023, Israel declared a state of war.[14] In preparation for that war, it, amongst other things, mobilised its reservists from Israel and abroad to take part in the war.[15] In early November 2023, South African media reported that some South African citizens had joined the Israel Defence Forces in the fight against Hamas. In response, the South African government threatened to prosecute those citizens who were serving in the Israel Defence Forces without the necessary authorisation.[16] The purpose of this article is to demonstrate how those South Africans, and others who may participate in conflicts of a similar or different nature, could be

9 Although the prosecuting authorities had started investigating some South Africans for participating in an alleged coup in Equatorial Guinea, it is not clear why they were never prosecuted. See Kaunda and Others v President of the Republic of South Africa 2005 (4) SA 235 (CC); 2005 (1) SACR 111 (CC) para 85.

10 See for example, Amnesty International Law, "Israel/OPT: 'Nowhere safe in Gaza': Unlawful Israeli strikes illustrate callous disregard for Palestinian lives" 20 November 2023. Available at https://www.amnesty.org/en/latest/news/2023/11/israel-opt-nowhere-safe-in-gaza-unlawful-israeli-strikes-illustrate-callous-disregard-for-palestinian-lives/ (accessed 20 November 2023).

11 See for example, "Statement of the Prosecutor of the International Criminal Court, Karim A.A. Khan KC, on the Situation in the State of Palestine: receipt of a referral from five States Parties." 17 November 2023. Available at https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-aa-khan-kc-situation-state-palestine (accessed 20 November 2023).

12 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel) (26 January 2024).

13 Ibid, para 54.

14 Hadas Gold, Shirin Faqiri, Helen Regan, Jessie Yeung and Caitlin Hu, "Israel formally declares war against Hamas as it battles to push militants off its soil." 8 October 2023. Available at https://edition.cnn.com/2023/10/08/middleeast/israel-gaza-attack-hostages-response-intl-hnk/index.html (accessed 20 November 2023).

15 Helen Coster and Alexander Cornwell, "Israel's reservists drop everything and rush home." 12 October 2023. Available at https://www.reuters.com/world/middle-east/israels-reservists-drop-everything-rush-home-following-hamas-bloodshed-2023-10-12/ (accessed 20 November 2023).

16 See Kgothatso Madisa, "South Africans fighting in Hamas-Israel war will be prosecuted, SA says." Available at https://www.businesslive.co.za/bd/national/2023-11-09-south-africans-fighting-in-hamas-israel-war-will-be-prosecuted-sa-says/ (accessed 10 November 2023).

prosecuted and punished under the Regulation of Foreign Military Assistance Act. The author further deals with the relevant provisions of the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act in the hope that this Act will come into force in the near future. The author also suggests ways in which South Africans who are enlisted in foreign armies could be prosecuted for offences committed outside South Africa under other pieces of legislation such as the Implementation of the Rome Statute of the International Criminal Court Act[17] and the Prevention and Combating of Torture of Persons Act.[18] The discussion will start with the offences under section 3 of the Regulation of Foreign Military Assistance Act and sections 3 and 4 of the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act.

II. Offences under the Acts

Section 3 of the Regulation of Foreign Military Assistance Act provides that:

> "No person may within the Republic or elsewhere— (a) offer to render any foreign military assistance to any state or organ of state, group of persons or other entity or person unless he or she has been granted authorisation to offer such assistance in terms of section 4; (b) render any foreign military assistance to any state or organ of state, group of persons or other entity or person unless such assistance is rendered in accordance with an agreement approved in terms of section 5."

Section 3 should be read with sections 1, 4 and 5. Section 4 provides for the circumstances in which the Committee may authorise a person to render a foreign military service under section 3(a).[19] Section 5 provides for the circumstances in which the Committee may approve an agreement for rendering a foreign military service under section 3(b).[20] Section 1 defines the concepts used in section 3. Before discussing section 3 in detail, it is important to understand what 'foreign military

17 Implementation of the Rome Statute of the International Criminal Court Act, Act 27 of 2002.

18 Prevention and Combating of Torture of Persons Act, No. 13 of 2013.

19 Section 4 provides that "(1) Any person who wishes to obtain the authorisation referred to in section 3(a) shall submit to the Committee an application for authorisation in the prescribed form and manner.
(2) The Committee must consider any application for authorisation submitted in terms of subsection (1) and must make a recommendation to the Minister that such application be granted or refused."
(3) The Minister, in consultation with the Committee, may refuse an application for authorisation referred to in subsection (2), or may grant the application subject to such conditions as they may determine, and may at any time withdraw or amend an authorisation so granted.
(4) Any authorisation granted in terms of this section shall not be transferable.
(5) The prescribed fees must be paid in respect of an application for authorisation granted in terms of subsection (3)."

20 Section 5 provides that "(1) A person who wishes to obtain the approval of an agreement or arrangement for the rendering of foreign military assistance, by virtue of an authorisation referred to in section 3(b) to render the relevant military assistance, shall submit an application to the Committee in the prescribed form and manner.
(2) The Committee must consider an application for approval submitted to it in terms of subsection (1) and must make a recommendation to the Minister that the application be granted or be refused.
(3) The Minister, in consultation with the Committee, may refuse an application for approval referred to in subsection (2), or grant the application subject to such conditions as they may determine, and may at any time withdraw or amend an approval so granted.
(4) Any approval granted in terms of this section shall not be transferable.
(5) The prescribed fees must be paid in respect of an application for approval granted in terms of subsection (3)."

assistance' entails. Section 1 defines or describes "foreign military assistance" to mean:

> "military services or military-related services, or any attempt, encouragement, incitement or solicitation to render such services, in the form of— (a) military assistance to a party to the armed conflict by means of—(i) advice or training; (ii) personnel, financial, logistical, intelligence or operational support; (iii) personnel recruitment; (iv) medical or para-medical services; or (v) procurement of equipment; (b) security services for the protection of individuals involved in armed conflict or their property; (c) any action aimed at overthrowing a government or undermining the constitutional order, sovereignty or territorial integrity of a state; (d) any other action that has the result of furthering the military interests of a party to the armed conflict, but not humanitarian or civilian activities aimed at relieving the plight of civilians in an area of armed conflict."

The following observations should be made about the definition of foreign military assistance above. The Act is applicable when the service is rendered whether or not there is an armed conflict. However, most of the "services" relate to armed conflicts. Thus, only section 1(iii)(b) is silent on the issue of armed conflicts. This could be attributable to the fact that the main objective of the Act, as can be inferred from its drafting history, is to prohibit mercenaries.[21] Section 1(i) includes an open list of examples of armed conflicts.[22] In other words, it does not define an "armed conflict." This is the case, although during the second reading of the Bill, the Minister of Defence argued, inter alia, that "[t]he Bill defines the many forms of armed conflict to which the continent is exposed."[23] The examples it outlines show that the armed conflict could be of international, internationalised or non-international nature.[24] Therefore, before a person is convicted of an offence under the Act, the prosecution must prove that at the time the service was rendered, there was an armed conflict. The Act does not describe the circumstances which have to be in place before it can be inferred that the conflict in question amounted to an armed conflict. To address this loophole, South African courts may have to refer to the Geneva Conventions of 1949 and the relevant protocols which were domesticated by the Implementation of the Geneva Conventions Act for the distinction between the different armed conflicts and the applicable rules.[25] Courts may also have to refer to the jurisprudence of international criminal tribunals, such as the International Criminal Court, for detailed criteria to establish whether at the time the service was rendered, there was an armed conflict.

21 While introducing the Bill for its second reading in the National Assembly, the Minister of Defence argued that "This Bill is significant, since mercenary activity has long been a scourge on the African continent. There have been many attempts by the UN and the OAU to deal with the problem of mercenaries. The Regulation of Foreign Military Assistance Bill effectively precludes any South African citizen, resident or company from participating as a combatant in armed conflict for private gain, nationally or internationally, except as provided for in terms of the Constitution or national legislation." See Debates of the National Assembly (Hansard), Second Session, Second Parliament (26 February 1998) 495.

22 Section 1(i) defines an armed conflict to include "any armed conflict between— (a) the armed forces of foreign states; (b) the armed forces of a foreign state and dissident armed forces or other armed groups; or (c) armed groups."

23 Debates of the National Assembly (Hansard) (26 February 1998) (n 21) 495.

24 See generally, *The Prosecutor v. Dominic Ongwen* (ICC-02/04-01/15-1762)(04 February 2021) paras 2683 – 2687.

25 Implementation of the Geneva Conventions Act 8 of 2012

For example, the International Criminal Court has developed the criteria that are used to determine whether a conflict amounts to an armed conflict.[26] South African courts may find this jurisprudence useful. It is now important to take a closer look at section 3.

Section 3 creates two offences. The first offence, under section 3(a) relates to a person who "offers" to render foreign military assistance as defined under section 1(iii) of the Act. Section 3(a) is applicable when it is the accused who initiated the punishable conduct. He/she makes an offer to a foreign state or non-state actor to render military assistance. Whether or not that offer is accepted is immaterial. The offer could be verbal, written or in any form. The offer could be a bid to render such services. However, section 3(b) is applicable where a person renders foreign military assistance. This could be triggered under two situations. One, where the offer under section 3(a) was accepted and the person went ahead to render the military assistance. In other words, he/she initiated the process and the foreign state or non-state actor accepted the offer hence giving him the opportunity to commit an offence (of rending a service). Two, where the foreign state or non-state actor made an offer to the accused and he/she accepted it and rendered the military assistance. In this case, the foreign state or non-state actor is the initiator of the process and the accused "grabbed" the opportunity. In both cases under sections 3(a) and (b), there is no requirement that the accused should have rendered military assistance for private gain. His or her motivation for rendering the assistance is immaterial.

It is important to highlight the changes that were introduced by the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act.[27] As the name suggests, the Act prohibits mercenary activities.[28] However, it is beyond the scope of this article to deal with the issue of mercenaries. The discussion is limited to cases where South African citizens, permanent residents or residents offer or render military services to foreign states. Unlike the Regulation of Foreign Military Assistance Act which creates two specific offences under section 3 for persons who are not mercenaries, the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act creates two categories of offences (each with different specific offences) for persons who are not mercenaries. The relevant provisions will be reproduced below before I discuss them. The first category is found in section 3 of the Act and the second category is in section 4. Section 3(1)

26 See for example, *The Prosecutor v. Dominic Ongwen* (n 24) paras 2683 – 2687. For a detailed discussion of the law of war, see for example, Rain Liivoja and Tim McCormack, *Routledge Handbook of the Law of Armed Conflict* (Taylor and Francis, 2016); Gary D. Solis, *The Law of Armed Conflict International Humanitarian Law in War* (Cambridge University Press, 2016); Geoffrey S. Corn, Victor Hansen, Richard Jackson, *The Law of Armed Conflict: An Operational Approach* (Aspen Publishing, 2018); Jan Wouters, Philip De Man and Nele Verlinden, *Armed Conflicts and the Law* (Intersentia, 2016); William H. Boothby, *Weapons and the Law of Armed Conflict* (Oxford University Press, 2016).

27 Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act, Act No. 27 of 2006.

28 Section 2.

> "No person may within the Republic or elsewhere— (a) negotiate or offer to provide any assistance or render any service to a party to an armed conflict or in a regulated country, unless such a person has been granted authorisation in terms of section 7 to negotiate or offer such assistance or service; (b) provide any assistance or render any service to a party to an armed conflict or in a regulated country, unless such assistance is provided or such service is rendered in accordance with an agreement or arrangement authorised in terms of section 7; (c) recruit, use, train, support or finance any person to provide assistance or render any service to a party to an armed conflict or in a regulated country, unless such person has been authorised in terms of section 7 to recruit, use, train, support or finance such a person; (d) recruit, use, train, support or finance any person to provide assistance or render a service to a party to an armed conflict or in a regulated country unless such a person is recruited, used, trained, supported or financed in accordance with an agreement or arrangement authorised in terms of section 7; or (e) perform any other act that has the result of furthering the military interests of a party to an armed conflict or in a regulated country, unless such a person has been authorised in terms of section 7."

The second category is provided for under section 4. It is to the effect that:

> "(1) No South African citizen or permanent resident may enlist with any armed force, other than the Defence Force, including an armed force of any foreign state, unless he or she has been authorised in terms of section 7.
>
> (2) Subject to section 7 (5) and (6), an authorisation granted in terms of section 7 may be revoked if the person to whom the authorisation has been granted takes part in an armed conflict as a member of an armed force other than the Defence Force and such authorisation contravenes any one of the criteria listed in section 9."

A combined reading of sections 3 and 4 shows the following. First, the offence(s) under section 3 can be committed by any person – natural or juristic (which includes South African citizens, permanent residents, and anyone in South Africa legally or illegally) whereas the offence under section 4 can only be committed by South African citizens or permanent residents. This is because under section 1 of the Act, a person is defined to mean "a person who is a citizen of, or is permanently resident in, the Republic, a juristic person registered or incorporated in the Republic, or any foreign citizen who contravenes this Act within the borders of the Republic." Second and related to the above, a South African citizen or permanent resident can commit any of the offences under sections 3 and 4 while in South Africa or elsewhere. However, for "any foreign citizen" (who is not a permanent resident) to commit an offence under section 3, he/she must be "within the borders of the Republic."[29] This implies that he/she does not commit an offence if, for example, they are on a South African-registered ship or aircraft which is not in South Africa at the time of the commission of the offence. Likewise, he/she does not commit an offence if they are in a territory

29 In *S v Basson* 2005 2007 (3) SA 582 (CC); 2007 (1) SACR 566 (CC), the South African Constitutional Court interpreted the words 'within the borders of South Africa' strictly to mean within South Africa.

controlled or administered by South Africa.[30] Three, the list of the prohibited activities under section 3 is not exhaustive. This is evident from section 3(1)(c). In other words, it is "catch all" provision. What is required is that the prosecution has to prove that the act in question "has the result of furthering the military interests of a party to an armed conflict or in a regulated country." Four, for section 3 to be applicable, there has to be an armed conflict or a regulated state. Section 1 defines an armed conflict to include "any":

> "(a) situation in a regulated country proclaimed as such in terms of section 6; and (b) armed conflict in any other country which has not been so proclaimed, between— (i) the armed forces of such country and dissident or rebel armed forces or other armed groups; (ii) the armed forces of any states; (iii) armed groups; (iv) armed forces of any occupying power and dissident or rebel armed forces or any other armed group; or (v) any other combination of the entities referred to in subparagraphs (i) to (iv)."

The above definition under section 1 has to be read with section 6(1) of the Act which provides that: "[t]he Committee must inform the National Executive, whenever it is of the opinion that— (a) an armed conflict exists or is imminent in any country; and (b) such a country should be proclaimed to be a regulated country." Section 6(2) empowers the President to proclaim a country to be a regulated state. Section 6(3) obligates the President to notify Parliament of such proclamation. Section 6(4) states that this "Act applies in a regulated country." Section 1 describes a "regulated country" by referring to section 6. A combined reading of sections 1 and 6 shows that section 3 is applicable where there is an armed conflict (it already started) or where the armed conflict is imminent. The definition under section 1 shows that an armed conflict could be of international, internationalised or non-international nature. The Act does not provide the criteria for determining when an armed conflict is "imminent." The Committee will have to rely on different sources such as official government statements or on statements from international humanitarian agencies or from regional or international inter-governmental bodies to determine whether the armed conflict is imminent. Once the Committee has concluded that an armed conflict exists or is imminent, it is obliged to inform the National Executive of its opinion. However, that is not enough for the President to proclaim the country a regulated state. This can only happen after the Committee has recommended that such a country should be proclaimed as a regulated state. Without that recommendation, the President does not have the power to make the proclamation. Section 6(2) of the Act provides that "[a]fter the Committee has informed the National Executive in the manner contemplated in subsection (1), the President, as Head of the National Executive, may, by proclamation in the Gazette, proclaim a country as a regulated country." The use of the word "may" implies that the President is not bound by

30 For example, South Africa used to have mandate over Namibia. See "Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)." Available at https://www.icj-cij.org/case/53 (accessed 20 November 2023).

the recommendation of the Committee to proclaim any country a regulated state. However, if the President decides to make a proclamation, section 6(3) obligates him/her to notify Parliament accordingly.

A closer examination of sections 1 and 6 shows that the definition of an armed conflict under section 1 is necessary to help the Committee determine whether or not the conflict in question amounts to an armed conflict for the purposes of section 6. Therefore, for the purposes of the Act, a person can only commit an offence under section 3 if the proclamation has been made under section 3 to the effect that the conflict in question amounts to an armed conflict. The implication for this is that the declaration is a prerequisite for the offence under section 3 to be committed. Thus, the mere fact that another state or other states have declared that a conflict between them or within a state is an armed conflict, does not necessarily mean that a person who does any of the activities under section 3 commits an offence. Differently put, other states' or parties' recognition of a conflict as an armed conflict does not on its own trigger the application of section 3. Likewise, the mere fact that other states or parties have not yet recognised a conflict as an armed conflict does not bar the President from making a proclamation under section 6. Once that proclamation is made, section 3 is triggered irrespective of the views of the parties to the conflict on whether or not the conflict is an armed conflict. The Act does not define a "party" to an armed conflict. It is not far-fetched to argue that an armed conflict can have many "participants" and a precise definition or description of a party to an armed conflict would have to be provided in every proclamation under section 6. This would enable a person to know whether or not they are required to apply for authorisation before they can render any of the services under section 3 to a specific country or group.

The Regulation of Foreign Military Assistance Act does not prohibit South Africans or permanent residents from enlisting with any armed force (including the armed force of a foreign state) unless when the joining such armed forces can be categorised as one of the prohibited activities under section 3 (offer to render or rending military assistance). However, section 4 of the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act prohibits South Africans and permanent residents, without authorisation, from enlisting in "any armed force" other than the South African Defence Force "including an armed force of any foreign state." The Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act does not define the term "enlist." This term is also not used in the Defence Act.[31] The drafting history of the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act shows that the purpose of the legislators was to prohibit South Africans

31 The Defence Act, Act 42 of 2002.

and permanent residents from "joining" any armed forces.[32] This includes armed groups, rebels and state armed forces. This implies that the word "enlist" under the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act has the same meaning as the word "enrol" in section 1(xii) of the Defence Act. This section defines the term "enrol" to mean "to accept and record the attestation of any person as a member of the Regular Force or the Reserve Force." However, the authorisation to enlist with any armed force can be withdrawn if such a person takes part in an armed conflict contrary to any of the conditions under section 9 of the Act. These conditions will be discussed below. For such authorisation to be revoked, the person must have taken part in the armed conflict as "a member of an armed force." Section 1(xiv)(b) defines a member to mean "any officer and any other rank." Section 1(xviii) defines "other rank" to mean "any member thereof other than an officer." During the second reading of the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict, some legislators were of the view that as a general rule, South Africans and permanent residents should be prohibited from enlisting with foreign armed forces.[33] If they are authorised to join foreign armed forces, they should not take part in armed conflicts. Some legislators argued that this prohibition was unconstitutional because, inter alia, it prevented South Africans from exercising their right to work.[34] However, this argument was dismissed by the majority who argued that the purpose of the legislation was to regulate and not to prohibit South Africans from taking up employment in the military industry.[35] This means that South Africans can enlist in foreign armed forces for the purpose of earning a living provided that they do not take part in armed conflicts. They could enlist as medical personnel, for example. Implied in section 4(2) of the Act is that a member of the South African Defence Force can also be authorised to serve in a foreign armed force. This is evident from the part of section 4(2) which states that "has been granted takes part in an armed conflict as a member of an armed force other than the Defence Force…" The drafting history of this provision shows that this was meant to deal with reservists. That is, former military officers who were no longer in active military service.[36]

III. Obtaining the Authorisation to Offer or Render Foreign Military Assistance

As mentioned above, section 3(a) of Regulation of Foreign Military Assistance Act has to be read with section 4. A combined reading of the two sections shows

32 Debates of the National Assembly (Hansard) (29 August 2006) (n 5) 6143 and 6157.

33 Ibid, 6144.

34 Ibid, 6133, 4143 and 6144.

35 Ibid, 6155 – 6156.

36 Ibid, 6127 – 6128 and 6155 – 6157.

that before a person can offer to render foreign military assistance, he/she must obtain authorisation from the Committee. In other words, it is the Committee that decides whether or not such authorisation should be granted. Likewise, a combined reading of sections 3(b) and 5 of the Act shows that the Committee's authorisation is a prerequisite before a person can render any foreign military assistance. For the Committee to decide whether or not to grant the authorisation under sections 4 and 5, it has to consider the factors under section 7. Section 7 provides that:

> "(1) An authorisation or approval in terms of sections 4 and 5 may not be granted if it would— (a) be in conflict with the Republic's obligations in terms of international law; (b) result in the infringement of human rights and fundamental freedoms in the territory in which the foreign military assistance is to be rendered; (c) endanger the peace by introducing destabilising military capabilities into the region where the assistance is to be, or is likely to be, rendered or would otherwise contribute to regional instability and would negatively influence the balance of power in such region; (d) support or encourage terrorism in any manner; (e) contribute to the escalation of regional conflicts; (f) prejudice the Republic's national or international interests; (g) be unacceptable for any other reason.
>
> (2) A person whose application for an authorisation or approval in terms of section 4 or 5 has not been granted by the Minister may request the Minister to furnish written reasons for his or her decision.
>
> (3) The Minister shall furnish the reasons referred to in subsection (2) within a reasonable time."

A few observations should be made about section 7. Although the word "may" is used under section 7(1), in this context it should be understood to mean "shall." This is because it is impossible for authorisation to be granted if it would result in one of the acts mentioned in section 7(a) – (f). This could also be inferred from the drafting history of the Act when, during the second reading of the Bill, the Minister of Defence argued, inter alia, that the Bill was "not intended to prevent anyone from rendering legitimate lawful military assistance where such legitimate activities include technical and training support rendered to democratically elected governments by private companies or individuals."[37] The intention of the Bill was "merely to regulate" such activities.[38] By referring to "democratically elected government", the Minister intended to indicate, amongst other things, that the authorisation will not be granted in case the purpose of military assistance was to undermine democratic values. The list of factors mentioned under section 7(1) is not exhaustive. This is inferred from the open-ended nature of section 7(1)(g) in terms of the Committee being empowered to reject an application if it finds it "unacceptable for any reason." Under section 7(2), the Minister is not obligated to provide written reasons for refusing to grant

37 Debates of the National Assembly (Hansard)(26 February 1998)(n 21) 495.

38 Ibid, 495.

the authorisation. However, once the person aggrieved by the Minister's decision requests for the reasons in writing, the Minister is obliged to give the reasons "within a reasonable time." What is reasonable will depend on the circumstances of each case. The Minister's decision is reviewable as an administrative action under the Promotion of Administrative Justice Act.[39]

Section 9 of the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act provides the criteria (factors) that the Committee has to consider in determining whether to grant authorisation under sections 3 and 4 of the Act. Section 9 of the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act reproduces almost all the criteria (factors) under section 7(1) of the Regulation of Foreign Military Assistance Act. There are two differences between the two provisions. First, section 9 of the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act adds one criterion which is not included in section 7(1) of the Regulation of Foreign Military Assistance Act. It is to the effect that authorisation will not be granted if it "in any manner initiates, causes or furthers an armed conflict, or a coup d'état, uprising or rebellion against a government." The second difference is that whereas section 7(1) of the Regulation of Foreign Military Assistance Act is open-ended, the list of factors under section 9 of the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act is closed. Put differently, the Committee can only decline to grant the authorisation on the basis of any of the eight factors under section 9. During the making of the Act, some people argued that section 4 of the Act should be amended so that a person who wanted to enlist with foreign armed forces should just register with the Committee after enlisting with such armed forces. However, this argument was rejected by the majority of the legislators. One of the reasons they gave was that the government had to monitor and, where necessary, control, the activities in which the South Africans in foreign armed forces were involved.[40]

Unlike the Regulation of Foreign Military Assistance Act, the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act provides clear steps that a person whose application for authorisation has been rejected can follow to challenge the decision. Section 7 provides that:

> "(5) Any person who feels aggrieved by a decision taken in terms of this section, may apply for written reasons in the manner contemplated in section 5 of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000).
>
> (6) Nothing in this Act must be construed as preventing a person from instituting proceedings in a competent court for judicial review."

39 Promotion of Administrative Justice Act, Act 3 of 2000.

40 Debates of the National Assembly (Hansard) (29 August 2006) (n 5) 6121, 6143 and 6157.

This creates a two-stage procedure. The first stage is to apply for the reason(s) for rejecting his/her application for authorisation. If the person is not satisfied with the reasons, he/she has a right to institute review proceedings in a competent court. This inevitably delays the process. It would be good practice for the Committee to immediately provide written reasons whenever it declines an application for authorisation. This would enable the applicant to save money and time by approaching a court to review the Committee's decision. In other words, it would save him/her the time and money that they would have spent applying for the reasons the Committee relied on to reject his/her application. A person who contravenes the above two Acts commits an offence; the next part of the article deals with the relevant penalties.

IV. Penalties for Contravening the Act(s)

Penalties for contravening section 3 of the Regulation of Foreign Military Assistance Act are provided for under section 8. It states that:

> "(1) Any person who contravenes any provision of section 2 or 3, or fails to comply with a condition with regard to any authorisation or approval granted in terms of section 4 or 5, shall be guilty of an offence and liable on conviction to a fine or to imprisonment or to both such fine and imprisonment.
>
> (2) The court convicting any person of an offence under this Act may declare any armament, weapon, vehicle, uniform, equipment or other property or object in respect of which the offence was committed or which was used for, in or in connection with the commission of the offence, to be forfeited to the State."

During the debates on the second reading of the Bill, the Minister of Defence referred to Clause 8 of the Bill (which would later become section 8 of the Act) and argued that "[t]he penalties for transgression are extremely severe, and include fines, imprisonment and forfeiture of property. In this respect, adding more legal bite to the Bill, no limit has been placed on the maximum penalty that may be imposed by the courts."[41] Although section 8 is silent on the minimum or maximum amount of fine or term of imprisonment which a court may impose, it does not mean that "no limit has been placed on the maximum penalty that may be imposed by the courts." It has been argued that where a penalty clause is silent on the amount of fine or term of imprisonment that a court may impose on an offender, "the courts are, in this case, only limited to their general jurisdiction when imposing a sentence."[42] This means, for example, that the High Court can impose any sentence including life imprisonment. This is because its penal jurisdiction is unlimited.[43] However, the maximum sentence that can be imposed by a regional court or the magistrate court is

41 Debates of the National Assembly (Hansard) (26 February 1998)(n 21) 495 – 496.

42 Stephan Terblanche, *A Guide to Sentencing in South Africa* (LexisNexis, 2007) 35.

43 Ibid, 14.

fifteen years or three years respectively.[44] In terms of section 9 of the Act, which is discussed below, "any court" in South Africa has jurisdiction over any offence of the Act irrespective of whether it is committed in South Africa or abroad. This means that the general jurisdiction of the court will determine the maximum sentence to which a person will be sentenced. Those prosecuted before the magistrate's court could be sentenced to a more "lenient" sentence compared to those prosecuted before the High Court should each of these courts decide to impose the maximum penalty. Section 10 of the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act provides for the penalties for the offences under the Act. It is worded the same way as section 8 of the Regulation of Foreign Military Assistance Act. This means that the discussion above on section 8 of the Regulation of Foreign Military Assistance Act is applicable with equal force to section 9 of the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act.

V. Extra-territorial Jurisdiction Over Offences in the Act(s)

The general rule is that South African courts do not have jurisdiction over offences committed abroad.[45] However, as the discussion below illustrates, there are exceptions to this rule. Section 9 of the Regulation of Foreign Military Assistance Act provides for one of the exceptions to this general rule. It states that:

> "Any court of law in the Republic may try a person for an offence referred to in section 8 notwithstanding the fact that the act or omission to which the charge relates, was committed outside the Republic, except in the instance where a foreign citizen commits any offence in terms of section 8 wholly outside the borders of the Republic."

During the second debate on the Regulation of Foreign Military Assistance Bill, the Minister of Defence referred to Clause 9 of the Bill (which would later become section 9 of the Act) and argued that the Bill "empowers South African courts to adjudicate upon any such acts that are committed outside the country. All activities that fall within the definition of foreign military assistance will be regulated through the issuing of permits."[46] There are two alternative ways to interpret the first part of section 9: one, that it is applicable to South African citizens only; or, two, that it is applicable to South African citizens and permanent residents. It has to be remembered that section 1(vi) defines a person to mean a "natural person who is a citizen of or is permanently resident in the Republic, a juristic person registered or incorporated in the Republic, and any foreign citizen who contravenes any provision of this Act within the borders of the Republic." Section 1(vi) puts citizens and permanent

44 Ibid, 14.

45 See generally, *Okah v S and Others* [2016] 4 All SA 775 (SCA); 2017 (1) SACR 1 (SCA).

46 Debates of the National Assembly (Hansard)(26 February 1998)(n 21) 496.

residents in the same category. For them to be convicted of an offence under the Act, there is no requirement that they should have contravened the Act "within the borders" of South Africa. A combined reading of sections 9 and 1(vi) the Act suggests that if a South African citizen or permanent resident, while abroad, offers to render foreign military assistance to any state or non-state actor, he/she commits an offence under section 3(a) of the Act and South African courts have jurisdiction over him/him. The same argument applies to cases where a South African citizen or permanent resident renders such military assistance. Whether or not such conduct is prohibited in the country in which the citizen or permanent resident was based at the time of making the offer (under section 3(a)) or rendering the service (under section 3(b)) is immaterial. The effect of the Act is to regulate the conduct of South African citizens and permanent residents who are based abroad. This is what the Supreme Court of Appeal referred to as the "nationality" principle in cases of extra-territorial jurisdiction.[47] The alternative reading of section 9 is that it does not apply to permanent residents in South Africa who commit the offence(s) under the Act outside South Africa. In other words, section 9 is only applicable to South African citizens or nationals. This is evident from the last part of section 9 which states that the section is inapplicable "in the instance where a foreign citizen commits any offence in terms of section 8 wholly outside the borders of the Republic." This argument is supported by the fact that South African law draws a clear distinction between citizens and non-citizens. Permanent residents are categorised as non-citizens.[48] The Constitution (1996) also provides for specific rights of citizens which are not enjoyed by foreign-nationals, including permanent residents.[49] It could thus be argued that had the legislators wanted the first part of section 9 to apply to permanent residents, they would have stated so expressly. This could have been, for example, by phrasing it as follows: "Any court of law in the Republic may try a citizen or a permanent resident for an offence referred to in section 8 notwithstanding the fact that the act or omission to which the charge relates, was committed outside the Republic…" In the author's view, section 9 should be interpreted in the light of the drafting history of the Act. This history shows, inter alia, that the Act was meant to regulate the activities of both South African citizens and permanent residents whether or not they are in South

47 In *Kouwenhoven v DPP (Western Cape) and Others* [2021] 4 All SA 619 (SCA); 2022 (1) SACR 115 (SCA) para 60, the Supreme Court of Appeal observed that "No fewer than five different principles are recognised in different jurisdictions… In summary, they are the territorial, nationality, passive personality, protective and universality principles. Under the territorial theory nations claim jurisdiction over crimes committed within their borders. Under nationality they claim jurisdiction based on the nationality of the perpetrator. Under passive personality they base liability on the nationality of the victims of the crime. The protective principle covers treason and any other crime particularly damaging to specific national interests. Universal jurisdiction deals with crimes like piracy, crimes against humanity, war crimes, torture and slavery. Considerable difficulties arise in adhering to a strict territorial principle and the result is that most, if not all, states sanction departures from it. We have not been referred to any rule of international law that outlaws extradition on the basis of such extended grounds of jurisdiction."

48 See generally, the South African Citizenship Act, No. 88 of 1995.

49 These include political rights (sections 19 and 47); the right to enter, to remain in and to reside anywhere in South Africa (section 21(3)); the right to a passport (section 21(4)); and the right to choose their trade, occupation and profession (section 22).

Africa. Excluding permanent residents from the application of the first part of section 9 would defeat the purpose of the Act. There are two possible defences or mitigating factors in the event of prosecution or conviction for a permanent resident. One, he/she could argue that at the time of offering to participate in the armed conflict or accepting the offer to participate in the armed conflict, he/she was not permanently residing in South Africa. In other words, he/she was a permanent resident "on paper." The second is that the armed conflict in question was in a country of his nationality/citizenship. A dual citizen could also argue in mitigation that at the time of making or accepting the offer, he/she was domiciled in the country in which the armed conflict took place. However, this is not a defence. The drafting history of both Acts shows that the legislators knew that some South African citizens held dual citizenship (especially in the United Kingdom and Israel) but they never created an exception for them.

Section 11 of the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act also provides for extra-territorial jurisdiction. It is more detailed than section 9 of the Regulation of Foreign Military Assistance Act. It is to the effect that:

> "(1) Any act constituting an offence under this Act and that is committed outside the Republic by— (a) a citizen of the Republic; (b) a person ordinarily resident in the Republic; (c) a company incorporated or registered as such under any law, in the Republic; or (d) any body of persons, corporate or unincorporated, in the Republic, must be regarded as having been committed in the Republic and the person who committed it may be tried in a court in the Republic which has jurisdiction in respect of that offence.
>
> (2) (a) Any act that constitutes an offence under section 2 of this Act and that is committed outside the Republic by a person, other than a person contemplated in subsection (1), against the Republic, its citizens or residents must be regarded as having been committed in the Republic if that person is found in the Republic. (b) A person contemplated in paragraph (a) may be tried for such an offence by a South African court if there is no application for the extradition of the person or if such an application has been refused.
>
> (3) Any offence contemplated in subsection (1) or (2), is, for the purpose of determining the jurisdiction of a court to try the offence, regarding as having been committed at— (a) the place where the accused is ordinarily resident; (b) the accused's principal place of business; or (c) the place where the accused was arrested.
>
> (4) Where a person is charged with conspiracy or incitement to commit an offence or as an accessory after the fact, the offence is regarded as having been committed not only at the place where the act was committed, but also at every place where the conspirator, inciter or accessory acted or in the case of an omission, should have acted."

It is evident that there are differences between extra-territorial provisions in the Regulation of Foreign Military Act and the Prohibition of Mercenary Activities and

Regulation of Certain Activities in Country of Armed Conflict Act. The scope of the Prohibition of Mercenary Activities and Regulation on this issue has been discussed above and will not be repeated here. The author will make some observations about section 11 of the Regulation of Foreign Military Act and the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act. First, section 11(1) deals with the nationality principle. As mentioned above, this means that South African courts have jurisdiction over South African nationals or permanent residents who commit any of the offences under the Act while outside South Africa. Second, section 11(2) embodies the "passive personality" and "protective" principles. Since section 11(2) deals with the issue of extra-territorial jurisdiction over mercenary activities, its discussion falls outside the scope of this article. However, it is important to mention that a person who is alleged to have committed a mercenary activity can be extradited for prosecution. Third, unlike section 9 of the Regulation of Foreign Military Assistance Act which is silent on the grounds on which a court can assume jurisdiction over the accused who committed an offence abroad, section 11(3) of the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act provides for three grounds one of which must be in place before a court can assume jurisdiction over the offence. Thus, unless one of the three grounds exists, a court does not have jurisdiction over the offence. However, this is not a requirement under the Regulation of Foreign Military Assistance Act. It implies, for example, that an accused can be prosecuted in Limpopo province even if he is ordinarily resident in Cape Town, his/her principle place of business is Cape Town and he/she was arrested in Cape Town.[50] Four, although sections 11(1) – (3) of the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act specifically deal with offences under the Act, section 11(4) refers to "conspiracy or incitement to commit an offence." In other words, it does not specify that the conspiracy or incitement has to relate to the offence in the Act. It is argued that this could have been an oversight on the part of the legislators. The incitement and conspiracy relate to the offences under the Act. Any other interpretation would lead to an absurdity. Related to the question of extra-territorial jurisdiction for the offences under the Act, is the issue of South African citizens or permanent residents who commit offences under international law while abroad. This issue is not provided for under the two pieces of legislation discussed above. This also raises the issue of holding South African citizens, permanent residents and temporary residents accountable for the offences they have committed in armed conflicts abroad. In other words, apart from being prosecuted for violating either the Regulation of Foreign Military Assistance Act or the Prohibition of Mercenary Activities and Regulation of Certain Activities

50 However, under section 111 of the Criminal Procedure Act, the National Director of Public Prosecutions may direct the transfer of a case from one jurisdiction to another. For the circumstances in which section 111 is applicable, see for example, *S v Ndzeku* [1996] 1 All SA 391 (A).

in Country of Armed Conflict Act (should it come into force), they could also be prosecuted for offences under international law committed in the course of violating these two pieces of legislation. It is to this issue that we turn.

The Regulation of Foreign Military Assistance Act and the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act provide that South African courts have extra-territorial jurisdiction in a case where a person has committed an offence under one of the Acts. However, it could be that the offence in question is also an offence under another piece of legislation. For example, common to both pieces of legislation is that a person shall not be granted authorisation if his/her participation in the conflict would be contrary to South Africa's obligations in terms of international law or would result into the infringement of human rights and fundamental freedoms in the country where the armed conflict is taking place. Some of the human rights violations could amount to genocide, war crimes or crimes against humanity. Section 4 of the Implementation of the Rome Statute of the International Criminal Court Act[51] provides that South African courts have extra-territorial jurisdiction over South African citizens and residents who commit genocide, war crimes and crimes against humanity. This means that if South African citizens or permanent residents participate in an armed conflict in which these offences are committed, they could be prosecuted in South Africa. However, it may be difficult for the South African prosecutors to collect evidence from such countries implicating individual soldiers in the commission of these crimes. This is so because the foreign armies in which they served may be reluctant to provide such evidence. In such a case, South African prosecutors may have to invoke Article 25 of the Rome Statute of the International Criminal Court (as domesticated by Implementation of the Rome Statute of the International Criminal Court Act) and prosecute them as co-perpetrators or joint-perpetrators in the commission of these offences. They could also be prosecuted for aiding, abetting or assisting in the commission of these crimes. International criminal tribunals have developed rich jurisprudence on the circumstances in which persons can be prosecuted for any of these offences.[52] South African courts could find these principles useful. If there is evidence that South African citizens or residents who serve in foreign armed forces have committed torture, which does not amount to a war crime or a crime against humanity, they could also be prosecuted under the Prevention and Combating of the Torture of Persons Act.[53] Section 6 of this Act provides that South African courts have jurisdiction over the offence of torture irrespective of the country in which it

51 Implementation of the Rome Statute of the International Criminal Court Act, Act No. 27 of 2002.

52 See generally, Gerhard Werle and Florian Jeßberger, *Principles of International Criminal Law* (3rd edition 2014) 198 – 220.

53 Act 13 of 2013. For a discussion of the circumstances in which torture committed abroad can be prosecuted in South Africa, see Jamil Ddamulira Mujuzi, "Prosecuting and Punishing Torture in South Africa as a Discrete Crime and as a Crime Against Humanity" (2015) 23(2) African Journal of International and Comparative Law 339–355.

is committed. In both cases (under the Implementation of the Rome Statute of the International Criminal Court Act and the Prevention and Combating of Torture of Persons Act) if there are witnesses who are based abroad and for whatever reason cannot travel to South Africa to testify against the accused, South African law provides for circumstances in which such witnesses can give evidence from abroad.[54] Alternatively, South African prosecutors can ask courts to issue letters of request and obtain the evidence from abroad.[55]

VI. Conclusion

In this article, the author has discussed the circumstances in which South African citizens and permanent residents can participate in foreign armed conflicts. It has been illustrated that in doing so, they have to apply for authorisation. Before that authorisation is granted, the Committee has many grounds to consider. The authorisation can be withdrawn if the person to whom it was granted does not observe the conditions imposed by the Committee. It has also been shown that South Africans and permanent residents who take part in foreign armed conflicts without the necessary authorisation or who do not comply with the conditions attached to the authorisation may be prosecuted for different offences. The penalties that courts are empowered to impose have also been explained. The author has also dealt with the issue of extra-territorial application of South African legislation to its citizens or permanent residents who take part in foreign armed conflicts. It has been illustrated that there are two ways in which they could be prosecuted. Firstly, under the Regulation of Foreign Military Assistance Act (1998) or under the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act (should it come into force in the future). Secondly, for offences under international law under the Implementation of the Rome Statute of the International Criminal Court Act or under the Prevention and Combating of the Torture of Persons Act.

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54 Section 158(2) of the Criminal Procedure Act provides that "Section 158(2) (a) A court may, subject to section 153, on its own initiative or on application by the public prosecutor, order that a witness, irrespective of whether the witness is in or outside the Republic, or an accused, if the witness or accused consents thereto, may give evidence by means of closed circuit television or similar electronic media (b) A court may make a similar order on the application of an accused or a witness."

55 Under the International Co-operation in Criminal Matters Act, Act 75 of 1996.

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RESEARCH ARTICLE

Rechtsmittel nach türkischem Recht gegen übermäßige Vergütungen an Vorstandsmitglieder in Aktiengesellschaften

Legal Remedies Against the Excessive Remuneration of the Directors in Corporations Pursuant to Turkish Law

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Zusammenfassung
Im türkischen Recht können die Vergütungen (oder sog. Entschädigungen) der Vorstandsmitglieder in der Satzung oder durch den Generalversammlungsbeschluss festgelegt werden. Es gibt keine Regelung, auf deren Grundlage der Umfang der Vergütungen in Aktiengesellschaften ermittelt werden. Diese Situation birgt in sich die Gefahr, den Gewinn der Gesellschaft unter dem Namen „Vergütung" an die Mehrheitsaktionäre abzuführen und damit die Rechte der Minderheitsaktionäre zu verletzen. Um dies zu verhindern, wird versucht, durch gerichtliche Entscheidungen einen Ausgleich zwischen dem Anspruch der Vorstandsmitglieder auf Vergütung und dem Anspruch der Aktionäre auf Dividenden herzustellen. Es wird anerkannt, dass die an die Vorstandsmitglieder bezahlten Vergütungen insoweit rechtswidrig sind, als sie das Recht auf Dividende der Aktionäre verletzen. Hierbei sind ausgerichtet die Grundlagen, die mit übermäßiger Vergütung verletzt sind, die Art der Rechtswidrigkeit und die Rechtsmittel der in ihren Rechten verletzten Aktionäre zu bestimmen. Außerdem wird auch die Frage behandelt, ob diese Zahlung zurückgefordert werden kann, falls aufgrund des für rechtswidrig befundenen Organbeschlusses bereits eine Zahlung an das Vorstandsmitglied erfolgt ist.

Schlüsselwörter
Vorstandsmitglied, Vergütung, Entschädigung, übermäßig, Sanktion

Abstract
The determination of directors' remuneration under Turkish law can be determined in articles of incorporation or General Assembly. However, there is a lack of provisions specifying the principles governing the scope of corporation renumeration. This loophole poses the risk of transferring the corporation's profits to the majority shareholders under the guise of remuneration, thereby violating minority shareholders' rights. To address this challenge, courts have sought to balance directors' entitlement to remuneration with shareholders' rights to dividends through legal rulings. Remuneration paid to directors may be deemed illegal if they violate the shareholders' rights to dividends. This study aims to determine the nature of such illegality and explore the legal remedies available to victimized shareholders. Furthermore, it examines the feasibility of reclaiming payments already disbursed to directors as a result of a resolution deemed illegal by the founding body.

Keywords
Director, remuneration, excessive, sanction

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Extended Summary

Remuneration for the board of directors members for their management duties can be paid at various intervals, such as daily, weekly, annual, or monthly, as specified in the articles of incorporation or determined by the General Assembly resolution (Turkish Commercial Code (TCC) Article 394). The TCC lacks regulations specifying the maximum amount or guiding principles of remuneration. Consequently, corporate profits often flow disproportionately to the majority shareholders through excessive remuneration, especially in corporations with concentrated shareholding structures. This practice detrimentally affects shareholders' right to receive dividends. To address this issue, certain criteria have emerged through judicial decisions to assess the appropriateness of the remuneration paid to directors. When assessing whether remuneration is excessive, balanced consideration must be given to directors' contributions. This assessment should safeguard shareholders' inherent right to dividends while considering factors such as the corporation's shareholding structure, financial status, past practices during general assemblies, and remuneration received by directors in comparable corporations facing similar circumstances regarding shareholding and finances.

When a judge concludes that remuneration is excessive, they have the discretion to either give a verdict for adjusting the remuneration in accordance with the aforementioned criteria or simply invalidate the resolution passed by the General Assembly. This choice stems from the legal nature of the shareholders' right to pursue the company's profit, which is considered inalienable. Resolutions passed by the body that limit or abolish this right are rendered null and void under Article 447 of the TCC. Excessive remuneration not only grants shareholder directors an unfair advantage in accessing the corporation's profit but also contravenes the principle of equal treatment, as stipulated in Article 357 of the TCC. Breaching the basic principle that fosters equality among shareholders in capital companies warrants the sanction of nullity under Article 447 of the TCC. Moreover, the resolution passed by the body is nullified because any illicit transfer of corporate assets to certain shareholders contradicts the principle of capital maintenance as outlined in Article 447 of the TCC. Consequently, resolutions passed by the General Assembly, wherein remuneration is deemed excessive, are subject to nullity sanction. However, it is noteworthy that the Court of Cassation has consistently opted to apply the sanction of annulability to body resolutions in almost all its rulings on this subject. This enforcement choice may be attributed to the procedural aspects of the cases brought before the court.

Given that the excessive determination of remunerations contravenes commercial provisions prohibiting transactions and resolutions that restrict shareholders' inalienable rights, as well as principles of equal treatment and capital maintenance, there is ample justification for applying the first paragraph of Article 1530 of the

TCC to address the repercussions of such violations. Article 1530 also provides a mechanism for recalling remuneration that exceeds reasonable limits. It stipulates that contracts exceeding the maximum limit set by law or competent authorities shall be considered concluded beyond the said limit, and the second sentence of Article 27 of the Turkish Code of Obligations (TCO) shall not be applicable in this context. Consequently, it is evident that the remuneration deemed reasonable by the court represents the highest limit established by competent authorities in accordance with Article 1530(I) of the TCC. Thus, it is warranted to deem the resolution of the General Assembly determining directors' remuneration unlawful to the extent that it exceeds reasonable limits. Consequently, the sanction for nullity should be applied to the portion of the resolution that exceeds this limit.

When Article 1530 of the TCC is applied, the recall process should be in accordance with provisions governing unjust enrichment, as outlined in Article 77 of the TCO. Directors may be held liable for interest, calculated at the rate applied for short-term advances, from the moment the remuneration is disbursed. The statutory limitation period for filing a recall request is set at 2 to 10 years under Article 82 of the TCO.

Should the excessive determination of remuneration render the continuation of the company untenable for minority shareholders due to the limitation or elimination of their divided rights, these shareholders reserve the right to petition for the dissolution of the corporation under Article 531 of the TCC.

Einführung

Gemäß dem HGB[1] Art. 394, das die finanziellen Rechte der Vorstandsmitglieder regelt, können Vorstandsmitgliedern Vergütungen, Sitzungsgeld, Gratifikationen, Prämien und Tantième gezahlt werden, sofern deren Höhe in der Satzung oder durch Beschluss der Generalversammlung festgelegt ist. Die Vergütung kann den Vorstandsmitgliedern und den Delegierten für die Wahrnehmung ihrer Führungsaufgaben auf täglicher, wöchentlicher, jährlicher oder monatlicher Basis ausbezahlt werden. Sitzungsgeld im Sinne des Begriffs ist ein finanzielles Interesse, das den Vorstandsmitgliedern pro Sitzung, monatlich oder jährlich als Gegenleistung für ihre Teilnahme an den Vorstandssitzungen gewährt wird[2]. Dennoch erscheint das Sitzungsgeld in der Praxis als allgemeine Bezeichnung für alle finanziellen Rechte der Vorstandsmitglieder[3]. In dieser Studie wird das Wort „Vergütung" verwendet, um sowohl den Vergütungsbegriff als auch das Sitzungsgeld auszudrücken, sofern nicht anders angegeben.

Bei Publikumsgesellschaften kann die Vergütung der Vorstandsmitglieder im Rahmen der Grundsätze des KMG[4] Art. 21 bestimmt werden, dass das Verbot der verdeckten Gewinnausschüttung regelt[5]. Dementsprechend sollten Vorstandsvergütungen, die ohne Einhaltung der Grundsätze der Armlänge, der Marktpraxis und der Vorsicht und Aufrichtigkeit des Geschäftslebens ausgezahlt wurden, an die Gesellschaft zurückgezahlt werden, soweit sie eine verdeckte Gewinnausschüttung darstellen. Bei Verstößen gegen dieses Verbot steht die Umsetzung, die in gleicher Regelung vorgesehenen Sanktionen, im Vordergrund (KMG Art. 21 IV).

In Bezug auf Aktiengesellschaften gibt es keine Regelung darüber, nach welchen Grundsätzen die Vergütung der Vorstandsmitglieder festgelegt wird und welche Sanktionen bei einer rechtswidrigen Festlegung anzuwenden sind. Allerdings prüft das Kassationsgericht die Rechtmäßigkeit der Vergütung anhand einiger Kriterien.

1 Türkisches Handelsgesetzbuch Nr. 6102, OZ 14.2.2011/27846.

2 Zur Definition der einzelnen finanziellen Rechte, vgl. Eda Akış, *Anonim Şirketlerde Yönetim Kurulunun Mali Hakları ve Genel Kurulun Bu Haklar Üzerindeki Yetkisi* (Seçkin 2022) 32 ff.; Işık Özer, *Türk ve Yabancı Hukuk Sistemlerinde Anonim Şirket Yöneticilerinin Mali Hakları* (Adalet 2013) 227 ff.; Hasan Pulaşlı, *Şirketler Hukuku Şerhi C.II* (4. Ausg., Adalet 2022) 1512 ff.; İsmail Kırca, Çağlar Manavgat und Feyzan Şehirali Çelik, *Anonim Şirketler Hukuku C.I: Temel Kavramlar ve İlkeler, Kuruluş, Yönetim Kurulu* (BTHAE 2013) 729-731.

3 Veliye Yanlı, 'Yönetim Kurulu Üyelerine Sağlanacak Mali Haklar ile İlgili Bazı Değerlendirmeler' (2017) 33(4) BATİDER 41, 45; Elfte Zivilabteilung des Kassationsgerichts, 3253/7015, 7.12.2017 [İstanbul Üniversitesi Hukuk Fakültesi Ticaret Hukuku Anabilim Dalı, *Yargıtay Hukuk ve Ceza Dairelerinin Türk Ticaret Kanununa İlişkin Kararları 2017* (On İki Levha 2018) (a) 177]; 2014-18093/12978, 3.12.2015 [İstanbul Üniversitesi Hukuk Fakültesi Ticaret Hukuku Anabilim Dalı, *Yargıtay 11. Hukuk Dairesinin Türk Ticaret Kanununa İlişkin Kararları 2015-2016* (On İki Levha 2018) (b) 294]; 2016-5240/7329, 18.12.2017 < https://karararama.yargitay.gov.tr/ > zugegriffen am 18.9.2022.

4 Kapitalmarktgesetz Nr. 6362, OZ 30.12.2012/28513.

5 Arif Duran, *Örtülü Kazanç Aktarımı Yasağı (SerPK m. 21)* (On İki Levha 2021) 230 ff.; Arslan Kaya, 'Örtülü Kazanç Aktarımı Yasağının TK'ya Tabi Şirketler/Şirketler Topluluğu ve SERPK ile İlişkisi Bakımından Değerlendirilmesi' (2016) 22(3) MÜHFHAD 1531, 1534; Kırca, Manavgat und Şehirali Çelik (n 2) 734, 749.

In dieser Arbeit wird erörtert, welche Sanktionen anzuwenden sind und welche Rechtsmittel vorhanden sind, wenn die Vergütungen als übermäßig festgestellt werden.

I. Grundlagen zur Bestimmung des Umfangs der Vergütungen

Im türkischem Recht gibt es keine Regelung, auf deren Grundlage der Umfang der Vergütungen in Aktiengesellschaften ermittelt wird. Dies birgt die Gefahr, den Gewinn der Gesellschaft unter dem Namen „Vergütung" an die Mehrheitsaktionäre abzuführen und damit die Rechte der Minderheitsaktionäre zu verletzen. Daher wird versucht, die Grundlagen der Vergütungen durch Gerichtspraxis festzulegen. Das Kassationsgericht nimmt an, dass übermäßig hohe Vergütungen das Recht auf Dividende der Aktionäre (HGB Art. 507 I) verletzt. Bei der Feststellung, ob die Vergütung übermäßig ist oder nicht, wird ein Ausgleich zwischen dem Recht der Vorstandsmitglieder, eine Vergütung zu verlangen, und der Dividendenberechtigung der Aktionäre angestrebt. Die Kontrollinstrumente dieses Ausgleichs wurden wie folgt festgelegt: Beteiligungsstruktur, finanzielle Situation und frühere Praktiken der Gesellschaft, Präzedenzfälle sowie die Arbeit und Arbeitszeit des Vorstandsmitglieds[6].

Die Beteiligungsstruktur der Gesellschaft bezeichnet die Verteilung der Anteile unter den Aktionären. Gehört die Mehrheit der Aktien bestimmten Einzelpersonen, Familienmitgliedern oder Gruppen (Gesellschaften mit einer hohen Beteiligungsstruktur) an, so hat diese Person oder auch die Gruppe aufgrund des Mehrheitsprinzips die Befugnis, das Management und deren Vergütungen festzulegen. Daher sollte die festgelegte Vergütung mit Vorsicht überprüft werden. Im Zusammenhang mit der finanziellen Situation der Gesellschaft wird geprüft, ob die vereinbarte Vergütung in einem angemessenen Verhältnis zum Gewinn der Gesellschaft steht. In einigen Entscheidungen wurden die Proportionen von 197 %[7], 75 %[8], 52

6 Elfte Zivilabteilung des Kassationsgerichts, 2019-1419/164, 8.1.2020: „Bei der Bewertung, ob die für die Vorstandsmitglieder bestimmten Vergütungen übermäßig sind, sind die Beteiligungsstruktur, die finanzielle Situation, die früheren Praktiken der Gesellschaft, die Beteiligungsstruktur und die finanzielle Situation der Gesellschaft in der gleichen bzw. ähnlichen Situation wie die beklagte Gesellschaft in dem Zeitraum, in dem die Generalversammlung abgehalten wird, …(die) Gegenüberstellung der bisherigen Vorstandsvergütungen (zu berücksichtigen) in einem angemessenen Verhältnis zu Arbeit und Arbeitszeit sowie in einer Weise, die das unverzichtbare Recht der Aktionäre auf Dividenden nicht verletzt. Diesbezüglich entschied das Gericht, dass die Bücher und Rekorde der beklagten Gesellschaft eingezogen werden sollten, Recherchen und Bewertungen wie erläutert durchgeführt werden sollten und eine Entscheidung gemäß dem Ergebnis getroffen werden sollte…" [İstanbul Üniversitesi Hukuk Fakültesi Ticaret Hukuku Anabilim Dalı, *Yargıtay Hukuk ve Ceza Dairelerinin Türk Ticaret Kanununa İlişkin Kararları 2020* (On İki Levha 2021) (a) 228-229]. In die gleiche Richtung, vgl. 2020-2125/1925, 3.3.2021; 2020-1032/228, 20.1.2021 [İstanbul Üniversitesi Hukuk Fakültesi Ticaret Hukuku Anabilim Dalı, *Yargıtay Hukuk ve Ceza Dairelerinin Türk Ticaret Kanununa İlişkin Kararları 2021* (On İki Levha 2022) (b) 145-146]; 2018-2906/94, 7.1.2020 < https://karararama.yargitay.gov.tr/ > zugegriffen am 9.5.2022; 336/805, 11.12.2019; 2017-4653/3747, 14.5.2019; 2017-2292/1682, 28.2.2019 < https://karararama.yargitay.gov.tr/ > zugegriffen am 9.5.2022; 3253/7015, 7.12.2017 [İstanbul Üniversitesi Hukuk Fakültesi Ticaret Hukuku Anabilim Dalı (n 3a) 177]; 2014-16299/11460, 3.11.2015; 2440/9726, 1.10.2015; 2014-18093/12978, 3.12.2015 [İstanbul Üniversitesi Hukuk Fakültesi Ticaret Hukuku Anabilim Dalı (n 3b) 294]; 2013-14441/17135, 7.11.2014 < https://www.sinerjimevzuat.com.tr/ > zugegriffen am 10.9.2022.

7 Elfte Zivilabteilung des Kassationsgerichts, 2019-3601/1943, 24.2.2020 < https://www.karararama.yargitay.gov.tr/ > zugegriffen am 21.10.2022.

8 Elfte Zivilabteilung des Kassationsgerichts, 2016-4873/6710 < https://www.sinerjimevzuat.com.tr/ > zugegriffen am

%[9] und sogar 14 %[10] als ausreichend angesehen, um die Vergütungen als übermäßig zu betrachten. Bei den Kriterien der früheren Praktiken werden die Vergütungen berücksichtigt, die die Gesellschaft den Vorstandsmitgliedern in den vergangenen Perioden gezahlt hat. Im Rahmen des Präzedenzfallkriteriums, das auf eine objektive Vergütungsbestimmung abzielt, werden die bezahlten Vorstandsvergütungen der Gesellschaft berücksichtigt, die sich in Bezug auf die Gesellschaftsstruktur und in finanzielle Lage in gleicher oder ähnlicher Situation wie die beklagte Gesellschaft befindet. Schließlich wird bei den Kriterien Arbeit und Arbeitszeit geprüft, ob die geschätzte Vergütung den Leistungen der Vorstandsmitglieder entspricht[11].

Es ist nicht notwendig, alle diese Kriterien gleichzeitig anzuwenden, um festzustellen, ob die Vergütung in einer Gesellschaft übermäßig ist. Tatsächlich werden die meisten Entscheidungen auf Basis von zwei oder drei Kriterien getroffen[12]. Durch die Priorisierung des Arbeitskriteriums wird festgelegt, dass andere Kriterien in einer Weise berücksichtigt werden sollen, solange sie dem Arbeitskriterium dienen[13]. Da die Rechtsnatur der Beziehung zwischen dem Vorstandsmitglied und der Gesellschaft ähnlich ist, sollte auch hier die im Anwaltsgesetz Art. 164 IV vorgesehene Quote für Anwaltsgebühren analog angewendet werden. Unter Berücksichtigung weiterer Kontrollinstrumente sollte eine Quote von mindestens 10 % und höchstens 20 % auf den Gewinn der Gesellschaft festgelegt werden.

II. Verletzte Grundlagen bei übermäßiger Vergütung

A. Verletzung des Rechts auf Dividende

Der Hauptzweck der Aktionäre besteht darin, Dividenden zu erzielen. Zu diesem Zweck kann eine Gesellschaft gegründet werden. Mit Ausnahme der Vorzugsaktien hat jeder Aktionär Anspruch auf eine Beteiligung am Netto Periodengewinn, dessen Ausschüttung an die Aktionäre beschlossen wurde, gemäß den gesetzlichen und

10.8.2022.

9 Elfte Zivilabteilung des Kassationsgerichts, 2016-5118/4360, 14.9.2017 < https://www.sinerjimevzuat.com.tr/ > zugegriffen am 12.9.2022.

10 Elfte Zivilabteilung des Kassationsgerichts, 2016-451/3128, 29.5.2017 < https://www.sinerjimevzuat.com.tr/ > zugegriffen am 12.6.2022.

11 Elfte Zivilabteilung des Kassationsgerichts, 2016-12948/7313, 22.11.2018 [İstanbul Üniversitesi Hukuk Fakültesi Ticaret Hukuku Anabilim Dalı, *Yargıtay Hukuk ve Ceza Dairelerinin Türk Ticaret Kanununa İlişkin Kararları 2018* (On İki Levha 2019) 199]; 2018-2906/94, 7.1.2020 < https://karararama.yargitay.gov.tr/ > zugegriffen am 9.5.2022.

12 Für die Entscheidungen, bei denen die Beteiligungsstruktur und die finanzielle Situation des Gesellschafts ausschlaggebend sind, vgl. Elfte Zivilabteilung des Kassationsgerichts, 2017-4118/2883, 11.4.2019 < https://www.sinerjimevzuat.com.tr/ > zugegriffen am 9.1.2022; 2016-451/3128, 29.5.2017 < https://www.sinerjimevzuat.com.tr/ > zugegriffen am 12.6.2022. Zur die Entscheidung, bei der die finanzielle Situation des Gesellschafts und die Arbeitskriterien ausschlaggebend sind, vgl. Elfte Zivilabteilung des Kassationsgerichts, 2020-2125/1925, 3.3.2021 [İstanbul Üniversitesi Hukuk Fakültesi Ticaret Hukuku Anabilim Dalı (n 6b) 145-146].

13 Elfte Zivilabteilung des Kassationsgerichts, 2019-1419/164, 8.1.2020 [İstanbul Üniversitesi Hukuk Fakültesi Ticaret Hukuku Anabilim Dalı (n 6a) 228-229]. In die gleiche Richtung, s. Elfte Zivilabteilung des Kassationsgerichts, 2018-2906/94, 7.1.2020 < https://karararama.yargitay.gov.tr/ > zugegriffen am 9.5.2022; 3253/7015, 7.12.2017 [İstanbul Üniversitesi Hukuk Fakültesi Ticaret Hukuku Anabilim Dalı (n 3a) 177]; 2014-18093/12978, 3.12.2015 [İstanbul Üniversitesi Hukuk Fakültesi Ticaret Hukuku Anabilim Dalı (n 3b) 294].

satzungsmäßigen Bestimmungen im Verhältnis zu seinem Anteil (HGB Art. 507 I,II). Im Gegensatz zum bisherigen Recht regelt das neue türkische Gesetz die erworbenen Rechte nicht[14]. Daher gibt es im geltenden Recht keine Bestimmung, die das Recht auf Dividende als wohlerworbenes Recht regelt. In der Lehre ist jedoch die Rechtsnatur des Rechts auf Dividende umstritten[15]. Auch die Gerichtsentscheidungen im türkischen Recht ist die Rechtsnatur dieses Rechts nicht einheitlich[16].

Es sollte ausdrücklich betont werden, dass das Ziel der Hauptversammlung nicht darin besteht, den nicht ausgeschütteten Gewinn im Interesse der Gesellschaft zu verwenden. Das Ziel besteht darin, Vermögen unter eine Deckung aus der Gesellschaft zu entnehmen. Damit sollte es eine ähnliche Wirkung wie das Recht auf die Gewinnstrebigkeit der Gesellschaft haben, das als absolute wohlerworben qualifiziert wird[17]. Denn dadurch die Gesellschaft oder das Organ nicht länger im Interesse aller Beteiligten handelt, sondern einem fremden Interesse dient, als wäre es wie ein Verein.

Die Aktiengesellschaften sind darauf ausgerichtet, Gewinne zu erhalten, nach bestimmten Regelungen Dividenden auszuschütten. Diese Eigenschaften hängen auch mit den Grundstrukturen der Gesellschaft zusammen (HGB 447). HGB bietet einige Möglichkeiten (Art. 521, 522, 523 usw.) zur Verwendung des Gesellschaftsgewinns für bestimmte Zwecke, die auch im Interesse der Gesellschaft liegen.

Daher sollte davon ausgegangen werden, dass ein Organbeschluss, der übermäßige Vergütungen festlegt, welcher das Recht auf die Gewinnstrebigkeit der Gesellschaft einschränkt oder aufhebt und die Grundstruktur der Gesellschaft verletzt, für nichtig erklärt werden[18] (HGB Art. 447).

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14 Siehe Türkisches Handelsgesetzbuch (Nr. 6762, OZ 9.7.1956/9353) Art. 385, vgl. aber auch HGB Art. 452.

15 Siehe zur die Ansicht, dass dieses Recht nur relativ wohlerworben ist [Peter Forstmoser, Arthur Meier-Hayoz und Peter Nobel, *Schweizerisches Aktienrecht* (Stämpfli+Cie 1996) § 40 N 41 ff]; dass das weder unverzichtbar noch wohlerworben ist [Aslı E. Gürbüz Usluel, *Anonim Şirketlerde Pay Sahibinin Kar Payı Alma Hakkı* (BTHAE 2016) 103 ff.; Hakan Bilgeç, 'Türk Hukukunda Anonim Şirketlerde Kar Payında İmtiyaz' (2019) 21(Private Ausg.) D.E.Ü. Hukuk Fakültesi Dergisi (Prof. Dr. Durmuş Tezcan'a Armağan) 2323, 2327-2328], dass das ein unentziehbares Recht [Roland von Büren, Walter A. Stoffel, Rolf H. Weber, *Grundriss des Aktienrechts* (3. Ausg. Schulthess 2011) § 5 N 884], dass eine Abweichung von die Proportionalität durch einen Mehrheitsbeschluss der Generalversammlung unzulässig ist [Peter Böckli, *Schweizer Aktienrecht* (5. Ausg., Schulthess 2022) § 8 N 666].

16 Siehe in die Richtung, dass das Recht auf Dividende unverzichtbar ist: Elfte Zivilabteilung des Kassationsgerichts, 2019-1419/164, 8.1.2020 [İstanbul Üniversitesi Hukuk Fakültesi Ticaret Hukuku Anabilim Dalı (n 6a) 228-229]; 2018-2906/94, 7.1.2020 < https://kararara.ma.yargitay.gov.tr/ > zugegriffen am 9.5.2022; 2018-353/2685, 8.4.2019 < https://www.sinerjimevzuat.com.tr/ > zugegriffen am 11.8.2022; 3253/7015, 7.12.2017 [İstanbul Üniversitesi Hukuk Fakültesi Ticaret Hukuku Anabilim Dalı (n 3a) 177]; 2014-18093/12978, 3.12.2015 [İstanbul Üniversitesi Hukuk Fakültesi Ticaret Hukuku Anabilim Dalı (n 3b) 294]. Für die Entscheidung, in der der Dividendenberechtigung der Aktionär als erworbenes Recht qualifiziert wird, vgl. Elfte Zivilabteilung des Kassationsgerichts, 2017-4118/2883, 11.4.2019 < https://www.sinerjimevzuat.com.tr/ > zugegriffen am 9.1.2022. Zu diesem Recht, das sowohl als „unverzichtbares" als auch als „relatives wohlerworbenes Recht" bezeichnet wird, vgl. Elfte Zivilabteilung des Kassationsgerichts, 2012-13234/3514, 25.2.2014 < https://www.sinerjimevzuat.com.tr/ > zugegriffen am 11.8.2022.

17 Vgl. Forstmoser, Meier-Hayoz und Nobel (n 15) § 39 N 118, § 40 N 22. Zur die Ansicht, dass das unverzichtbar ist [Reha Poroy, Ünal Tekinalp und Ersin Çamoğlu, *Ortaklıklar Hukuku I* (15. Ausg., Vedat 2021) N 898a]. Nach der Revision wird das Recht auf die Gewinnstrebigkeit der Gesellschaft mit der Anfechtbarkeit im OR Art. 706 II Ziff.4 sanktioniert. Gemäß dieser Regelung, Beschlüsse, die die Gewinnstrebigkeit der Gesellschaft ohne Zustimmung sämtlicher Aktionäre aufheben, ist anfechtbar.

18 Elfte Zivilabteilung des Kassationsgerichts, 2018-353/2685, 8.4.2019 < https://www.sinerjimevzuat.com.tr/ > zugegriffen am 11.8.2022.

B. Verletzung des Gleichbehandlungsgrundsatzes

Sanktionen gegen Generalversammlungsbeschlüsse, die gegen den Gleichbehandlungsgrundsatz (HGB Art. 357) verstoßen, sind umstritten. Eine Ansicht in der rechtswissenschaftlichen Fachliteratur argumentiert damit, dass Generalversammlungsbeschlüsse, die dem Gleichbehandlungsgrundsatz zuwiderlaufen, anfechtbar sind[19]. Gewisse Stimmen befürworten, die Sanktion sollte die Nichtigkeit sein[20]. Andere argumentieren dagegen und unterscheiden zwischen der Schwere des Verstoßes gegen den Gleichbehandlungsgrundsatz: Ein fortlaufender Verstoß könnte zur Nichtigkeit führen, während ein einzelner Verstoß anfechtbar wäre[21].

Durch die übermäßige Festsetzung der Vergütung für Vorstandsmitglieder wird der Gleichbehandlungsgrundsatz verletzt, da den geschäftsführenden Aktionären Vorteile bei der Gewinnerzielung verschafft werden[22]. Daher sollte im Kontext unseres Themas angenommen werden, dass die hier anzuwendende Sanktion als nichtig betrachtet werden sollte[23]. Dieser Verstoß gegen den Gleichbehandlungsgrundsatz betrifft nicht nur die Rechte der gegenwärtigen Aktionäre, sondern auch die Rechte zukünftiger Aktionäre. Da übermäßige Vergütungen über Jahre hinweg an Geschäftsführern gezahlt werden könnten und wie zuvor erwähnt die neuen Vergütungen unter Berücksichtigung der bereits übermäßigen Vorgänger festgelegt werden.

C. Verletzung des Grundsatzes des Kapitalschutz

Gemäß dem HGB Art. 480 III, können Aktionäre das, was sie der Gesellschaft als Kapital zugeführt haben, nicht zurückverlangen (Verbot der Einlagenrückgewähr). Dabei wird der Begriff „Kapital" weit gefasst und ist nicht auf das Grundkapital beschränkt. Das Gesellschaftsvermögen, das über das Grundkapital hinausgeht, wird in diesem Zusammenhang ebenfalls berücksichtigt[24]. Die Einlagenrückgewähr kann entweder in Form offener oder verdeckter Leistungen erfolgen. Dividendenzahlungen

19 Abuzer Kendigelen, *Yeni Türk Ticaret Kanunu Değişiklikler, Yenilikler ve İlk Tespitler* (2. Ausg., On İki Levha 2012) 279; Kırca, Manavgat und Şehirali Çelik (n 2) 84, 85; İsmail Kırca, *Anonim Şirket Genel Kurul Kararlarının Hükümsüzlüğü* (3. Ausg., On İki Levha 2022) N 119; Forstmoser, Meier-Hayoz und Nobel (n 15) § 39 N 83.

20 Poroy, Tekinalp und Çamoğlu, N 722c.

21 Erdoğan Moroğlu, *Anonim Ortaklıkta Genel Kurul Kararlarının Hükümsüzlüğü* (9. Ausg., On İki Levha 2020) 234, 235; Şükrü Yıldız, *Anonim Ortaklıkta Pay Sahipleri Açısından Eşit İşlem İlkesi* (Seçkin 2004) 213-215; Setenay Yağmur, *Anonim Şirketlerde Eşit İşlem İlkesi* (On İki Levha 2020) 251-257.

22 Elfte Zivilabteilung des Kassationsgerichts, 2018-353/2685, 8.4.2019 < https://www.sinerjimevzuat.com.tr/ > zugegriffen am 11.8.2022.

23 Vgl. Marc Bauen und Robert Bernet, *Schweizer Aktiengesellschaft* (Schulthess 2007) N 292. Für die Gegenansicht, vgl. Claire Huguenin Jacobs, *Das Gleichbehandlungsprinzip im Aktienrecht* (Schulthess 1994) 100.

24 Beşir Fatih Doğan, 'Anonim Şirketlerde Sermaye Payını Geri Ödeme Yasağı' (2005) 56 TBB Dergisi 48, 49; Funda Özdin, „Sermayenin İadesi Yasağı"nın (TTK m. 480/3) Örtülü Malvarlığı Aktarımının Önlenmesi Açısından Geniş Yorumlanması Zorunluluğu -Alman ve İsviçre Hukukları ile Karşılaştırmalı Olarak-' in *Tüzel Kişilik Penceresinden Anonim Ortaklık Sempozyumu* (On İki Levha 2021) 85, 94 ff.; Florian Drinhausen, in *Aktienrecht und Kapitalmarkt*, Thomas Heidel (Hrsg.) (5. Aufl., Nomos 2020) § 57 N 4; Holger Fleischer, in *AktG Kommentar*, Karsten Schmidt und Marcus Lutter (Hrsg.) (3.Aufl., Otto Schmidt 2015) § 57 N 9; Wolfgang Servatius, in *AktG Kommentar*, Thomas Wachter (Hrsg.) (4. Aufl., RWS 2022) § 57 N 3, 9; Jens Koch, in *Aktiengesetz*, Uwe Hüffer (Begr.), Jens Koch (Bearb.) (17. Aufl., C.H.Beck 2023) § 57 N 4.

ohne Jahresabschluss oder Kapitalrückzahlungen ohne entsprechenden Kapitalherabsetzungsbeschluss könnten als offene Leistungen betrachtet werden. Hingegen bedeuten verdeckte Leistungen, dass die Einlagenrückgewähr hinter anderen Rechtsgeschäften, wie beispielsweise einer verdeckten Gewinnausschüttung, verborgen wird[25]. Für eine verdeckte Gewinnausschüttung wird ein objektives Missverhältnis zwischen Leistung und Gegenleistung benötigt[26]. Übermäßige Zahlungen an einen Gesellschafter, der aber gleichzeitig ein Vorstandsmitglied ist, unter dem Namen der „Vergütung", stellen ein typisches Beispiel für eine verdeckte Gewinnausschüttung dar[27].

Die Zahlungen können direkt an den Aktionär erfolgen oder durch die Beteiligung Dritter vermittelt werden. Eine Beteiligung Dritter könnte auftreten, wenn Leistungen an Dritte erbracht werden, die dem Aktionär zuzurechnen sind, sei es auf Veranlassung des Aktionärs oder an nahe Angehörige[28]. Daher kann das Verbot auch dann gelten, wenn der Geschäftsführer nicht gleichzeitig ein Gesellschafter ist. Es kann nachgewiesen werden, dass eine Verbindung zwischen dem Gesellschafter und dem Geschäftsführer besteht. Die Kriterien hinsichtlich des Verbots der verdeckten Gewinnausschüttung in Publikumsgesellschaften, wie „natürliche oder juristische Personen, mit denen sie in direkter oder indirekter Geschäftsführungsbeziehung stehen" soll auch hier analog angewendet werden[29]. Tatsächlich sind die Vergütungen übermäßig, wenn der Geschäftsführer gleichzeitig der Mehrheitsaktionär oder der Geschäftsführer ein Dritter ist, der sich jedoch wie ein Vertreter der Mehrheitsaktionäre verhält. In anderen Fällen ist es in der Praxis unmöglich, Vergütungen übermäßig zu ermitteln.

Da die rechtswidrige Übertragung des Gesellschaftsvermögens auf bestimmte Aktionäre nicht mit dem Grundsatz des Kapitalschutzes vereinbar ist, ist der Organbeschluss auch aus diesem Grund nichtig[30] (HGB Art. 447).

D. Einschätzung in Bezug auf das HGB Art. 512

Gemäß dem HGB Art. 512 sind „Aktionäre, die ungerechtfertigt und in bösem Glauben Dividenden oder Bauzinse bezogen haben, zur Rückerstattung verpflichtet. Die gleiche Regelung gilt für die Tantièmen von Vorstandsmitgliedern". Die Ungerechtfertigkeit in diesem Kontext bedeutet, dass ein Organbeschluss zur Ausschüttung einer Dividende, Bauzinsen oder Tantièmen vorliegt, dieser Beschluss

25 Vgl. Drinhausen (n 24) § 57 N 7, 8; Fleischer (n 24) § 57 N 10, 11; Koch (n 24) § 57 N 13; Servatius (n 24) § 57 N 3, 11.

26 Fleischer (n 24) § 57 N 12; Koch (n 24) § 57 N 15.

27 Vgl. Fleischer (n 24) § 57 N 21; Koch (n 24) § 57 N 37.

28 Fleischer (n 24) § 57 N 31.

29 KMG Art. 21 I.

30 Kaya (n 5) 1537, 1540, 1542. Vgl. Özlem Akıncı Albayrak, *Anonim Şirketler Hukukunda Şirket Malvarlığının Korunması* (On İki Levha 2022) 524 ff.

jedoch aufgrund einer fehlerhaften Bilanz oder eines Gesetzesverstoßes rechtswidrig ist[31]. Der Antragsteller muss nachweisen, dass sowohl der Aktionär als auch die Vorstandsmitglieder, die ungerechtfertigt Dividende oder Tantième erhalten haben, ebenfalls in bösem Glauben gehandelt haben. Diese Regelung findet daher Anwendung in Fällen, in denen die Zahlungen technisch betrachtet ungerechtfertigt und in bösem Glauben sind unter den Bezeichnungen „Dividende", „Bauzinse" und „Tantième" erfolgen. Diese Regelung gilt nicht für Fälle, in denen es keinen Gewinnausschüttungsbeschluss gibt und die Rechtswidrigkeit nicht auf übermäßiger Vergütung beruht. Daher sollte nach HGB Art. 512 nicht als rechtliche Grundlage für die Rückerstattung von Vergütungen angesehen werden[32]. Diese Regelung ist auch ungünstig, da sie nur für Aktionäre im Rahmen von Dividenden eine Rückgabepflicht vorsieht und tantièmenspezifisch für Vorstandsmitglieder ist.

III. Rückerstattung bereits bezahlter Vergütungen

A. Allgemeines

In nahezu all seinen Entscheidungen, in denen die Vergütung der der Verwaltungsratsmitglieder bestimmt wird, dass das Kassationsgericht die Sanktion der vollständigen Anfechtbarkeit des Generalversammlungsbeschlusses angewandt. Besonders kontrovers wird dieser Streit, wenn es um Anfechtungsklagen geht, da der Handlungsspielraum des Richters bezüglich der Formulierung von Urteilen wie „anfechten" oder „nicht anfechten" variiert und die Unklarheit darüber besteht, ob eine Entscheidung als „teilweise anfechten" möglich ist[33]. Die Festlegung der Vergütungshöhe unter Berücksichtigung der Situation und Bedürfnisse der Gesellschaft ist eine Frage der kaufmännischer Erfahrung und kann am besten von Aktionären und Geschäftsführern getroffen werden, die in engem Kontakt mit der Gesellschaft stehen[34]. Aus diesem Grund sollte der Richter in der Regel nicht in die Festsetzung der Vergütungshöhe eingreifen. Andererseits sollte es nicht unterschieden werden zwischen der Verhinderung der Durchführung des Organbeschlusses durch die Feststellung seiner Beschlussungültigkeit oder der Feststellung, dass ein Teil des Beschlusses ungültig ist, basierend auf der Erkenntnis, dass die festgesetzte Vergütung übermäßig ist. Ebenso wenig sollte unterschieden werden zwischen der

31 Vgl. Elfte Zivilabteilung des Kassationsgerichts, 1772/6175, 27.10.1988 < https://www.sinerjimevzuat.com.tr/ > zugegriffen am 29.10.2022.

32 Vgl. Ece Deniz Günay, *Sermaye Piyasası Hukukunda Örtülü Kazanç Aktarımı ve Türk Ticaret Kanunu Açısından Değerlendirilmesi* (On İki Levha 2018) 163 ff.; Kırca, Manavgat und Şehirali Çelik (n 2) 746.

33 Zur die Ansicht über die teilweise Anfechtung der Generalversammlungsbeschlüsse ist möglich, vgl. Moroğlu (n 21) 248-249; Simon Bühler und Hans Caspar von der Crone, 'Positive Beschlussfeststellungsklage' (2014) 86 SZW 564, 571. Nach Ansicht des Kassationsgerichts kann das Gericht den Generalversammlungsbeschluss nicht teilweise anfechten. Elfte Zivilabteilung des Kassationsgerichts, 8440/16410, 23.10.2014 < https://www.sinerjimevzuat.com.tr/ > zugegriffen am 20.9.2022.

34 BGE 82 II 148 S. 150.

Gewährleistung, dass eine als angemessen erachtete Vergütung erhoben wird[35]. Tatsächlich hat das Schweizerische Bundesgericht in einer Anfechtungsklage, bei der ein Antrag auf Aufhebung des Generalversammlungsbeschlusses gestellt wurde, die eine Erhöhung der Vergütung von 50.000 Franken auf 70.000 Franken vorsah, und in der die Festsetzung der Vergütung auf 35.000 Franken beschlossen wurde, nachdem festgestellt wurde, dass es keine vernünftige wirtschaftliche Begründung für die Erhöhung der Vergütung gab, den betreffenden Teil des Beschlusses aufgehoben hat. In der Entscheidung wurde auch diskutiert, ob der Richter befugt ist, über die teilweise Anfechtung des Organbeschlusses zu entscheiden. Es wurde festgestellt, dass die teilweise Anfechtung im Rahmen des OR Art. 706 (HGB Art. 445) liegt, die dem Richter die Befugnis erteilt, den Beschluss der Generalversammlung aufzuheben, soweit er gegen das Gesetz oder die Satzung verstößt[36]. Dies ist jedoch keine allgemein anerkannte Praxis im schweizer Recht und wird von einigen Autoren kritisiert[37].

Da zwischen dem Vorstandsmitglied und der Gesellschaft ein dauerndes Schuldverhältnis besteht, wird in einigen rechtswissenschaftlichen Fachliteraturen argumentiert, dass dieses Verhältnis mit Wirkung für die Zukunft endet. Es wird dabei betont, dass es gegen Treu und Glauben verstoße, eine Rückerstattung der bereits bezahlten Vergütungen zu verlangen[38]. Sowohl die Sanktion der Nichtigkeit als auch der Anfechtbarkeit haben aber auch Rückwirkungen (*ex tunc*) auf den Organbeschluss[39]. Da die Nichterstattung der bezahlten Vergütungen die Ungültigkeitsentscheidung unwirksam macht und sogar die Rückerstattung des rechtswidrig bezahlten Gewinnanteils möglich ist (HGB Art. 512 I), das heißt, in diesem Fall liegt kein Verstoß gegen Treu und Glauben vor, sollten auch die bezahlten Vorstandsmitgliedervergütungen rückerstattet werden[40].

Nach einer anderen Ansicht sollte die Rückerstattung gemäß den Regelungen der ungerechtfertigten Bereicherung erfolgen. Bei der ungerechtfertigten Bereicherung kann der tatsächliche Bereicherungsbetrag gefordert werden, selbst wenn keine neue Beschlussfassung über die Vergütungen in der Generalversammlung erfolgt ist. In dieser Ansicht wird lediglich der Teil der Vergütung von den Vorstandsmitgliedern

35 Zur die Ansicht, dass eine teilweise Aufhebung den leichten Eingriff in die Beschlussfreiheit der Generalversammlung darstellt als komplette Aufhebung, vgl. Claire Huguenin und Bruno Mahler, 'Anfechtbarkeit und Nichtigkeit als Folgen mangelhafter Generalversammlungsbeschlüsse' in Aktuelle Herausforderungen des Gesellschafts- und Finanzmarktrechts, Festschrift für Hans von der Crone zum 60. Geburtstag, Rolf H Weber, Walter A Stoffel, Jean-Luc Chenaux und Rolf Sethe (Hrsg.) (Schulthess 2017) 131, 145.

36 BGE 84 II 550 S. 555.

37 Huguenin und Mahler (n 35) 145-146.

38 Huriye Kubilay, 'Anonim Ortaklıklarda Yönetim Kurulu Üyelerinin Ücretlerinin Belirlenmesi' in *Ticaret Hukuku ve Yargıtay Kararları Sempozyumu XXIV (10-11 Aralık 2010)* (BTHAE 2012) 9, 32-34.

39 Transaktionen mit gutgläubigen Dritten bleiben vorbehalten (HGB Art. 371/4).

40 In die gleiche Richtung, vgl. Kırca, Manavgat und Şehirali Çelik (n 2) 751.

gefordert, der über die angemessene Vergütung hinausgeht[41]. Diese Ansicht zielt darauf ab, das Problem anhand allgemeiner Bestimmungen zu lösen. Steht im HGB jedoch eine spezifische Regelung dazu?

Wenn der Richter der Ansicht ist, dass die Vergütung übermäßig ist, steht er vor der Entscheidung, entweder gemäß den oben beschriebenen Kriterien eine bestimmte Vergütung festzulegen oder sich darauf zu beschränken, die Ungültigkeit des Organbeschlusses über die Vergütung festzustellen. Die Beantwortung dieser Frage liefert der Gesellschaft Klarheit darüber, ob die berechtigt ist, die Rückerstattung der Vergütung zu fordern, und falls ja, in welchem Umfang diese Forderung besteht.

B. Könnte KMG Art. 21 als Grundlage für die Rückerstattung dienen?

Wie oben erwähnt, gibt es diesbezüglich eine besondere Regelung unter dem Titel „Verbot der verdeckten Gewinnausschüttung" im KMG Art. 21 für Publikumsgesellschaften. Diese Regelung dient der Bereitstellung von Lösungen sowohl für die Bestimmung der Grundsätze der „Übermäßigkeit" von Vergütungen (Art. 21 I, II) als auch für die Rückerstattung zu Unrecht erhaltenen Vergütungen (Art. 21 IV). Sofern die Gewinnausschüttung durch die Finanzdienstleistungsaufsicht festgestellt wird, sind Publikumsgesellschaften dazu verpflichtet, von den Parteien, die den Gewinn erhalten haben, innerhalb einer von ihr festgelegten Frist die Rückerstattung des übertragenen Betrags zusammen mit den gesetzlichen Zinsen an die Gesellschaft zu fordern. Die Empfänger des Gewinns sind verpflichtet, dieser Forderung nachzukommen. Die Art. 94 und Art. 110 sowie die in den einschlägigen Rechtsregelungen vorgesehenen rechtlichen, strafrechtlichen und verwaltungsrechtlichen Sanktionen bleiben vorbehalten (KMG Art. 21 IV). Obwohl die Grundsätze als Einhaltung der Grundsätze der Armlänge, der Marktpraxis und der Vorsicht und Aufrichtigkeit des Geschäftslebens zur Bestimmung der verdeckten Gewinnausschüttung (Art. 21 I, II) bei Aktiengesellschaften analog berücksichtigt werden können, gestaltet sich die Anwendung der im Abschnitt IV festgelegten Sanktionen auf Aktiengesellschaften als schwierig. Hierbei findet die Auslegungsregel als „*Lex specialis derogat legi generali*" keine Anwendung, da das KMG speziell auf Publikumsgesellschaften zugeschnitten ist.

C. Wie wäre es mit HGB Art. 1530 I?

Gemäß dem HGB Art. 1530 I S.1[42] sind Geschäfte und Bedingungen, die durch handelsrechtliche Regelungen verboten sind, nichtig, es sei denn, es liegt eine gegenteilige Regelung vor. Diese Regelung ähnelt derjenigen im deutschen Recht, wonach ein Rechtsgeschäft, das gegen ein gesetzliches Verbot verstößt, nichtig

41 Kırca, Manavgat und Şehirali Çelik (n 2) 752.

42 Dieselbe Regelung wurde in Art. 1466 des HGB Nr. 6762 aufgenommen.

ist, sofern nicht das Gesetz etwas Anderes vorsieht (BGB[43] § 134). § 134 ist im Bürgerlichen Gesetzbuch geregelt und gilt daher im gesamten Privatrechtsbereich. HGB Art. 1530 I ist jedoch etwas Besonderes für den Handelsbereich. Trotz dieser Unterschiede können die Ausführungsbestimmungen des BGB § 134 im Sinne vom HGB Art. 1530 berücksichtigt werden[44].

Diese Regelung sieht keine Sanktion vor, die bei jedem Verbot verhängt werden muss. Wenn ein Verbot mit einer Spezialregelung wie der Anfechtung sanktioniert wird, muss diese Sanktion zunächst auf diesen Verstoß angewendet werden[45]. Die hier angeordnete Nichtigkeit tritt daher nur dann ein, wenn die handelsrechtlichen Regelungen selbst keine ausdrückliche Rechtsfolgenregelung vorsieht (*lex imperfecta*) und ihre Auslegung ergibt, dass das Rechtsgeschäft nach Sinn und Zweck des Verbots keine Wirksamkeit entfalten soll[46]. Die Nichtigkeitsfolge betrifft grundsätzlich das gesamte Rechtsgeschäft (Totalnichtigkeit). Wenn jedoch aus einer an den Zweck des Gesetzes orientierten Auslegung etwas Anderes hervorgeht, tritt eine teilweise Nichtigkeit des Rechtsgeschäfts ein (Teilnichtigkeit)[47].

Der Organbeschluss, durch den die Vergütungen der Vorstandsmitglieder als übermäßig festgelegt wurden, muss gemäß dem HGB Art. 1530 I S.1 als nichtig anerkannt werden. Wie oben ausgeführt, handelt es sich bei den gesetzlichen Regelungen, die durch die übermäßige Festsetzung der Vergütungen verletzt werden, um handelsrechtliche Regelungen, die Rechtsgeschäfte und Beschlüsse untersagen, welche die unverzichtbaren Rechte der Aktionäre einschränken, den Gleichbehandlungsgrundsatz verletzen und gegen den Grundsatz des Kapitalschutzes[48] verstoßen. Daher gibt es keinen Grund, weshalb HGB Art. 1530 I S.1 nicht auf die Konsequenzen einer Verletzung dieser Bestimmungen angewendet werden sollte.

Es sollte auch in Bezug auf HGB Art. 512 betrachtet werden. Wenn ein Rechtsgeschäft zwar den buchstäblichen Wortlaut einer Verbotsregelung nicht verletzt, jedoch durch seinen Inhalt und Zweck darauf abzielt, das rechtliche oder wirtschaftliche Ergebnis eines Rechtsgeschäfts grundsätzlich zu verhindern (Umgehungsgeschäft), dann fällt es unter das Verbot jedes Rechtsgeschäfts, das solche Ergebnisse erzielen soll[49]. Kann man damit argumentieren, dass HGB Art.

43 Deutsches Bürgerliches Gesetzbuch (BGBl. I S. 42, ber. S. 2909, 2003 S. 738).

44 Vgl. İsmail Özgün Karaahmetoğlu, 'TTK M. 1530/1 Bağlamında Ticari Hükümlerle Yasaklanmış İşlemler' (2021) 6(2) YBHD 565, 578 ff.

45 Wucher Armbrüster, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Franz Jürgen Säcker, Roland Rixecker, Hartmut Oether und Bettina Limperg (Hrsg.) (9. Auf., C.H.Beck 2021) § 134 N 2; Heinrich Dörner, in *Bürgerliches Gesetzbuch*, Reiner Schulze (Hrsg.) (11. Aufl., Nomos 2021) § 134 N 5.

46 Armbrüster (n 45) § 134 N 2; Dörner (n 45) § 134 N 7.

47 Dörner (n 45) § 134 N 10; Heinz-Peter Mansel, in *Jauernig Bürgerliches Gesetzbuch*, Rolf Stürner (Hrsg.) (18. Aufl., C.H.Beck 2021) § 134 N 15.

48 Armbrüster (n 45) § 134 N 104.

49 Dörner (n 45) § 134, N 11; Armbrüster (n 45) § 134 N 18, 19; Mansel (n 47) § 134 N 18.

512 durch eine übermäßige Vergütung umgangen werden kann? Im Gegensatz zum schweizerischen Recht existiert im HGB keine Bestimmung wie im OR Art. 678 II, die Aktionäre, Vorstandsmitglieder und ihre Angehörigen verpflichtet, der Gesellschaft andere Leistungen zurückzuerstatten, die in einem offensichtlich unverhältnismäßigen Verhältnis zur wirtschaftlichen Lage der Gesellschaft stehen. Obwohl OR Art. 678 I im ursprünglichen türkischen Gesetz zitiert wurde, hat der Gesetzgeber sich entschieden, den zweiten Abschnitt (und auch den dritten Abschnitt[50]) nicht zu übernehmen. Dies zeigt, dass der Gesetzgeber bewusst darauf verzichtet hat, diesen Abschnitt zu implementieren. Daher könnte im HGB Art. 512 sowohl allein als auch in Verbindung mit der Auslegung im Hinblick auf Art. 1530 I nicht als Grundlage für übermäßige Vergütungen dienen.

Wie bereits erwähnt, enthält HGB 1530 I S.1 auch die Teilnichtigkeit, wodurch ein Organbeschluss für nichtig erklärt werden kann, soweit sie übermäßig ist. HGB Art. 1530 I enthält jedoch eine Sonderregelung und gleichzeitig eine Begrenzung für die Teilnichtigkeit bei Verträgen. Dementsprechend ist geregelt, dass Verträge, die die gesetzlich oder behördlich festgelegte Höchstgrenze überschreiten, als über der Höchstgrenze abgeschlossen gelten (HGB Art. 1530 I S.2)[51]. Hier ermächtigt der Gesetzgeber den Richter, in die Rechtsgeschäfte einzugreifen. Zwar handelt sich nicht um einen gesetzlich definierten Begriff, aber in der rechtswissenschaftlichen Literatur (und Rechtsprechung) wird diese Befugnis des Richters als „geltungserhaltende Reduktion" qualifiziert. Mit dieser geltungserhaltenen Reduktion wird die rechtsgeschäftliche Geltungsfreiheit eingeschränkt, indem der Richter in den Vertragsinhalt eingreift, wie etwa der Mitgestaltung bzw. der Korrektur[52]. Im Falle der Vertragsinhaltskorrektur korrigiert ein übermäßiger Inhalt durch das Gericht[53]. Damit wird die maximale Rechtsgültigkeit des Vertrags und folglich die Rechtssicherheit im Handelsverkehr, die unverzichtbar für das Handelsleben ist, beabsichtigt. Obwohl es sich um einen Ausnahmefall handelt, wird dem Richter gemäß HGB Art. 1530 I S.2 ausdrücklich die Befugnis erteilt, indem die Berechtigungsgrenze deutlich aufgewiesen wird. Im Rahmen der vorliegenden Angaben ist es zweifellos die Aufgabe des Richters, die angemessene Vergütung festzulegen, wie sie vom Gesetz oder der zuständigen Behörde, die hier als gesetzlicher Richter fungiert, vorgegeben wurde. Es ist auch deutlich im HGB 1530, I S.3 geregelt, dass TOR[54] Art. 27 II S.2

50 Was regelt, dass der Anspruch auf Rückerstattung der Gesellschaft und dem Aktionär zusteht und dieser auf Leistung an die Gesellschaft klagt.

51 Aus diesem Grund werden in der Lehre zu der zuvor genannten Bestimmung Bezeichnungen wie „modifizierte Teilnichtigkeit" und „gesetzliche Konversion" verwendet. Darüber vgl. Fahri Erdem Kaşak, *Sözleşme Özgürlüğünün Sınırı Olarak Kanunun Emredici Hükümlerine Aykırılık* (2. Ausg., On İki Levha 2021) 437 N 535.

52 Katharina Uffmann, *Das verbot der geltungserhaltenden Reduktion* (Mohr Siebeck 2010) 13 ff.; Alessia Dedual, *Geltungserhaltende Reduktion* (Mohr Siebeck 2017) 16-19. Vgl. auch [Kaya (n 5) 1542]. 16-19.

53 Dedual (n 52) 34; Uffmann (n 52) 13.

54 Türkisches Obligationenrecht (Nr. 6098, OZ 4.2.2011/27836) Art. 27 II S.2: „Wenn klar ersichtlich ist, dass der Vertrag ohne diese Bestimmungen nicht zustande kommt, ist der gesamte Vertrag nichtig".

in diesem Zusammenhang keine Anwendung findet und daher keine Notwendigkeit besteht, den Parteiwillen zu berücksichtigen. Folglich gelten der Vertrag und der zugrundeliegende Generalversammlungsbeschluss, die die Vergütung der Vorstandsmitglieder bestimmen, als rechtswidrig, soweit sie angemessene Grenzen überschreiten. Die Sanktion der Nichtigkeit sollte für den Beschluss- und Vertragsteil angewendet werden, der die angemessene Vergütung übersteigt.

Aus den Ausführungen in der Begründung[55] lässt sich vielleicht erahnen, dass die Regelung zum Parteischutz in wirtschaftlicher Notlage gedacht war[56], und dass sie bei den übermäßigen Vergütungen der Vorstandsmitglieder keine Anwendung finden würde. Zu beachten ist, dass solch eine Beschränkung des Anwendungsbereichs im Wortlaut der Regelung nicht enthalten ist. Auch im deutschen Recht im Sinne des BGB § 134 bedarf es einer solchen Anforderung nicht. Damit die Bestimmung durchgesetzt werden kann, muss sich eine Vertragspartei nicht in einer schwachen Position befinden. Auch wenn es so ist, darf dabei nicht außer Acht gelassen werden, dass die Vergütung der Vorstandsmitglieder über der gerichtlich festgelegten Vergütung erfolgt: Einerseits schützt die verfassungsrechtlich geschützten Vorstandsmitglieder vor dem Verbot der Zwangsarbeit, und darüber hinaus die Minderheitsaktionäre, die gegenüber den Mehrheitsaktionären in einer schwachen Position sind.

Hier entscheidet der Richter nicht über etwas anderes als den Antrag, demzufolge liegt kein Verstoß gegen das Zivilprozessrecht (ZPO[57] Art. 26) vor. Der Antrag des Antragstellers zielt darauf ab, eine Rechtswidrigkeit aufgrund der übermäßigen Vergütung festzustellen und den Generalversammlungsbeschluss aus diesem Grund für ungültig zu erklären. Es obliegt jedoch dem Richter, den Rechtscharakter des Antrags nämlich den Typen der Rechtsungültigkeit und die auf den konkreten Sachverhalt anzuwendenden Regeln zu bestimmen (ZPO Art. 33). Das Gesetz gibt dem Richter hierbei die Anweisung, hier HGB Art. 1530, I anzuwenden. Tatsächlich entscheidet der Richter in einer Klage, die den Antrag auf Anfechtung des Generalversammlungsbeschluss betrifft, den Beschluss mit der Nichtigkeitssanktion zu verhängen[58].

Auch für den Fall, dass die Vergütungen als übermäßig angesehen werden und der diesbezügliche Generalversammlungsbeschluss für Totalnichtig erklärt wird, sind die Vorstandsmitglieder berechtigt, Klage zu erheben und zu verlangen, dass ihnen eine angemessene Vergütung bezahlt wird[59]. In diesem Fall ist es aus prozessökonomischer

55 Siehe den offizielle Bericht der Justizkommission des HGB Nr. 6762, (1/150, 50), 4.6.1956 [Hüseyin Ülgen, Arslan Kaya, Mehmet Helvacı und Füsun Nomer Ertan, *Ticari İşletme Hukuku* (8. Ausg., On İki Levha 2022) 55-56].

56 Daher vgl. Elfte Zivilabteilung des Kassationsgerichts, 5426/5544, 11.11.1978: „…dass die Bestimmung die Partei in wirtschaftlicher Notlage schützt und mit der öffentlichen Ordnung zusammenhängt. …" [Ülgen, Kaya, Helvacı und Nomer Ertan (n 55) 56 fn. 11].

57 Türkische Zivilprozessordnung Nr. 6100, OZ 4.2.2011/27836.

58 Elfte Zivilabteilung des Kassationsgerichts, 2016-11386/3628, 16.5.2018 < https://www.sinerjimevzuat.com.tr/ > zugegriffen am 13.8.2022.

59 Elfte Zivilabteilung des Kassationsgerichts, 2020-1175/194, 20.1.2021 < https://karararama.yargitay.gov.tr/ > zugegriffen

Sicht nicht angebracht, dass das Gericht eine Entscheidung über die vollständige Nichtigkeit erlässt.

Wenn der Generalversammlungsbeschluss für Totalnichtig erklärt wird, steht der Generalversammlung praktisch nichts mehr im Wege, denselben Beitrag erneut oder mit einem symbolischen Rabatt festzusetzen. Tatsächlich tritt diese Situation in der Praxis häufig auf[60]. Zweifellos ist in diesem Fall der neue Beschluss, die Gerichtsentscheidung aufzuheben, nicht nur rechtswidrig, da er weiterhin den Unwirksamkeitsgrund des bisherigen Generalversammlungsbeschlusses trägt, sondern auch in seiner Art und Weise nicht im Einklang mit Treu und Glauben. Um die Unwirksamkeit des neu getroffenen Beschlusses festzustellen, muss jedoch erneut Klage durch den Minderheitsaktionär erhoben werden. Die Anwendung von HGB Art. 1530 I wird die Erhebung von Klagen aus diesem Grund verhindern.

Bei Anwendung HGB Art. 1530 I erfolgt die Rückerstattung gemäß den Regelungen über die ungerechtfertigte Bereicherung (TOR Art. 77 ff.). Die Regelung im TOR Art. 78 I zur ungerechtfertigten Bereicherung in der Form „Derjenige, der die Leistung freiwillig erfüllt, dass er nicht verschuldet ist, kann sie nur zurückfordern, wenn er nachweist, dass er sie erfüllt hat, indem er annimmt, ein Schuldner zu sein" erschwert diese Klagen, indem der Rückerstattungsantrag des Anspruchstellers unter der Bedingung angenommen wird, dass die Zahlung nur irrtümlich erfolgt ist. Diese Situation wurde im Bereich der kaufmännischen Bestimmungen als bedenklich eingestuft und mit HGB Art. 1530 I geregelt, um TOR Art. 78 I zu deaktivieren, sodass eine Rückerstattung erfolgte, selbst wenn die Grenzüberschreitungen irrtümlich nicht erfüllt wurden[61].

Der Schuldner einer fälligen Schuld kommt mit einer Mahnung des Gläubigers in Verzug (TOR Art. 117 I). Bei ungerechtfertigter Bereicherung kommt der Schuldner zum Zeitpunkt der Bereicherung in Verzug. In Fällen, bei denen der ungerechtfertigt Bereicherte gutgläubig ist, ist die Mahnung jedoch weiterhin für den Verzug erforderlich (TOR Art. 117 II). Zinsen können demnach ab dem Zeitpunkt der Bereicherung, also der Vergütungsbezahlung, verlangt werden. Da ein Vertrag, der für die eine Partei ein Handelsgeschäft ist, für die andere Partei in der Regel als ein Handelsgeschäft anzusehen ist (HGB Art. 19 II), hat das Vorstandsmitglied, das nicht kaufmännischer Vertragspartei ist, gegebenenfalls auch Zinsen in Höhe des Zinssatzes für kurzfristige Vorschüsse[62] zu zahlen[63].

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am 16.7.2022; 13605/151, 15.1.2007 < https://www.sinerjimevzuat.com.tr/ > zugegriffen am 21.8.2022; 2018-4391/5822, 25.9.2019 [İstanbul Üniversitesi Hukuk Fakültesi Ticaret Hukuku Anabilim Dalı, *Yargıtay Hukuk ve Ceza Dairelerinin Türk Ticaret Kanununa İlişkin Kararları 2019* (On İki Levha 2020) 189-190]; Dreiundzwanzigster Zivilabteilung des Kassationsgerichts, 457/6126, 7.10.2013 < https://www.sinerjimevzuat.com.tr/ > zugegriffen am 21.8.2022.

60 Vgl. Elfte Zivilabteilung des Kassationsgerichts, 4218/11560, 16.6.2014 < https://www.sinerjimevzuat.com.tr/ > zugegriffen am 27.9.2022.

61 Begründung von HGB (Nr. 6762) 1466.

62 Gesetz über gesetzliche Zinsen und Verzugszinsen (Nr. 3095, OZ 19.12.1984/18610) Art. 2 II.

63 Vgl. Sabih Arkan, *Ticari İşletme Hukuku* (28. Ausg., BTHAE 2022) 89.

Die Verjährung der Rückerstattungsforderung bestimmt sich auch nach den Regelungen über ungerechtfertigte Bereicherung. Dieser Zeitraum beträgt 2 und 10 Jahre (TOR Art. 82). Die 2-Jahresfrist beginnt ab dem Datum, an dem der Kläger erfährt, dass er das Recht auf Rückforderung hat, und die 10-Jahresfrist beginnt ab dem Zeitpunkt, an dem die Bereicherung stattfindet[64].

V. Auflösung der Gesellschaft

Wird die Fortführung der Gesellschaft für die Minderheitsaktionäre durch Wegfall oder Einschränkung ihres Dividendenrechts durch eine übermäßige Festsetzung der Vergütungen der Vorstandsmitglieder untragbar, und ist diese Situation dauerhaft, dann können diese Aktionäre die Auflösung der Gesellschaft gemäß HGB Art. 531[65] verlangen.

Schlussfolgerung

Das türkische Recht enthält keine Regelung über die Grundsätze, die den Umfang der Vergütungen in Aktiengesellschaften bestimmen. Daher gibt es einige Probleme sowohl bei der Bestimmung der Höhe der Vergütungen als auch bei den Sanktionen, die bei zu Unrecht festgesetzten Vergütungen zu verhängen sind. Wenn die Höhe der Vergütung falsch festgelegt wird, beeinträchtigt dies grundsätzlich die Interessen der Aktionäre an der Dividende. In diesem Fall ist es wichtig, die Art der Rechtswidrigkeit und die zur Verfügung stehenden Rechtsmittel für die Aktionäre, deren Rechte verletzt wurden, zu bestimmen.

HGB Art. 512 sollte hier nicht angewendet werden, da diese Regelung in spezifischen Fällen zur Anwendung kommen kann. Auch die teleologische Auslegung hindert uns daran, diese Bestimmung im Rahmen von HGB Art. 1530 zu berücksichtigen. Der Gesetzgeber hat bewusst darauf verzichtet, den zweiten Abschnitt von OR Art. 678 II (der den Aktionären die Möglichkeit gibt, von den Vorstandsmitgliedern die übermäßigen Vergütungen zurückzufordern) zu übernehmen. Dies zeigt, dass der Gesetzgeber diesen Abschnitt bewusst nicht erlassen wollte und HGB Art. 512 sich daher sowohl allein als auch mit der Auslegung im Hinblick auf HGB Art. 1530 I nicht als Grundlage für übermäßige Vergütungen dienen könnte.

Es ist unmöglich, die im KMG Art. 21 IV geregelten Sanktionen für das Verbot der verdeckten Gewinnausschüttung auf Aktiengesellschaften anzuwenden, da das KMG speziell auf Publikumsgesellschaften zugeschnitten ist.

64 Fikret Eren und Ünsal Dönmez, *Eren Borçlar Hukuku Şerhi, Band II* (1. Ausg., Yetkin 2023) 1900 ff.

65 Forstmoser, Meier-Hayoz und Nobel (n 15) § 40 N 52; Ayşe Şahin, *Anonim Ortaklığın Haklı Sebeple Feshi* (Vedat 2013) 161. Sehen Sie, dass der Missbrauch der Mehrheitsmacht zusammen mit den Elementen der Kontinuität und Intoleranz einen berechtigten Grund im Sinne von HGB Art. 531 darstellt: Nuri Erdem, *Anonim Ortaklığın Haklı Sebeple Feshi* (Vedat 2012) 113 ff.; Şahin (n 65) 140 ff. Elfte Zivilabteilung des Kassationsgerichts, 2019-4836/4728, 3.6.2021 (Begründung für den Widerspruch) < https://www.sinerjimevzuat.com.tr/ > zugegriffen am 21.9.2022.

Der Organbeschluss, in dem die Vergütungen der Vorstandsmitglieder als übermäßig festgesetzt werden, ist gemäß dem HGB Art. 1530 I S.1 nichtig, da er das unverzichtbare Recht der Aktionäre auf die Gewinnstrebigkeit der Gesellschaft, den Gleichbehandlungsgrundsatz und den Grundsatz des Kapitalschutzes verletzt (HGB Art. 447). Diese Regelung enthält auch die Teilnichtigkeit, weshalb der Organbeschluss nichtig sein kann, soweit sie übermäßig ist. Die Befugnis des Richters wird hier als „geltungserhaltende Reduktion" bezeichnet. Hier entscheidet der Richter lediglich über den gestellten Antrag, demzufolge liegt kein Verstoß gegen das Zivilprozessrecht vor.

Für den Fall, dass die Vergütungen als übermäßig angesehen werden und der diesbezügliche Generalversammlungsbeschluss für vollständig nichtig erklärt wird, sind die Vorstandsmitglieder berechtigt, Klage zu erheben und eine angemessene Vergütung zu verlangen. Aus prozessökonomischer Sicht wäre es in diesem Fall nicht angebracht, dass das Gericht eine Entscheidung über die vollständige Nichtigkeit erlässt. Bei Anwendung von HGB Art. 1530 I erfolgt die Rückerstattung gemäß den Regelungen über die ungerechtfertigte Bereicherung. Zinsen können demnach ab dem Zeitpunkt der Bereicherung, also der Vergütungsbezahlung, verlangt werden. Die Verjährungsfrist der Rückerstattungsforderung beträgt 2 und 10 Jahre.

Darüber hinaus kann diese Situation, in der die Festsetzung der Vergütung als übermäßig anhaltend ist, einen berechtigten Grund für Minderheitsaktionäre darstellen, die Auflösung der Gesellschaft zu fordern.

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RESEARCH ARTICLE

Models of Criminal Liability of a Plurality of Perpetrators under Polish and German Criminal Law: Comparative Approach

Aleksandra Miśkiewicz*, Alexander Vadokas**

Abstract

Polish-German history goes back centuries. The long-lasting relationship of the two countries also becomes apparent looking at their regimes of criminal liability as a perpetrator. The article presents these models focusing on the phenomenon of cooperation of criminals of more than one perpetrator. The purpose of this study is to consider co-perpetration as a form of committing a prohibited act. The article seeks to capture the entirety of criminal lawlessness of committing prohibited acts in the form of co-perpetration and perpetration by means, through the analysis of the currently functioning regulations of the Polish and German Criminal Codes and their comparative approach, as well as determining the scope of legal liability in this regard. An analysis of the possibility of liability for committing a prohibited act in the form of co-perpetration in the light of philosophical and psychological concepts of criminal law was also carried out. The article also presents a historical analysis of Polish and German regulations in the field of criminal liability. The article presents a historical analysis of Polish and German regulations in the field of criminal liability for committing a crime in the form of complicity, based mainly on the post-partition and post-war history of Poland. Due to their common heritage to the Prussian Landrecht and criminal code as well as Feuerbach's Bavarian Criminal Code, it is proved that the models of criminal liability of a plurality of perpetrators under Polish and German criminal law share many similarities.

Keywords

Criminal law, Perpetration, Criminal cooperation, Liability of co-perpetrators, Polish criminal law, German criminal law

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I. Preliminary Remarks. Outline of the Problem

The German Penal Code of 1871[1] punishes the criminal act itself rather than the person committing it.[2] Its provisions describing the types of offenses are created by using verbs expressing an executive action in such a way as to suggest that one person implements them. Although there were aspirations in the 1930's to depart from this focus on the action and introduce a new focus on the criminal person. After the defeat of the Nazi regime, these changes were rolled back and the last traces of a focus on a normative type of criminal perpetrator can be found in §§ 211, 212 of the German Penal Code which punish 'a murderer'[3].

The provisions of the Polish Criminal Code[4] similarly describe the punishable behavior instead of the perpetrator. Exceptions can be made to Art 158 § 1 of the Code: 'Who is involved in a fight or beating in which he exposes himself to the immediate danger of loss of life' and Article 197 § 3 of the Code, where cooperation with another person becomes a specific qualifying mark – 'If the perpetrator commits rape together with another person'.

Practice shows that committing crimes often occurs with the cooperation of many people. And this interaction is organized, with the distinct roles of individual participants. Individual behaviors acquire a specific meaning only when they are evaluated in the context of the behavior of other cooperatives. Often only the sum of individual actions taken in accordance with a specific plan result in an infringement or a threat to a legal right. Moreover, these behaviors, assessed in isolation from the behavior of other cooperatives, do not have to constitute the elements of a crime or be particularly reprehensible.

Based on both German and Polish Criminal Codes, collective responsibility should be distinguished from criminal cooperation, i.e. situations where a certain group of persons associated with the act itself or the perpetrator by a specific objective criterion, independent of the causal offense itself, is held criminally liable for a specific criminal act. Collective responsibility may historically have affected the perpetrator's family members (on the basis of blood ties), people living in the area where the offense was committed, or persons belonging to a given organization.[5] Particularly in the latter case, where the organization was illegal or had the aim of committing criminal offenses, it was sometimes assumed that participation in such an organization itself is the basis for liability for any offense committed by its members.

1 'German Penal Code of 15.05.1871 in the Adaption of 13.11.1998 (BGBl I S 3322), Last Amended by Art 4 of the Act to Amend the Federal Central Register and the Penal Code of 04.12.2022 (BGBl I S 2146)'.

2 See for a detailed historical overview Claus Roxin and Luís Greco, *Strafrecht Allgemeiner Teil Band I Grundlagen – Der Aufbau Der Verbrechenslehre* (CH Beck 2020) § 6.

3 English translation by Michael Bohlander, *The German Criminal Code: A Modern English Translation* (Hart Publishing 2008).

4 'Ustawa z Dnia 6 Czerwca 1997 r – Kodeks Karny (Dz. U. z 2022 r Text No 1138).'

5 Juliusz Bardach, *Historia Ustroju i Prawa Polskiego* (LexisNexis 2005).

Group liability is contrary to the principle of individualization of punishment and the principle of guilt adopted under the Polish and German Criminal Codes.

It should be emphasized that the scope of criminal liability of persons who in one way or another cooperate in committing a criminal act is culturally variable. It covers those who engaged in conduct both in the period preceding the criminal act and subsequently. The substantive link between the act which implements the characteristics of the type of prohibited act and other conduct as the general criterion of cooperation therefore needs to be clarified.

This study attempts to capture the entirety of criminal lawlessness of committing prohibited acts when more than one perpetrator acts. To do so, the article analyzes the currently functioning regulations of the Polish and German Criminal Codes and their comparative approach, as well as determines the scope of legal liability in this regard. An analysis of the possibility of liability for committing a prohibited act in the form of cooperation between criminals in light of philosophical and psychological concepts of criminal law will be carried out. The analyzes are intended to demonstrate the adopted assumption in the form of similarities between both law regimes which are to be derived from the common history of both legislative orders.

II. Basics of Responsibility for Criminal Cooperation – A Historical and Philosophical Outline

Historically, the grounds for criminal liability for criminal cooperation depended on the adopted concept of perpetration, i.e. on determining what features must be met by the behavior of a person to be considered as the implementation of the element of an executive act indicated in the description of the prohibited act.

A. Distinction between Primary and Secondary Liability

In the formal-objective approach, the perpetrator is the person whose behavior is the designation of this executive action, regardless of in whose interest and for what purpose he does it.[6] In the material-objective approach, the perpetrator is the person whose decision or behavior significantly determines the event that fulfils the constituent elements of a prohibited act[7]. Thus, the concept of perpetration includes any behavior that itself is a designation of an executive act or conditions the performance of such an act by another person. The criterion of perpetration based on this concept will be the objective relationship of a given behavior to the determination of the executive act, and this relationship includes all behaviors conditioning the commission of a

6 Włodzimierz Wróbel and Andrzej Zoll, *Polskie Prawo Karne. Część Ogólna* (Znak 2013); Wolfgang Joecks and Jörg Scheinfeld, 'Vor § 25 StGB' in Volker Erb and Jürgen Schäfer (eds), *Münchener Kommentar*, vol 1 (4th edn, CH Beck), mn. 10–11.

7 Ibidem.

prohibited act. It should be noted that this concept introduces additional criteria that help to distinguish proper agency from instigation and aiding and abetting, but these considerations are not the subject of this study.[8]

Subjective concepts of perpetration indicate that the basic criterion for distinguishing is the attitude of a given person to the committed act. This means that the perpetrator is the one who has the will to carry out a given prohibited act as his own – *animus auctoris*. Thus, the perpetrator will not be the one who wants another person to commit a prohibited act. Therefore, even the one whose behavior fulfils all the elements of a crime can be an accomplice if he acted with the will only to participate in another's crime – *animus socii.*[9] The strict version of the subjective approach has been historically very influential on German jurisprudence. Today however, it is rare to rely on the strict subjective theory which only serves as a starting point to understand the discussion between the objective approaches and a moderate understanding of the subjective concept.[10]

Departing from the strictly objective or subjective theories, the theory of 'power over the act' or 'control over the crime' tries to take objective and subjective elements into account.[11] According to this theory, the perpetrator is the one who controls the behavior of other people, having control over the course of the event that has the characteristics of a crime.[12] Consequently, the principal participant can be described as the 'central figure' of the crime whereas secondary participants just 'stand aside'.[13]

This theory has been so successful that even advocates of a subjective approach have started to take the power over the act into account when determining the *animus auctoris.* In the moderate-subjective theory, control over the crime or at least the will thereto serves as one indicator of the principal's will next to the degree of interest in the crime to succeed or the extend of involvement in the commission of the crime.[14]

B. Accessorial and Unitary Participation

Bearing in mind the general concepts of perpetration outlined in this way, it is possible to indicate at least several general models for determining the principles of criminal liability for criminal cooperation.

8 Władysław Wolter, *Nauka o Przestępstwie* (PWN 1973).

9 In the famous 'bathtub case' of the Reichsgericht (*RGSt 74, 84*.), the accused was the sister of a woman who gave birth to a child outside a marriage. She drowned the newborn child to help her sister avoid social stigma. The Reichsgericht found that the accused acted solely in the interest of the young mother and was thusly to be held accountable as a secondary accomplice even though she fulfilled all the elements of the crime in her own person.

10 Kristian Kühl, *Strafrecht Allgemeiner Teil* (8th edn, Verlag Franz Vahlen 2017) § 20, mn. 20–23.

11 Harro Otto, 'Täterschaft, Mittelbare Täterschaft Und Mittäterschaft' [1987] Juristische Ausbildung 246, 248.

12 Wróbel and Zoll (n 6).

13 Kristian Kühl, 'Täterschaft Und Teilnahme' [2014] Juristische Arbeitsblätter 668, 669.

14 *BGH, NStZ-RR 2016, 6,* 7.

According to the concept of participation in someone else's crime, only the perpetrator alone or jointly and in agreement with another person, conducts all the features of a prohibited act commits his or her own crime. Others who cooperate do not then commit their own crimes, but only participate in the main crime, which is also a source of reprehensible behavior of other cooperating parties. The liability then results from the principle of accessory and as such depends on the responsibility of the proper perpetrator.[15] In a variety of this principle – known as the principle of limited accessory – it is sufficient that the principal perpetrator commits an intentional and unlawful, but not necessarily guilty act.[16]

The concept of uniform perpetration treats all cooperating parties, regardless of the nature of their actions or the criminal liability of others, as responsible perpetrators. Therefore, it does not matter whether the main perpetrator has committed the constituent elements of a prohibited act and whether he even attempted to commit a crime at all, or whether he can be blamed. Consequently, each of the cooperating parties commits his or her own crime, for which he is liable under general rules. The basis for differentiation of the penalty is the degree of actual or alleged contribution to the commission of the crime.

The concept of treating instigation as well as aiding and abetting as *delictum sui generis* took quite different assumptions. Instigation as well as aiding and abetting would be included in the specific part of the Code as separate types of offences, the commission of which would be punishable by a separate sanction[17]. According to the authors of this very article, this concept encounters difficulties at the level of defining the limits of this sanction. It would have to include behaviors with such varying degrees of social harmfulness as incitement to destroy property of little value and abetting to murder.

One of the variations of this concept was the introduction to each type of prohibited act from the special part of such an approach to the executive act that, apart from the actual perpetration, it included instigation, aiding and abetting, or supplementing a given type of prohibited act with a related provision specifying the criminal sanction for instigation, aiding, or abetting to carry out this type of prohibited act. Importantly, the Polish Criminal Code of 1997 currently in force sometimes directly introduces, in the specific part, criminal liability for behavior of an instigation, aiding, or abetting nature. As examples can serve Art 151 of the Polish Criminal Code ('Whoever by persuasion or by providing help leads a man to take his own life') or Art 152 § 2 of the Criminal Code ('The same penalty applies to anyone who assists a pregnant

15 Lech Gardocki, *Prawo Karne* (CH Beck 2021); Wolfgang Joecks and Jörg Scheinfeld, 'Vor § 26 StGB' in Volker Erb and Jürgen Schäfer (eds), *Münchener Kommentar*, vol 1 (4th edn, CH Beck), mn. 18.

16 Günter Heine and Bettina Weißer, 'Vor. §§ 25ff StGB' in Albin Eser (ed), *Schönke/Schröder* (30th edn, CH Beck) mn. 22–24.

17 Kazimierz Buchała, *Polskie Prawo Karne* (PWN 1997).

woman in terminating her pregnancy in violation of the provisions of the Act or who induces her to do so.'). This solution has been applied in situations where the behavior of the main perpetrator, for various reasons, is not a crime.

III. The Polish Criminal Code

A. Historic and Current Understanding of Perpetration

The original Polish concept of recognizing the criminal liability of cooperating persons was to define perpetration, instigation, abetting and aiding as general phenomenal forms of committing a crime. The creator of this concept was Juliusz Makarewicz, and it was reflected in the regulations of the Polish Criminal Code of 1932[18]. It should be noted that this concept evolved over time and its current statutory interpretation differs from the original version. Makarewicz assumed that the types of prohibited acts included in the special part of the Criminal Code referred only to perpetration. Instigation, abetting and aiding were included in the general part of the code as special forms of committing a crime and referred to each of the types appearing in the special part. Perpetration, instigation, abetting and aiding were thus equated and treated as technical forms of committing a crime – phenomenal forms. They were independent in nature, i.e., it did not matter for the criminal liability of the instigator whether the perpetrator had committed the act he was abetted to do at all. The aider or abettor committed a separate crime from the perpetrator and was responsible for it within the limits of his intent and guilt. The criminal and political circumstances leading to the repeal of criminality also referred to each form of committing a crime separately.[19]

It seems that consistent treatment of instigation, abetting and aiding as phenomenal forms of committing a crime, equivalent to perpetration, would lead to the conclusion – contrary to J. Makarewicz – that in the case of individual crimes, an aider or abettor should have the subjective characteristics specified in each type of prohibited act, as a rule related to perpetrators. The absence of such a feature would therefore have to result in impunity. As early as 1937, the Polish Supreme Court ruled that an instigator or an accomplice is liable for an individual crime, regardless of whether the perpetrator possesses the characteristics required by law.[20]

A similar remark applies to prohibited acts to which circumstances of a subjective nature, related to limited guilt, e.g., murder of passion, were introduced – they could only refer to the perpetrator in the strict sense. As a departure from the principle of full independence of phenomenal forms, it was necessary to link the limits of the

18 Juliusz Makarewicz, *Kodeks Karny z Komentarzem* (1938).

19 ibid.

20 *Decision of the Supreme Court of Poland I K 736/36 of 20/03/1937*.

penal sanction, which was threatened by instigation, abetting and aiding to commit a specific prohibited act, with the amount of the statutory threat provided for in the special part for perpetrating this act.

B. General Approach to Perpetration Under the Polish Criminal Code

The term perpetration *(sprawstwo)* appears in the content of the Polish Criminal Code in many provisions with two meanings: narrower, omitting instigation, abetting and aiding (e.g. Art 21 § 2 of the Criminal Code: 'If a personal circumstance concerning the perpetrator, affecting even only higher punishment, is a constituent element of a prohibited act, the cooperating party is liable for the penalty provided for this prohibited act, if he knew about this circumstance, even if it did not apply to him)', and a broader one, applicable to all forms of criminal cooperation (most provisions of the general part of the Criminal Code).

Pursuant to Art 18 § 1 of the Criminal Code, not only the one who performs the prohibited act alone or jointly and in agreement with another person is responsible for the perpetration, but also the one who directs the performance of the prohibited act by another person or taking advantage of the dependence of another person on himself, instructs him to perform such an act. Therefore, this provision provides for four causative forms: perpetration, co-perpetration, ordering perpetration and commanding perpetration. In practice, this means that based on the Polish Criminal Code, a broad understanding of perpetration has been adopted, including also behaviors that only indirectly lead to the implementation of the characteristics of an executive act described in the type of prohibited act in the special part of the Criminal Code. The regulation of Art 18 § 2 of the Criminal Code is an interpretative rule, according to which the verbal act expressed in the description of the type of prohibited act also includes the behaviour described in this provision as co-perpetration, commanding perpetration, and ordering perpetration. This means that the constituent element of an executive act can be realized in four ways – by undertaking the behavior constituting the designation of this element on your own, by jointly carrying out this behavior with another person, by issuing an order to perform such a behavior and by directing the execution of such behavior by another person. As an example, one can mention Art 148 § 1 of the Criminal Code – 'Whoever kills a man is to be punished.' Due to the content of Art 18 § 1 of the Criminal Code, killing may also include killing a person jointly and in agreement with another person, issuing an order to kill or directing a killing performed by another person.

The forms of perpetration mentioned in Art 18 § 1 of the Criminal Code are, however, only technical ways of implementing an executive act, and in order to perform it, it is necessary to perform all the constituent elements of a prohibited act,

in particular the occurrence of an effect or the implementation of a specific behavior by the person to whom the order was given.[21] In this sense, the responsibility of a co-perpetrator, an ordering perpetrator or commanding perpetrator depends on the other person's undertaking behavior that directly refer to the executive action specified in the type of prohibited act. The construction of the causative figures adopted based on this provision therefore refers to the concept of J. Makarewicz. They take over the elements of the concept of participation in someone else's crime (accessory nature) and elements of the concept of uniform perpetration (assigning a separate crime to each of the perpetrators).

IV. The German Penal Code

Individual responsibility for criminal actions under the German Penal Code is laid down in §§ 25–27 of the Penal Code. On one hand, § 25 contains individual direct perpetration (subpara 1 alt 1), individual indirect perpetration (subpara 1 alt 2) and co-perpetration (subpara 2) for three different definitions of perpetration. On the other hand, § 26 defines instigation and § 27 aiding and abetting as forms of participation in another person's crime. The German legislator thus opted for a differentiated approach to criminal responsibility by distinguishing these forms of participation already on the level of their contribution and a restrictive understanding of perpetration.[22] Doing so, the Penal Code adheres to the principle of limited accessory when it demands that the principal perpetrator 'intentionally commit[s] an unlawful act' in § 26 of the Penal Code and the 'intentional commission of an unlawful act' in § 27 subpara 1 of the Penal Code. This can be said at least about any criminal offense which requires some form of intentional commission. Since § 26 and § 27 of the Penal Code both require an intentional contribution, negligent instigation or negligent aiding and abetting is not possible under the current scheme of the German Penal Code.[23] This leads to the use of a restrictive understanding of perpetration when it comes to intentionally committing a crime, whereas in the field of negligence an extensive understanding is applied.[24]

A. Types of Criminal Offenses

The distinction between the types of crimes is crucial for determining the possibilities of different ways of commission. Firstly, there are crimes which can be committed by anybody, for instance causing bodily harm as in § 223 of the Penal Code which reads 'Whosoever physically assaults or damages the health of another

21 Piotr Kardas, 'Przypisanie Skutku Przy Przestępnym Współdziałaniu' [2004] Przegląd Prawa Publicznego nr 4.

22 Kühl (n 10)§ 20, mn. 7.

23 Claus Roxin, *Strafrecht Allgemeiner Teil Band II – Besondere Erscheinungsformen Der Straftat* (CH Beck 2003) § 25, mn. 9.

24 Heine and Weißer (n 16) mn. 9.

person, shall be liable […].' These so called 'anybody-offenses' *(Jedermansdelikte)* are the majority of offences contained in the special part of the Penal Code. In dealing with them, no peculiarities need to be observed as they only describe an act which is prohibited by law. All three variations of commission as a principal perpetrator of § 25 of the Penal Code can be applied to anybody-offenses just as someone can instigate or aid or abet another person to commit an anybody-offense.

Secondly, there are crimes that require an action, which can only be fulfilled by the perpetrator himself.[25] Similar to special offenses, the possibilities to cooperate with another person as a perpetrator are limited in cases of these single-handed offenses *(eigenhändige Delikte)*. One instance of a single-handed offense is false testimony as in § 153 of the Penal Code: 'Whosoever as a witness or expert gives false unsworn testimony before a court […] shall be liable […].' The behavior under punishment is lying before a court. Only the person speaking in that moment can be lying and therefore giving false testimony.

Thirdly and finally, there are certain offenses, which require the perpetrator to possess a specific characteristic – so called special offenses *(Sonderdelikte)*. Someone who does not possess this characteristic cannot be characterized as having fulfilled any of the three forms of perpetration and can therefore be a secondary participant only.[26] One example can be found in § 339 of the Penal Code which deals with perversion of justice. It states: 'A judge, another public official or an arbitrator who in conducting or deciding a legal matter perverts the course of justice for the benefit or to the detriment of a party shall be liable […].' The wording of the provision requires the perpetrator to hold a specific position in a trial or other legal proceeding. If defense counsel lies about the facts of the case, this might lead to a wrong acquittal of the defendant. Nonetheless, the defense attorney is neither a judge nor another public official[27] and therefore lacks the required position to be prosecuted as a perpetrator of § 339 of the Penal Code. They might be tried for obstruction of prosecution (§ 258 of the Penal Code) or as a participant in the judge's crime of perverting the course of justice if they applied the incorrect factual basis pursuant to a common plan.

In cases where the elements of a crime stipulate the existence of a special personal characteristic, the absence of the required characteristic excludes the possibility participation as a primary. Secondary participation is possible and regularly the case.

25 For a detailed discussion see Helmut Satzger, 'Die Eigenhändigen Delikte' [2011] Juristische Ausbildung 103.

26 Johannes Wessels, Werner Beulke and Helmut Satzger, *Strafrecht Allgemeiner Teil* (52nd edn, CF Müller 2022)§ 1, mn. 55.

27 Even though a lawyer is an independent agent of the administration of justice according to § 1 of the Federal Code of Lawyers (BRAO), they are not covered by the definition of a public official of § 11 subpara. 1 no. 2 of the penal code. See e.g. Matthias Korte, '§ 339 StGB' in Volker Erb and Jürgen Schäfer (eds), *Münchener Kommentar*, vol 6 (4th edn, CH Beck) mn. 56.

B. Levels of Criminal Behavior

Determining criminal responsibility under the German Penal Code requires three steps.[28] Firstly, an act which fulfils the definition of a crime needs to have been committed. This level comprises the *actus reus* as well as the *mens rea* of the offense. Secondly, the perpetrator must have acted unlawfully. On this level grounds for excluding the illegality of the action – e.g., self-defense according to § 32 of the Penal Code – might come into play. Thirdly, the action must be blameworthy. This is the case if the perpetrator is guilty, i.e., the legal order can personally reproach him for his action and no ground excluding the guilt such as § 35 of the Penal Code is applicable.

V. Forms of Perpetration

Both provisions governing perpetration provide different forms of perpetration. For the purpose of this study, the modes of perpetration as in Art. 18 § 1 of the Polish Criminal Code and of § 25 of the German Penal code shall be divided into three groups. The first one briefly deals with one single perpetrator, the second one being about two or more perpetrators co-acting in agreement and the last group is concerned with one perpetrator using another person to commit the act.

A. Individual Perpetration (sprawstwo pojedyncze and Alleintäterschaft)

The basic and most intuitive form of perpetration encapsulates a single perpetrator committing a crime by himself. In this regard, no materially significant differences can be observed between the Polish *(sprawstwo pojedyncze)* and the German approach *(Alleintäterschaft).*

Individual perpetration means that an individual perpetrator must fulfil the conduct prohibited by the *actus reus* of a crime and possess the requisite *mens rea* in his own person. This term can be given two meanings. On one hand, it will emphasize that there were no other cooperating persons apart from the perpetrator. On the other hand, it indicates the independent implementation of the features, which does not automatically exclude that other cooperating person committed the crime together with that person. The phrase 'alone' will therefore not mean 'alone' but 'by one's own behavior.' In German criminal law theory, this so-called parallel perpetration (Nebentäterschaft) is particularly common in cases of negligence.[29] This comes as no surprise due to the extensive understanding of the word 'perpetration' as simply causing the required effect of a crime in this area of commission.

28 Detailed Thomas Rönnau, 'Grundwissen – Strafrecht: Drei- Oder Zweistufiger Verbrechensaufbau?' [2021] Juristische Schulung 499.

29 Rudolf Rengier, *Strafrecht Allgemeiner Teil* (14th edn, CH Beck 2022)§ 42, mn. 3–6.

The understanding of 'by one's own behavior' results in a single perpetrator being a person who committed a prohibited act because of issuing an order, who was incited to it or who was assisted in doing so. However, it will not cover cases of parallel co-perpetration in the Polish understanding.

B. Co-perpetration (*współsprawstwo* and *Mittäterschaft*)

Co-perpetration describes a situation in which two or more people act together and fulfil parts of the definition of the crime. Only when looking at the acts of all co-perpetrators together, can the crime be seen.

1. Polish Approach

Pursuant to Art 18 § 1 of the Criminal Code, co-perpetration occurs when a prohibited act is committed jointly and in agreement with another person. The meaning of this phrase over time has become a significant problem of interpretation, especially the terms *'jointly'* and *'in agreement.'*

It leaves no doubt that the term *'jointly'* is objective in nature and describes situations where the characteristics of a prohibited act are realized through complementary behaviors of individual persons. This will most often occur in two-act crimes, such as burglary. One of the accomplices performs one of the executive actions indicated in the provision (breaks the security), and then the other performs the other action (taking possession). It is only when these behaviors are combined that they constitute the features of a prohibited act, and this type of complicity is referred to as proper or complementary complicity.

The joint implementation of the features of a prohibited act should also be understood as a situation in which each of the cooperating partners implements all the features of a prohibited act (each cooperating in the theft enters the room and takes things from it). The functional link connecting the actions of individual accomplices is the size of the jointly created potential threat to the legal good or violation of the legal good. This type of complicity is referred to as parallel complicity.

It is controversial in the legal doctrine whether the joint performance of the characteristics of a prohibited act can also be considered when a given person has not performed any of the statutory characteristics of a prohibited act by their behavior, but only facilitated the performance of the prohibited act by another person (e.g. providing transport and enabling escape). In light of the formal and objective concept, such a person could never be treated as an accomplice, but only as an assistant. Supporters of this concept emphasize that to recognize a given behavior as co-perpetration, it is necessary to formally recognize this behavior as a designation of at least part of

the feature defining the executive act. On the other hand, supporters of the material-objective concept assume that the requirement of joint implementation of the features of a prohibited act is also met when the assessed behavior is a necessary condition for undertaking a behavior directly implementing the features of a prohibited act or a particularly significant facilitation or significant reduction of the risk of such implementation. This view is also supported by the jurisprudence of common courts and the Polish Supreme Court. The assessment of how important a particular behavior was in the perspective of the implementation of the features of a prohibited act by another cooperating party must be made in the context of the concluded agreement and the conviction of the other co-perpetrators.

Another element constructing co-perpetration is an agreement between persons jointly conducting the features of a prohibited act. However, this agreement cannot be identified with the intention characterizing the intentional implementation of the characteristics of a prohibited act. The intention must be present at the moment of the act, whereas the agreement occurs at an earlier stage. It is characterized by the acceptance of joint implementation of the features of the type of prohibited act and often combined with the division of roles and agreement on the essential elements of the act being performed. It does not matter whether it is formal, oral, written, or implied. All that is required is the appearance of all the co-operators in the awareness of joint action. Such an agreement may precede the commission of a prohibited act, but it may also occur during the implementation, when another person joins the person carrying out the agreement, and only from the moment of joining the agreement or concluding the agreement, the behavior of the persons participating in it can be treated as co-perpetration. This means that it is not possible to be held criminally liable for the behavior of the other co-perpetrators undertaken before entering into the agreement and commencing joint implementation of the features of a prohibited act. Lack of agreement precludes complicity both when individual perpetrators simultaneously conduct the constituent elements of a prohibited act and when objectively these behaviors complement each other, jointly constituting the performance of the constituent elements of a prohibited act.

The agreement is so important in the perspective of the rules of liability for complicity that it sets the limit of liability for the joint performance of a prohibited act. Individual accomplices may also be held responsible for what other accomplices did only if it was within the scope of the agreement. The accomplice is not responsible for the excess of another accomplice, i.e., behavior that goes beyond the content and scope of the agreement.

In addition to the agreement itself, an extra condition of co-perpetration, allowing to distinguish it from instigation, aiding and abetting, is the so-called *animus auctoris,*

which means perceiving an act committed jointly with other people as one's own. This may be evidenced by, for example, involvement in determining the content of the agreement, the division of roles, participation in the loot. Undoubtedly, this is the least measurable feature of co-perpetration, but in dubious cases it can be an auxiliary criterion allowing for adequate qualification of certain behaviors as complicity.

The provisions of the specific part of the Polish Criminal Code treat co-perpetration as a qualifying mark – for example in the wording of Art 197 § 3 of the Criminal Code: 'If the perpetrator commits rape: 1) together with another person, 2) against a minor under the age of 15, 3) against an ascendant, descendant, adopted, adoptive parent, brother or sister, he shall be subject to the penalty of deprivation of liberty for a period of not less than 3 years.' The phrases used in the special part should then be understood in the same way as under Art 18 § 1 of the Criminal Code.

2. German Approach

'If more than one person commits the offense jointly, each shall be liable as a principal (joint principals).' This short sentence sets the definition of co-perpetration in § 25 subpara 2 of the Penal Code. The Federal Court of Justice ('FCJ', German: 'BGH') described co-perpetration as a case in which someone, in a situation of participation of several people who do not all materialize all the criteria of a crime, acts jointly, if he or she incorporates his or her own contribution into the offense in such a manner that it appears as part of the act of another person and conversely that person's act as the first one's offense.[30] Co-perpetration thus is a form of attributing different acts to form the commission of an offense. It stems from this that a suitable perpetrator for co-perpetration can only be who could commit the crime on his own.[31] Regarding special offenses each joint principal has to possess the special criterion that characterizes the special character and in regard to single-handed offenses each co-perpetrator has to show the prohibited behavior himself.[32]

The nature of the relationship between the joint principals is characterized as a partnership between equals.[33] Joint commission requires a common plan to commit the offense on the subjective side and a common commission on the objective side.[34]

30 *BGH, BeckRS 2020, 10990,* mn. 4; Jörg Eisele, 'Strafrecht AT: Abgrenzung von Mittäterschaft Und Beihilfe' [2020] Juristische Schulung 1081, 1082.

31 Klaus Geppert, 'Die Mittäterschaft (§ 25 Abs. 2 StGB)' [2011] Juristische Ausbildung 30, 32; Thomas Fischer, *Strafgesetzbuch Mit Nebengesetzen* (70th edn, 2023)§ 25, mn. 28.

32 Wolfgang Joecks and Jörg Scheinfeld, '§ 25 StGB' in Volker Erb and Jürgen Schäfer (eds), *Münchener Kommentar*, vol 1 (4th edn, CH Beck) mn. 223; Günter Heine and Bettina Weißer, '§ 25 StGB' in Albin Eser (ed), *Schönke/Schröder* (30th edn, CH Beck) mn. 89.

33 Ingeborg Puppe, 'Wie Wird Man Mittäter Durch Konkludentes Verhalten? (NStZ 1991, 571)' [1991] Neue Zeitschrift für Strafrecht 571, 571–572.

34 *BGHSt 48, 52,* 56; *BGH, NJW 2020, 2900,* 2902; *BGHSt 37, 289,* 292; Kristina Peters and Anna Bildner, 'Die Mittäterschaft Gem. § 25 II StGB Und Ihre Herausforderungen in Der Fallbearbeitung' [2020] Juristische Schulung 731, 731.

The common plan to commit a crime can take many forms. Joint principals can agree to it explicitly or implicitly, before or after the start point of an attempt to commit the crime. However, it is necessary that each perpetrator intentionally acts pursuant to the common plan. Therefore, it is insufficient if a person 'joins' someone in their crime without that person even noticing it. Thus, some form of communication between the co-perpetrators is required to assume the existence of a common plan.[35] Without a common plan there is no co-perpetration. It forms the basis and the boundaries of the joint commission of the prohibited act. If one joint principal substantially exceeds the boundaries of the common plan and does something which their fellow joint pricipals did not reasonably forsee, the excessive conduct cannot be attribted to them.[36]

Anybody who originally had to be seen as co-perpetrator but later retracts his agreement to the common plan before the phase of an attempt in the meaning of § 22 of the Penal Code has been reached cannot be held liable as joint principle even if the other co-perpetrator commits the offense according to the common plan. This stems from the principle of coincidence and can restrictively be said only if the retracting person informs the other perpetrator.[37] If the acting co-perpetrator acts under the impression that he still is supported, he envisages his behavior as part of the common plan and is at least psychologically encouraged. Liability as a secondary participant remains possible. It should be noted that the FCJ in its application of a subjective theory does not come to the same conclusion and asks whether the retreating person still wanted the result as his own act, if his or her action influenced the commission of the offense.[38]

When it comes to the objective part of joint perpetration, the distinction between primary and secondary participation becomes most crucial. While scholarly debate strongly argues in favor of the objective approach of control over the crime,[39] jurisprudence applies a moderate subjective theory.[40] In their application, both theories reach the same conclusion in most cases. According to the control over the crime theory, control over the prohibited act is required to be seen as the central figure and thus a principal whereas a minor figure can be a mere secondary participant.[41] It is this ability to frustrate the execution of the common plan by simply not performing the assigned role that distinguishes the principle from the secondary participant.[42]

35 Kühl (n 10)§ 20, mn. 104, 106.

36 Geppert (n 43) 32.

37 Rudolf Rengier, 'Täterschaft Und Teilnahme – Unverändert Aktuelle Streitpunkte' [2010] Juristische Schulung 281, 287; Puppe (n 45) 573. This is disputed by e.g. Kühl (n 10)§ 20, mn. 105.

38 *BGHSt 28, 346,* 348–349; *BGH NStZ 1987, 364,* 364. The FCJ explicitly continues the jurisprudence of the Reichsgericht, e.g. *RGSt 54, 177,* 178.

39 Roxin, *Strafrecht AT II* (n 35)§ 25, mn. 188; Rengier (n 49) 281–282; Heine and Weißer (n 44) mn. 64, with further references.

40 *BGHSt 37, 289,* (n 46) 291–293; *BGHSt 48, 52,* (n 46) 56; *BGH, NStZ-RR 2016, 6,* (n 14) 7.

41 Roxin, *Strafrecht AT II* (n 35)§ 25, mn. 10–13.For a short summary of the development see Joecks and Scheinfeld, '§ 25 StGB' (n 44) mn. 10–13.

42 Wessels, Beulke and Satzger (n 38) mn. 806.

Each co-perpetrator hence provides an essential contribution to the commission of the crime. Other than its predecessor the *Reichsgericht* as Supreme Court of the German Reich,[43] the FCJ does not apply a strict subjective theory. It incorporates elements of the control over the crime theory into its subjective approach and thus advocates for a normative combined theory. Criteria to establish criminal liability as a principal perpetrator are the level of interest in the success of the crime, scale of the contribution and the control over the crime or at least willingness to exert control.[44]

If a joint perpetrator contributes to the commission of the offense before it reaches the phase of an attempt – for instance by buying the weapon which is later used by the second co-perpetrator to shoot the victim – a strict application of the control over the crime theory comes to the conclusion that the first co-perpetrator cannot influence the commission decisively once he provided the weapon and hence lacks control over the crime.[45] A functional understanding of the control over the crime theory interprets the criterion of an essential contribution in such a way that a contribution in the phase of mere preparation can convey control over the crime if it still effects the commission.[46] A controversial example is found in the case of a gang leader who plans a crime and assigns the roles to those gang members who later act according to their leaders planning. The strict interpretation would have to treat the gang leader as a secondary participant while the functional understanding of control over the crime could see him as a principal. The latter one seems favorable to avoid offering the criminal mastermind a loophole by simply deferring the execution to someone else. Distributing tasks is inherent to joint perpetration. To reach equal control as the committing party, the planning party must provide an especially high valued contribution to the criminal undertaking since preparing contributions do indeed convey a lower degree of control.[47] Hence, the gang leader must play a pivotal role in the preparation to outweigh his minor role in the phase of commission but can still be classified as a co-perpetrator. The obligatory reduction of punishment stipulated by § 27 subpara 2 of the Penal Code could lead to an unjust lower sentence for the person who showed high criminal energy which can well exceed the one of the acting perpetrators. The subjective approach reaches the same result as control over the crime is just one factor in evaluating the *animus auctoris* and therefore covers a contribution in the phase of preparation.[48]

43 See e.g. *RGSt 3, 181,* 182–183; *RGSt 74, 84* (n 9) 85.

44 *BGHSt 28, 346,* (n 50) 348–349; *BGHSt 37, 289,* (n 46) 291; *BGHSt 48, 52,* (n 46) 56; Fischer (n 43)§ 25, mn. 27 with further references; *BGH, NStZ-RR 2016, 6,* (n 14) 7.

45 In this vein Christian Becker, *Das Gemeinschaftliche Begehen Und Die Sogenannte Additive Mittäterschaft* (2008) 46–55; Roxin, *Strafrecht AT II* (n 35)§ 25, mn. 198–203; René Bloy, 'Grenzen Der Täterschaft Bei Fremdhändiger Tatausführung' [1996] Goltdammer's Archiv für Strafrecht 424, 432–437.

46 Heine and Weißer (n 44) mn. 67; Wessels, Beulke and Satzger (n 38) mn. 822–823; Kühl (n 10)§ 20, mn. 110–111.

47 Rengier (n 41)§ 44, mn. 43.

48 *BGH, NStZ-RR 2016, 6,* (n 14) 7; *BGHSt 48, 52,* (n 46) 56; *BGHSt 28, 346,* (n 50) 348; *RGSt 58, 279,* 279.

3. Comparison

Under Polish and German law, attributing someone else's behavior to a person requires a subjective and an objective link. The agreement or common plan as the subjective part of co-perpetration sets out the limits for the attribution. It is distinct from the intention to commit the crime and serves as the guiding plan for the commission of the prohibited act. A co-perpetrator who leaves the ground of the agreement destroys the link to the other co-perpetrator(s) and can be found criminally liable as an individual perpetrator of his excess. The implementation of the common plan requires each co-perpetrator to perform an act of his own. The behavior in question, however, need not meet the definition of the crime itself if a functional understanding of control over the crime is preferred by the authors of this article. This result can also be achieved by considering the *animus auctoris* of the co-perpetrator.

C. Perpetration by Means (*sprawstwo kierownicze, sprawstwo polecające* and *mittelbare Täterschaft*)

The final group of the study encompasses situations in which a perpetrator's behavior does not fulfil the definition of the crime. Criminal liability can be assumed if this kind of perpetrator uses another person to commit the criminal act. Polish and German criminal law have found different constructions to deal with this group. While the Polish Criminal Code relies on commanding perpetration (*sprawstwo kierownicze)* and ordering perpetration *(sprawstwo polecające),* the German Penal Code uses the concept of indirect perpetration *(mittelbare Täterschaft).*

1. Polish Approach

Commanding perpetration and ordering perpetration share some of the same features. Both see the commanding/ordering perpetrator influencing another person to commit the crime as an individual perpetrator. Differences emerge in this influence. Exerting influence, especially in the beginning of the criminal activity, is what renders the commanding/ordering perpetrator criminally liable.

a. Commanding Perpetration (sprawstwo kierownicze)

As follows from the content of Art 18 § 1 of the Criminal Code, commanding perpetration is directing the performance of a prohibited act by another person. The causative figure defined in this way appeared for the first time in the Polish Criminal Code of 1969[49] and was supposed to cover the organizer of the crime, whose behavior does not have to directly implement the constituent elements of a prohibited act. It is impossible to reduce commanding perpetration solely to the dominant role of

49 'Ustawa z Dnia 19 Kwietnia 1969 r Kodeks Karny (Dz U 1969.13.94)'.

one of the accomplices, because it also includes behaviors consisting of initiating criminal activity of other persons. However, this type of perpetration does not stop with incitement, because in the next phase it includes actual control over the implementation of a prohibited act performed by other persons.[50] The judicature indicates that this control means that the decision of the person in charge is dependent on the initiation, conduct, change and discontinuation of a criminal action[51] – this approach to commanding agency seems to refer to the previously described theory of power over the act.

It is impossible to consider the organization of a criminal action itself as commanding perpetration, without the possibility of further influence in its course. The legislator clearly indicated that commanding perpetration is to consist of directing the performance of a prohibited act, and thus the existence of at least potential power over the actions of another person at the time when the characteristics of a prohibited act are directly implemented. For these reasons, it is impossible to recognize the commanding perpetrator as a managerial principal who offers a financial benefit to the contractor for committing a specific prohibited act, unless he has actual control over the course of the commissioned criminal action.

Commanding perpetration is most often associated with relations of subordination occurring between given persons – both in formalized relations, such as military services or a workplace, and in actual ones, such as peer groups.

Similarly, as in the case of complicity, the commanding perpetrator's liability is limited to those behaviors undertaken by the contractors that coincide with the content of the instructions issued by the commanding perpetrator. Therefore, he is not responsible for the excesses of contractors whose behavior goes beyond the scope of the issued order. The commanding perpetrator may, however, be held responsible for the actions of persons subordinated to him, if, when ordering their execution, despite his obligation, he did not control the course of the ordered actions and did not issue an order to modify or stop them in a timely manner, which could have prevented the commission of the prohibited act.

b. Ordering Perpetration (sprawstwo polecające)

Pursuant to Art 18 § 1 of the Criminal Code, the person who, taking advantage of the dependence of another person on himself, instructs him to perform a prohibited act, is responsible for the commission. From a subjective point of view, there must be a relationship of dependence between the ordering perpetrator and the contractor that justifies the high probability of performing the prohibited act covered by

50 *Decision of the Supreme Court of Poland II KK 289/19 of 18/06/2020.*

51 *Decision of the Supreme Court of Poland V KK 375/18 of 24/10/2018.*

the instruction – e.g., subordination, employment relationship, a special factual relationship or emotional relationship, as well as the use of a threat by the ordering perpetrator. However, it is not necessary that this dependence be permanent.

As for the issue of the order itself, its form is arbitrary, and the content is to be the performance of behavior that objectively constitutes the implementation of the characteristics of a prohibited act. It is not sufficient to issue a general action order, which is specified later only by the executor himself (e.g., issuing an order to 'settle the matter') to accept the referrer's agency.

The difference between incitement and issuing an order is expressed in its categorical nature – therefore, it will not be a command, persuasion, or encouragement to carry out a specific act. The issuing of an order must also be accompanied with a relationship of dependence, which means that it must be objectively linked to a specific relationship of subordination that exists between the issuer of the order and the executor. Ordering perpetration differs from incitement in that it is not limited to solicitation to commit a prohibited act but is accompanied by pressure having the character of psychological coercion.[52] This relationship of dependence is not the same as full subordination of the contractor to the ordering perpetrator – this is where the boundary between the ordering and the commanding perpetration runs, because the former does not have full authority over the contractor during the performance of the characteristics of a prohibited act and cannot control the course of the implementation of the prohibited act.

A necessary condition for accepting ordering perpetration is an awareness of issuing the command and the existence of a relationship of dependence, as well as the use of this relationship. The ordering perpetrator is responsible within the limits of the issued order, which means that he cannot be held criminally responsible for the contractor's behavior going beyond the content of the order – excess.

2. German Approach

The last form of perpetration known to the German Penal Code is called indirect perpetration. § 25 subpara 1 alt 2 of the Penal Code defines it as committing an offense 'through another'. As it is in the case of joint perpetration, indirect perpetration requires at least two persons. Firstly, there is the one who acts and through his or her action realizes a criminal behavior. That person is known as the 'tool to commit the crime' *(Tatwerkzeug),* the crime conveying person *(Tatmittler)* or person in the front *(Vordermann).* And secondly, there is the indirect perpetrator. This is the person who exercises control over the crime by exercising control over the acting person. They are known as the indirect perpetrator *(mittelbarer Täter)* or person in

52 Jacek Giezek, *Kodeks Karny. Część Ogólna. Komentarz t. I (Art. 1-31)* (2000).

the background *(Hintermann).* The key difference between joint perpetration and indirect perpetration lies within the relationship between the participants. While co-perpetration is characterized by equality – each person's contributions are attributed to each other, indirect perpetration describes the opposite phenomenon – the actions of the person in the front are attributed one way only to the person in the background.[53] This requires the acting person to possess a deficit of either the level of the elements of an offense, the unlawfulness, or guilt.[54] This deficit shields the person in front from criminal liability and would result in impunity even though an offense has been committed. Indirect perpetration as a means to attribute another person's action to the indirect perpetrator fill this void and avoids an unbearable outcome. The person in the background manages the person in the front and uses them as their human tool by superior knowledge, superior will, or the structure of a criminal organization.[55] If the acting person realizes the definition of the crime through his own behavior and cannot invoke a rule excluding responsibility (on either the level of unlawfulness or guilt), they have to be seen as a perpetrator. This conclusion stems from the principle of responsibility *(Verantwortungsprinzip)*.[56] Anybody who influences such a perpetrator can only be seen as a secondary participant. As an exception to that rule, there are the highly debated cases of 'the perpetrator behind the perpetrator.'

a. Deficit on the Level of the Definition of A Crime

The special part of the Penal Code contains offenses whose definitions describe a behavior which is criminal for most persons but not for the bearer of the legal value. § 303 of the Penal Code (criminal damage) punishes destroying 'an object belonging to another', just as § 242 of the Penal Code (theft). § 223 of the Penal Code (causing bodily harm) and §§ 211, 212 of the Penal Code (murder and manslaughter) are concerned with injuring a different person than oneself.[57] If the crime conveying person destroys his own painting, because the indirect perpetrator successfully convinced them that painting belonged to someone else, the *actus reus* of criminal damage is not realized.

Secondary participation according to §§ 26, 27 of the Penal Code requires an intentional and unlawful (not necessarily blameworthy) commission of a crime by the principal. In a case like this one, the attack on their own legal value by the person in the front falls short of fulfilling the *actus reus* of the offense and thus would lead

53 Thomas Rönnau, 'Grundwissen – Strafrecht: Der „Täter Hinter Dem Täter"' [2021] Juristische Schulung 923, 923.

54 A different systematisation is offered by Roxin, *Strafrecht AT II* (n 35)§ 25, II. who takes the kind of control over the acting person as basic criterion. Similar Otto (n 11) 254–257. Like here: Kühl (n 10)§ 20, mn. 45; Rengier (n 41)§ 43, mn. 2.

55 Roxin, *Strafrecht AT II* (n 35)§ 25, mn. 46.

56 Claus Roxin, *Täterschaft Und Tatherrschaft* (Elfte Auflage, De Gruyter 2022) 161–165 <https://katalog.ub.uni-freiburg.de/link?kid=1794641343>; Rönnau (n 61) 924–925.

57 Detlev Sternberg-Lieben, '§ 223 StGB' in Albin Eser (ed), *Schönke/Schröder* (30th edn, CH Beck) 223 mn. 9; Albin Eser and Detlev Sternberg-Lieben, '§ 212 StGB' in Albin Eser (ed), *Schönke/Schröder* (30th edn, CH Beck) mn. 2.

to impunity for the person in the background. This result was deemed intolerable as it was the person in the background – who by his influence made the person in the front act – should be made responsible. This can be achieved by punishing the indirect perpetrator for their control over the acting person by their superior knowledge. The indirect perpetrator knew whose painting it was, and this knowledge can establish the link between the prohibited action (damaging the painting) and the person in the background. It should be noted however that not any mistake on the part of the acting person is sufficient to establish criminal liability of the person in the background. If they are mistaken about the reason they acted in a certain manner, responsibility for that action lies solely on the person in the front. A popular example would be the doctor falsely telling his patient that he has a deadly disease who later – as intended by the doctor – kills himself. In this case, the doctor influenced the patient's motive to commit suicide. The motive however is not part of the criminal intent and therefore cannot constitute a sufficient link between the person acting in the front and the one in the back.[58]

A deficit cannot just occur regarding the objective parts of a crime's definition. If the crime conveying person lacks the necessary *mens rea* to commit a crime due to manipulation by the person in the background, indirect perpetration might come into play.[59] This could be a case if a doctor tells a nurse to give the patient an injection with a painkiller and hands her the syringe with the alleged drug. However, the syringe has been prepared with poison and indeed kills the patient. The nurse does not know the deadly effect of the injection and thus does not possess the intent to kill or commit bodily harm to the patient according to § 16 subpara 1 of the Penal Code. As a result, the nurse remains unpunished. The doctor on the other hand, uses superior knowledge to use the nurse as his human tool to commit the murder in accordance with § 25 subpara 1 alt 2 of the Penal Code.

Some offenses require a special mental state. For instance, theft according to § 242 subpara 1 of the Penal Code asks for 'the intention of unlawfully appropriating [the object] for himself or a third person' which must be understood as *dolus directus* in the first degree, i.e. purpose.[60] A thief in the opera who asks a fellow guest to get 'their' coat from the cloak room, uses the guest as a human tool. The guest does not intend to unlawfully appropriate the coat for anybody else than for what they think is the rightful owner. This precludes him from being a perpetrator or even an accomplice in a theft. The indirect perpetrator, who possesses the special mental element but does not wish to act himself, exerts normative control over a human tool. Ultimately, he decides whether the crime conveying person commits the theft or not.

58 Roxin, *Strafrecht AT II* (n 35)§ 25, mn. 71–72.

59 Uwe Murmann, 'Grundwissen Zur Mittelbaren Täterschaft (§ 25 I 2. Alt. StGB)' [2008] Juristische Arbeitsblätter 321, 325.

60 Roland Schmitz, '§ 242 StGB' in Volker Erb and Jürgen Schäfer (eds), *Münchener Kommentar*, vol 4 (4th edn, CH Beck) mn. 129.

The final group, which can appear on the level in the definition of a crime, is limited to special offenses. § 203 subpara 1 of the Penal Code (violation of private secrets) can serve as an example. The offense requires that a perpetrator have a special position which allows them knowledge of a secret due to a professional relationship with the victim. The pharmacist who leaks a famous athlete's prescription for a substance on a doping list to a journalist, can be prosecuted as an individual perpetrator in the meaning of § 25 subpara 1 alt 1 of the Penal Code. The pharmacist's husband however lacks the required personal criterion for this special offense. This also rules out joint perpetration of the couple if the pharmacist asks her husband to leak the information instead of her. And since the husband did not commit a crime, the pharmacist cannot even be prosecuted as an instigator according to § 26 of the Penal Code. The result would be impunity for both. In accordance with § 25 subpara 1 alt 2 of the Penal Code, the pharmacist can be treated as an indirect perpetrator if they had sufficient control over the crime. The case portrays another example of normative control over the acting person and therefore the commission of the crime.[61] It is the pharmacist's discretion which decides whether the husband will leak the information or not. The husband's participation in the pharmacist's crime can in turn be classified as aiding and abetting in accordance with § 27 subpara 1 of the Penal Code.

b. Deficit on the Level of Unlawfulness

The indirect perpetrator makes use of a human tool that does not act unlawfully when he creates a situation in which the acting person can rightfully invoke a ground to exclude the unlawfulness of their action. A man whose flirting attempts get rejected by a woman at Oktoberfest and calls the nearby police to report that the woman stole his wallet, can be guilty of unlawful imprisonment as an indirect perpetrator in accordance with §§ 239 subpara 1, 25 subpara 1 alt 2 of the Penal Code in case the police bring the woman to a holding cell. The police officer acts lawfully as he can invoke § 127 subpara 2 of the Code of Penal Procedure. This man knowing that the woman never stole anything while the police officer may think so, becomes the indirect perpetrator who exerts control over the crime by superior knowledge.

The indirect perpetrator can also create a situation in which the crime conveying person acts in self-defense and therefore not unlawfully. For example, a person might tell their strongly intoxicated and thus easily influenced friend that a stranger just insulted them. If that friend – as predicted – starts to attack the third person, that third person acts in self-defense according to § 32 of the Penal Code and may lawfully defend themself against the attack by the drunk friend of the perpetrator. In a case like this, it is necessary that the perpetrator create a situation in which his human tool acts appear to be justified. Additionally, he must be in a position to be superior to the

61 Murmann (n 67) 322.

attacker.[62] This can easily be assumed when the tricked person is in a state of insanity which excludes criminal responsibility according to § 20 of the Penal Code.

c. Deficit on the Level of Guilt

The human tool can possess a deficit on the third level of criminal liability. These cases need to be distinguished from cases of secondary liability, since the principle of limited accessorial liability requires a principal perpetrator who acts intentionally and unlawfully but does not necessarily act guiltily.[63] The distinction between a principle and a secondary liability can be made asking whether the participant knew about the deficit of the acting person and systematically and intentionally takes advantage of it. If this is the case, indirect perpetration must be applied.

According to §§ 17, 19, 20 of the Penal Code, a person acts 'without guilt' when they suffer an unavoidable mistake of law, are under the age of fourteen, or are in a condition where they are mentally not able to comprehend what they are doing due to mental illness or intoxication. If an indirect perpetrator uses a human tool, which is unable to be blamed by the legal order, he can exercise control either by superior will or by coercion.[64] The former is illustrated in the case when the indirect perpetrator pays a ten-year-old fifty euros to steal a laptop; the latter, if he threatens a thirteen-year-old to expose his secret smoking to his parents and forces him to beat up a classmate. In both cases, the child does not bear any criminal responsibility due to the legislative will which is laid down in § 19 of the Penal Code.[65]

Acting 'without guilt' is a person who usually can foresee the consequences of their actions and act in accordance with such insight, i.e. is able to be legally blamed, if they are under duress in accordance with § 35 subpara 1 of the Penal Code. If the person in the background threatens to kill the husband of the person in the front if that person does not steal a diamante from a jeweler, the crime conveying person commits the crime intentionally and unlawfully but can invoke § 35 subpara 1 and therefore acts without guilt. The indirect perpetrator who steers the human tool through their threat exercises control by coercion. This constitutes the requisite link between the commission by the person in the front and the person in the back who then commits the theft 'through another' in the meaning of § 25 subpara 1 alt 2 of the Penal Code. Prerequisite of this form of control over the crime is however that the threshold of § 35 subpara 1 of the Penal Code is met in order to maintain the principle of responsibility.[66] If the person in the back for example threatened to kill a random

62 Kühl (n 10)§ 20, mn. 59.

63 Wessels, Beulke and Satzger (n 38), mn. 850.

64 Roxin, *Strafrecht AT II* (n 35)§ 25, mn. 139–140.

65 Rengier (n 41)§ 43, mn. 29.

66 ibid§ 43, mn. 44–46; Koch, 'Grundlagen Zur Mittelbaren Täterschaft, § 25 I Alt 2' [2008] Juristische Schulung 496, 496; Roxin, *Strafrecht AT II* (n 35)§ 25, mn. 49; Otto (n 11) 254. This however is disputed for example by Heine and Weißer

colleague if the crime conveying person did not commit the crime, the person in the front could not invoke § 35 subpara 1 because work colleagues are not 'a relative or person close to him'. As a result, the person in the front commits the theft without a deficit and in accordance with the principle of responsibility is solely responsible for the crime. This leaves room for secondary liability only on the end of the person who made use of the threat.

d. The Perpetrator Behind the Perpetrator

The construction of a 'perpetrator behind the perpetrator' has been developed as an exception to the principle of responsibility in cases where the acting person does not possess any criminal deficit.[67] Groups of cases which are discussed under this construction are an avoidable mistake of fact according to § 17 sentence 2 of the Penal Code, diminished responsibility under § 21 of the Penal Code, a mistake regarding the sense of an action, and control over the crime through an organization.

To be granted impunity under § 17 sentence 1 of the Penal Code, the mistake of fact – i.e., 'the awareness that he is acting unlawfully' („Einsicht, Unrecht zu tun") – must have been unavoidable. This poses a high standard because most mistakes of law can be avoided by obtaining legal advice by a professional.[68] For this reason, § 17 sentence 2 of the Penal Code offers the court the possibility to mitigate the sentence. This means that the perpetrator still acted guilty and may be blamed for their action by the legal order. The amount of guilt however is reduced because the appellative function of the criminal provision does not reach the perpetrator. If a person in the background knows about the mistake of law of the person in the front and uses this mistake to control them, indirect perpetration by virtue of superior knowledge is established.

Like § 17 sentence 1 of the Penal Code, § 21 alt 1 of the Penal Code requires that 'the capacity of the offender to appreciate the unlawfulness of his actions' („die Fähigkeit des Täters, das Unrecht der Tat einzusehen") is diminished. Therefore, a case involving a crime conveying person with diminished responsibility according to § 21 alt 1 of the Penal Code can be construed parallel to the case of an avoidable mistake of law.[69]

§ 21 alt 2 of the Penal Code on the other hand is concerned with the 'capacity […] to act in accordance with any such appreciation' („die Fähigkeit, […] nach dieser

(n 44) mn. 40; Friedrich-Christian Schroeder, *Der Täter Hinter Dem Täter. Ein Beitrag Zur Lehre von Der Mittelbaren Täterschaft* (Duncker & Humblot 1965) 123–125.

67 Detailed Rönnau (n 61).

68 Wessels, Beulke and Satzger (n 38) mn. 735–737.

69 Roxin, *Täterschaft Und Tatherrschaft* (n 64)§ 25, mn. 150; Bernd Schünemann, 'Die Rechtsfigur Des „Täters Hinter Dem Täter" Und Das Prinzip Der Tatherrschaftsstufen' [2006] Zeitschrift für internationale Strafrechtsdogmatik 301, 303; Schroeder (n 74) 120–122.

Einsicht zu handeln"). In such a case, the normative appeal does reach the perpetrator, but they do not let it dissuade them from acting, nonetheless. This situation is closer to the cases of coercion below the threshold of § 35 subpara 1 of the Penal Code. For that reason, the principle of responsibility does not need to be broken through and the acting person in the front bears sole responsibility as a perpetrator.[70] The influencing person in the back can be punished as a secondary.

Highly debated are cases in which the acting person errs about the sense of their actions. These cover cases for errors regarding the quantification of injustice and the qualification of injustice. In the first case, the person in the background manipulates their human tool as to the amount of damage to the protected value they commit. The person in the front for instance damages a painting by Claude Monet worth 50.000.000 euros believing it was a worthless fake. In the second case, the human tool commits a crime (e.g.,§ 212 of the Penal Code) while only the indirect perpetrator knows that a qualified offense (§ 211 of the Penal Code) is committed. The final nuance of the error regarding the sense of action occurs in cases where the crime conveying person suffers from an *error in persona vel obiecto,* i.e., hits the object or person that they were aiming for but is mistaken about the identity of that target. The identification of the target can influence the perpetrator's *mens rea.* If the identity is part of the crime's definition or in relation to part of that definition – e.g., the property that an object belongs to another for § 303 subpara 1 of the Penal Code – § 16 of the Penal Code can negate the mental element. If the perpetrator is mistaken about the exact owner, but still knows that the object does not belong to himself, the mistake is irrelevant and § 16 of the Penal Code is inapplicable.[71] The setting of an *error in persona* combined with indirect perpetration sees the crime conveying person shooting at someone who the indirect perpetrator switched for another person. The person in the front is liable for manslaughter as an individual perpetrator in accordance with §§ 212 subpara 1, 25 subpara 1 alt 1 of the Penal Code because the error about the identity of the person shot is irrelevant to their intention. The indirect perpetrator is liable according to §§ 212 subpara 1, 25 subpara 1 alt 2 of the Penal Code since he controlled the course of event by deciding which person gets shot.

The last form of control over the crime an indirect perpetrator can possess is exercised by having a controlling position inside a criminal organization. Roxin developed this kind of control over the crime to find a link between the officers of the Nazi regime who gave the orders to commit the Holocaust from behind their desks but left the execution to others.[72] The idea behind this kind of control over the crime is that the indirect perpetrator can – from behind his desk – set a course of action in

70 Rengier (n 41)§ 43, mn. 46c.

71 This is a simplified summary. For a detailed analysis of the *error in persona vel obiecto* see Roxin and Greco (n 2)§ 12, mn. 193–201.

72 Claus Roxin, 'Straftaten Im Rahmen Organisatorischer Machtapparate' [1963] Goltdammer's Archiv für Strafrecht 193.

motion which results more or less 'automatically' in the commission of the crime by the lower members of the criminal organization. According to Roxin, control over the crime by control over a criminal organization has three requirements.[73] Firstly, there must be a hierarchical apparatus of a certain size. This can be said if the there are enough members that the indirect perpetrator is sure to have enough human tools at his disposal. The head of the organization (indirect perpetrator) does not need to know the individual member down the chain of command (direct perpetrator).[74] Secondly, the apparatus must have left the grounds of the legal order. If the organization acts lawfully, the legal order and as part thereof criminal laws are paramount to any order of the head of the organization. Hence, the members of the apparatus are expected to withstand any pressure from above which does not trigger the legal ground to exclude criminal responsibility.[75] And thirdly, the direct perpetrator must be fungible, and the indirect perpetrator has to know that if the first recipient of their order refuses to act, there is another one that can take their place. This last point is central to Roxin's understanding of control over the crime by virtue of control over a criminal organization. The fungibility of the person in the front ensures the automatic implementation of the order. The Nazi regime fulfilled all the criteria, but the construction can also be applied for instance to drug cartels and terror organizations.

The FCJ applied this construction in a case against the members of the national security council of the former German Democratic Republic ('GDR') who gave the orders to kill inner-German fugitives.[76] The soldiers who shot the fugitives at the border committed murder as individual perpetrators according to §§ 211, 212, 25 subpara 1 alt 1 of the Penal Code. Therefore, it was necessary to find a way to attribute these killings to the members of the GDR's national security council. The former GDR as a dictatorship fulfilled the requirements of a criminal organization.[77] The members of the national security council had the authority to issue the order to shoot and knew that they had an entire security force which would follow their order even if an individual soldier refused to comply with the order. Therefore, they were indirect perpetrators of murder according to §§ 211, 212, 25 subpara 1 alt 2 of the Penal Code. It must be noted however that the FCJ did not apply the theory of

73 Roxin, *Täterschaft Und Tatherrschaft* (n 64)§ 44, mn. 369–377; Roxin, *Strafrecht AT II* (n 35)§ 25, mn. 105–107; Roxin, 'Straftaten Im Rahmen Organisatorischer Machtapparate' (n 80) 199–201; Leon Radde, 'Von Mauerschützen Und Schreibtischtätern – Die Mittelbare Täterschaft Kraft Organisationsherrschaft Und Ihre Anwendung Auf Wirtschaftsunternehmen de Lege Lata' [2018] Juristische Ausbildung 1210, 1213–1215.

74 This also rules out co-perpetration since there cannot be a common plan if the head of the organization does not know who his partner in crime will be. See Roxin, 'Straftaten Im Rahmen Organisatorischer Machtapparate' (n 80) 200. In favour of co-perpetration e.g. Günther Jakobs, 'Mittelbare Täterschaft Der Mitglieder Des Nationalen Verteidigungsrats' [1995] Neue Zeitschrift für Strafrecht 26, 27.

75 If the pressure reaches that point, the construction of a perpetrator behind the perpetrator is inapplicable and another form of indirect perpetration can be assumed.

76 *BGHSt 40, 218,*.

77 Claus Roxin, 'Anmerkung Zu BGHSt 40, 218' [1995] Juristenzeitung 49, 49.

control over the crime by virtue of control over a criminal organization as developed by Roxin but rather created its own understanding of it.[78] The court relies on the idea that in a criminal organization the process continues 'automatically' if started from behind the desk.[79] It combined Roxin's idea of fungibility of the human tool with the ideas of FC Schroeder.[80] He reasoned that a member of a criminal organization is more likely to commit a crime in the context of their criminal organization because they are already determined to do so.[81] Key to determining control over the crime by virtue of control over a criminal organization is according to the FCJ just the hierarchical structure of the organization resulting in the local and temporal distance between order and execution which allows automatic routines to commit the individual offense.[82] Even though having developed an understanding of this kind of control over the crime, the court did only apply it as part of its subjective theory to establish criminal responsibility as a principal perpetrator.

The FCJ later expanded the application of the doctrine of control over the crime by control over a criminal organization to economic corporations.[83] It did so – against massive criticism from legal scholarly debate –[84] by focusing (implicitly) rejecting the requirement of fungibility and that the organization must have left the grounds of the legal order and instead focusing on the unconditional determination to commit the crime. Hence, the CEO of a bankrupt company can be found guilty of committing fraud according to §§ 263, 25 subpara 1 alt 2 of the Penal Code if he instructs a knowing employee to continue ordering new materials contrary to the obligation to file bankruptcy.[85]

By relying on a subjective *animus* theory, the FCJ avoids complications for which proponents of the material-objective approach of control over the crime are critizised. Especially in cases of indirect perpetration, control over the crime cannot always be easily established. Turning to additional criteria like interest in the success of the offense may help distinguish between primary and secondary participants. It cannot be disregarded however that it blurs the lines between the perpetrators and accomplices – categories which the Penal Code clearly stipulates.

78 Radde (n 81) 1216–1217.

79 *BGHSt 40, 218,* (n 84) 236.

80 ibid 237.

81 Schroeder (n 74) 166–169.

82 *BGH NStZ 2008, 89,* 90.

83 ibid; *BGH, JR 2004, 245,* 246; *BGH NStZ 1998, 568,* 569; *BGHSt 40, 218,* (n 84) 237.

84 Roxin, *Täterschaft Und Tatherrschaft* (n 64)§43, mn. 63; Roxin, 'Anmerkung Zu BGHSt 40, 218' (n 85) 51–52; Heine and Weißer (n 44) mn. 30 with further references; Radde (n 81) 1223–1224; Alfred Dierlamm, 'Anmerkung Zu BGH, NStZ 1998, 568' [1998] Neue Zeitschrift für Strafrecht 569; Thomas Rotsch, 'Die Rechtsfigur Des Täters Hinter Dem Täter Bei Der Begehung von Straftaten Im Rahmen Organisatorischer Machtapparate Und Ihre Übertragbarkeit Auf Wirtschaftliche Organisationsstrukturen' [1998] Neue Zeitschrift für Strafrecht 491, 493–495.

85 *BGH NStZ 1998, 568,* (n 91).

3. Comparison

Compared to individual and co-perpetration, perpetration by using another person is a far more contentious form of committing a crime. Establishing a link between the people involved requires careful consideration not to stretch the ordinary meaning of 'committing a crime.'

Indirect perpetration as in § 25 subpara. 2 of the German Penal Code shares similarities with ordering perpetration. The latter one bases the criminal blame against the ordering perpetrator on the fact that they take advantage of the dependence of the direct perpetrator. If the relationship which the dependence stems from is between a father and his ten-year-old daughter, both legal orders come to the same conclusion. The daughter is not criminally responsible due to her age[86] and the father is criminally liable as an ordering/indirect perpetrator. In certain situations, when this dependence reaches the point where grounds to exclude criminal responsibility becomes applicable, this can lead to indirect perpetration in the German meaning as well. If this point is reached, a decisive difference between the two concepts comes to light. While Polish law allows for a conviction of both the direct (individual) and "indirect" (ordering) perpetration, German law can only punish the indirect perpetrator relying on the principle of responsibility. Only in the case of a perpetrator behind the perpetrator can the German Penal Code get to the same conclusion. This requires more than just dependence. It requires some sort of misperception or partial deficit on the end of the crime conveying person. And even the case of control through an organization sets the bar higher. Since indirect perpetration covers such a wide range of constellations, a case-by-case assessment is warranted.

When it comes to commanding perpetration, the involvement of the commanding perpetrator in the execution stage marks a key difference between commanding and indirect perpetration. In most cases of indirect perpetration, there is no simultaneous link between the parties involved. A commanding perpetrator who steers the direct perpetrator can also be seen as a co-perpetrator from a German perspective. The control over the commission lies in the control over the person fulfilling the *actus reus* of the offense. If both parties act in agreement with one another (voluntarily or not), German criminal law will consider it a common commission relying on the functional understanding of control.

VI. Principles of Responsibility for Causative Forms of Cooperation

As indicated earlier, the Polish structure of responsibility for causative forms of cooperation – co-perpetration, commanding perpetration, ordering perpetration – to some extent refers to both the concept of participation in someone else's crime and the concept of uniform perpetration.

86 Art. 10 of the Polish Criminal Code and § 19 of the German Penal Code.

The condition for attributing responsibility for a prohibited act is the fulfilment by the perpetrator (or jointly by the accomplices) of all the characteristics specified by the legislator in the specific part of the Criminal Code. To commit a prohibited act in the form of a commanding or ordering perpetration it is not enough to issue an order or direct the actions of other persons, but to carry out all the characteristics of a prohibited act by the performers. If such implementation does not take place, the ordering perpetrator, commanding perpetrator and co-perpetrators who have previously performed activities covered by the agreement will be liable for an attempt to commit a prohibited act both when the behavior of the contractors or other accomplices has already entered the stage of attempting, and when they did not carry out the activities covered by the order or the agreement at all.[87]

Accomplices who have not performed any activities covered by the agreement are not liable for an attempt to commit a prohibited act, even if other co-operators have performed behaviors covered by the agreement. They may then be liable for instigation, aiding, abetting, or preparation if it is punishable.

All co-operators, i.e., both co-perpetrators as well as ordering perpetrators and commanding perpetrators, are liable within the limits of their intent or negligence, as well as within the limits of their guilt. This means that the lack of liability of the contractor or one of the co-perpetrators due to the exclusion of the possibility of assigning fault is irrelevant to the liability of the other cooperating parties. Personal circumstances leading to exclusion of criminality or exacerbating this criminality are also irrelevant – this is in particular the sphere of mental experiences, mental state, maturity, active regret, recidivism.[88] Since each of the cooperating party in the causative form commits his own crime, all the conditions of criminal liability referring to the principle of time coincidence are determined for the time of action of each of the cooperating party separately – for example, the sanity of the ordering perpetrator is determined at the moment of issuing the order, and not at the moment of execution by the contractor).

Despite the recognition that each cooperating party commits their own offence, the beginning of the limitation period for criminal liability will be the moment when the performer completes the features of a prohibited act, since only the moment of completion of its activity determines the time of committing a prohibited act within the meaning of Art 6 § 1 of Criminal Code.

87 Wróbel and Zoll (n 6).

88 Agnieszka Liszewska, *Współdziałanie Przestępcze w Polskim Prawie Karnym. Analiza Dogmatyczna* (2004).

VII. Common History and Other Similarities

In the following step more differences and similarities between the different law regimes will be examined. However, in the first step, a brief history of the development of the Polish Criminal Code offers an explanation as to why the two systems have so much in common.

A. German History of the Polish Criminal Code[89]

The broad similarities between the Polish and German criminal codes that appear have a historical basis. Criminal law during the Partitions of Poland differed depending on the geographical location of the lands where it was in force. In the Prussian partition, the Prussian Landrecht of 1794 was initially in force, characterized by considerable severity, based on the idea of intimidation as a preventive measure against society. Despite the beginning of codification work at the beginning of the 19th century, the Prussian Code was adopted only in 1851. Its content shows the influence of the Napoleonic Code of 1810 and Feuerbach's Bavarian Penal Code of 1813 – it introduced solutions corresponding to the ideas of the classical school of criminal law. The solutions of this code, which had an impact on future Polish codifications, were to equate responsibility for an attempt with responsibility for committing it and accepting the same responsibility for participation in someone else's crime with perpetration. The Prussian Code of 1851 was replaced by the Penal Code of the German Reich of 1871 as a result of political transformation – this regulation was in force in the areas of the former Prussian partition until enforcement of the Polish Penal Code of 1932.

After Poland regained independence in 1918, four legal orders were in force in its territory: Austrian, German, Russian and Hungarian. Initially, the possibility of adopting a single partitioning code for the entire territory of Poland was considered, but it was decided to build a new Polish criminal code – drawing on the existing codification achievements of European countries.

VIII. Uniform Perpetration vs. Polish Approach to Phenomenal Forms of Crime

The Polish approach to phenomenal forms of crime and the resulting differentiation of criminal liability of individual perpetrators allows the implementation of the principle of individualization and the personal nature of the criminal sanction.

According to Art 55 of the Polish Criminal Code, circumstances affecting the penalty are considered only as to the person to whom they relate. Therefore, a

89 Juliusz Bardach, Bogusław Leśnodorski and Michał Pietrzak, *Historia Ustroju i Prawa Polskiego* (LexisNexis 2009).

stricter or milder liability cannot be attributed to the perpetrator with reference to circumstances concerning other cooperating persons. This applies to a reduced degree of guilt due to age, previous criminal record, reconciliation with the aggrieved party, financial situation, and a certain social status. The principle of individualization of the punishment is understood as a supplement to the principles of liability of persons cooperating in committing a crime set out in Art 20 and 21 of the Polish Criminal Code. This stems from the nature of guilt as the individual attribution and reproach of the legal order against the individual committing the prohibited act.

Pursuant to the first regulation, each of the parties cooperating in the commission of a prohibited act is liable within the limits of its intention or negligence, regardless of the liability of the other cooperating parties. At the level of punishment, this also means that circumstances beyond the characteristics of a prohibited act, influencing the assessment of the degree of social harmfulness, may be considered only in relation to the cooperating party for whom they were foreseeable. Art 21 of the Polish Criminal Code, in turn, states that personal circumstances excluding or mitigating or aggravating criminal liability are considered only as to the person to whom they refer.

The principle of individualization of a penal sanction goes beyond the wording of Art 55 of the Polish Criminal Code – in a broad sense, it also expresses the order to adjust the punishment to the degree of individual guilt of each perpetrator, as well as to limit the negative consequences of conviction only to the perpetrator. Therefore, a criminal sanction cannot refer to the rights and freedoms of persons other than the convict, and the punishment should not be carried out by anyone other than the perpetrator.

A separate solution, which is a departure from the principle of independence of liability of causative forms of cooperation, is provided for individual crimes. Pursuant to Art 21 § 2 of the Criminal Code, 'if a personal circumstance concerning the perpetrator, affecting even only a higher criminality, is a sign of a prohibited act, the collaborator is subject to criminal liability provided for this prohibited act, if he knew about this circumstance, even if it did not concern him.'

Art 21 § 2 of the Criminal Code also provides for the criminal liability of a contractor who does not have a qualifying characteristic provided for in the type specifying an individual offence, if any of the accomplices, the ordering perpetrator or commanding perpetrator has such a characteristic, and the contractor knows about it. Thus, it can be stated that cooperation in the causative form with a person who has a feature qualifying them as the perpetrator of an individual crime increases the degree of social harmfulness of this cooperation if it was covered by the person's knowledge.

Examples of such prohibited acts include infanticide, the perpetrator of which may only be the mother, all prohibited acts relating to public authorities, and all

prohibited acts specified in the military part of the Criminal Code, which may only be committed by a soldier.

The legislator also introduced into the content of the Polish Criminal Code a special rule regarding the liability of the cooperating parties for an offense completed in the preparation or attempted phase. Pursuant to Art 23 § 1 of the Criminal Code, an accomplice who voluntarily prevented the commission of a prohibited act is not punishable. It should be clearly noted that the benefit of active regret regulated in this way can only be used by the cooperating person who himself prevented the commission of the entire prohibited act. The other cooperating parties will therefore be liable for the attempt, although objectively no prohibited act has been committed.

In the same vein, the German Penal Code stipulates in § 46 subpara 1 that '[t]he guilt of the offender is the basis for sentencing.' This must be understood as each participant's guilt determines their individual punishment. This becomes most obvious when looking at the criterion of 'the offender's prior history, his personal and financial circumstances' as in § 46 subpara 2 of the Penal Code. The individual experiences a person has in their life shapes them and makes up an important part of their personality. This personality together with the events of the commission build the foundation of the sentence.[90] As § 46 subpara 3 clarifies, circumstance which are part of the legal definition of the crime cannot be considered determining the just sentence as it relates to the amount of guilt contracted by the individual.

Just like Art 20 of the Polish Criminal Code, § 29 if the German Penal Code determines that each participant – primary or secondary – must be judged upon their 'own guilt irrespective of the guilt of the others.' In the German system of limited accessory in which the secondary participant is liable for the wrong committed by the principal, § 29 of the Penal Code clarifies that there is no attribution of guilt.[91] Consequently, a participant who possesses the characteristic of grounds excusing them by eliminating the blameworthiness of the criminal act – for instance § 19 of the criminal code (lack of criminal responsibility due to young age) or § 21 of the criminal code (insanity) – cannot invoke this ground of excluding criminal responsibility.

Like Art 21 of the Polish Criminal Code, § 28 of the German Penal Code deals with special personal characteristics on the level of the crime itself. These special characteristics describe the person rather than the act.[92] § 28 of the Penal Code differentiates between characteristics establishing criminal liability (subpara 1) and those which 'aggravate, mitigate or exclude punishment' (subpara 2).

90 *BGHSt 16, 351,* 353; Jörg Kinzig, '§ 46 StGB' in Albin Eser (ed), *Schönke/Schröder* (30th edn, CH Beck) mn. 29–30.

91 Wolfgang Joecks and Jörg Scheinfeld, '§ 29 StGB' in Volker Erb and Jürgen Schäfer (eds), *Münchener Kommentar*, vol 1 (4th edn, CH Beck) 1.

92 Brian Valerius, 'Besondere Persönliche Merkmale' [2013] Juristische Ausbildung 15, 17.

In the latter case, participants will be punished based on two different violated norms. A participant without the characteristic will be punished in accordance with the basic norm violated. A participant possessing the special characteristic will be punished according to the relevant provision with a higher/lower range of punishment. As far as aggravating, mitigating, or excluding characteristics are concerned, there is no difference between the Polish and German criminal law.

Differences emerge in cases of special characteristics establishing the principal perpetrator's criminal liability – i.e., cases of special offenses. As mentioned above,[93] a perpetrator of a special offense under German law can only be a person possessing the special subjective quality defining the special character of the offense. Anyone else involved in the commission of the special offense must be deemed a secondary participant which leads to the different handling between the two investigated law regimes. On one hand, § 28 subpara 1 of the German Penal Code stipulates a mandatory reduction of the sentence for the *secondary* participant. Both participants will be sentenced according to the same norm, but their ranges of punishment will differ. On the other hand, Art 21 § 2 of the Polish Criminal Code states that one party (might it be a co-, ordering, or commanding perpetrator) is aware of the special quality of their partner and leads to everyone being sentenced on the basis of the same norm according to their individual guilt but from the same range of punishment.

IX. Summary

The article has shown that because of their common heritage to the Prussian Landrecht and criminal code as well as Feuerbach's Bavarian Criminal Code, the models of criminal liability of a plurality of perpetrators under Polish and German criminal law share similarities. In the areas of individual and co-perpetration, no major differences emerged. Equal participation in a crime committed by more than one person requires a subjective agreement and an objective common commission. Over time, different solutions for regulations of a perpetrator using another person have been developed. The Polish interpretation of commanding and ordering perpetration is seen as two convictions (one of the acting and one of the commanding/ordering of people) which offers a fine distinction for the 'wire-puller's' case. In contrast to that, the German indirect perpetrator usually convicts just the 'puppet-master' in the background while the acting person – except for cases of a perpetrator behind the perpetrator – remains unpunished. This shows that Polish criminal law sees these constructions more like cooperation while German criminal law stresses the factor of the indirect perpetrator taking advantage of his human tool.

93 *Supra* IV. 1.

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RESEARCH ARTICLE

The Intent Requirement for the Liability Arising from Immorality under German, Swiss and Turkish Laws

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Abstract

Upon the modernization of the Republic of Türkiye, the Swiss Civil Code and the Swiss Code of Obligations were adopted in 1926. The Turkish provision that regulates liability arising from immorality (Turkish Code of Obligations Art 49/2) requires the tortfeasor to act intentionally. However, it is controversial in Swiss doctrine whether the Swiss Code of Obligations Art 41/2 – the source law of Turkish provision – requires *Absicht* (malice/pure intent to cause harm) as a different degree of intent. Even though the Turkish Code of Obligations Art 49/2 uses the Turkish term kasıt -intent- (*Vorsatz*), the debate in the Swiss doctrine spread to Turkish doctrine, and there is a disagreement regarding the degree of intent required in the provision. While some authors state that, in accordance with Swiss law, *Absicht* (malice) should be required for the application of such a provision with a restrictive nature, other authors find indirect intent (*dolus eventualis*) sufficient to invoke said provision. In brief, in this paper, the degree of intent required for the liability arising from immorality under Turkish tort law shall be evaluated in comparison with German and Swiss laws.

Keywords

Malice, Direct intent, Indirect intent, Liability, Immorality

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Introduction

Upon the modernization of the Republic of Türkiye, the Swiss Civil Code and the Swiss Code of Obligations were adopted in 1926. According to Art 49/2 of the Turkish Code of Obligations (TCO), which regulates liability arising from immorality: 'Even if there is no legal rule prohibiting the harmful act, a person who intentionally harms another person with an immoral act is also obliged to compensate for this damage.' The source text of TCO Art 49/2 is Art 41/2 of the Swiss Code of Obligations (OR) which reads as follows: 'A person who willfully causes damage to another in an immoral manner is likewise obliged to provide compensation.' (*Ebenso ist zum Ersatze verpflichtet, wer einem, andern in einer gegen die guten Sitten verstossenden Weise absichtlich Schaden zufügt*.) The source law of OR Art 41/2 is the German Civil Code (BGB) which provides in BGB § 826: 'A person who, in a manner contrary to public policy, intentionally inflicts damage on another person is liable to the other person to make compensation for the damage.' (*Wer in einer gegen die guten Sitten verstoßenden Weise einem, anderen vorsätzlich Schaden zufügt, ist dem, anderen zum Ersatz des Schadens verpflichtet.*)

Whether OR Art 41/2 requires *Absicht* – malice/pure intent to cause harm – as a different degree of intent is a controversial issue within Swiss doctrine. Whereas some authors argue for the *Absicht* (malice) requirement as the provision explicitly mentions *Absicht* and not *Vorsatz*; the prevailing opinion argues that *Vorsatz* – intent – is sufficient for the application of OR Art 41/2. According to the latter view, the provision in OR should be interpreted in accordance with German law (source law of Swiss law) where direct intent (*dolus directus*) (*Vorsatz*), and in fact, indirect intent (*dolus eventualis*) are sufficient for the application of BGB § 826.

Even though TCO uses the Turkish term *kasıt/*intent (*Vorsatz*) in its Art 49/2, the debate in the Swiss doctrine has spread to Turkish doctrine. There is disagreement regarding the degree of intent required in the Turkish provision, and some authors state that, in accordance with Swiss law, *Absicht* (malice) should be required for the application of such provision with restrictive nature; other authors find indirect intent (*dolus eventualis*) to be sufficient to invoke the immorality provision.

In this paper, the degree of intent required for the liability arising from immorality under Turkish tort law shall be evaluated in comparison with German and Swiss laws. First, liability arising from immorality under Turkish law shall be explained. Second, the concept of intent and its degrees shall be examined. Third and finally, the degree of intent required for the liability arising from immorality under German, Swiss and Turkish laws shall be analyzed and the approaches in the doctrine and the jurisprudence in the respective countries shall be compared.

I. Liability Arising from Immorality under Turkish Law

A. Tort Liability in General under Turkish Law

Pursuant to TCO Art 49, 'Whoever causes harm to another by a faulty and unlawful act is obliged to compensate for this damage. Even if there is no legal rule prohibiting the harmful act, a person who intentionally harms another person with an immoral act is also obliged to compensate for this damage.' This provision which obliges anyone who causes harm to another by a faulty and unlawful act is to compensate for this damage, is the foremost, and most fundamental rule of Turkish tort law. This is the general tort liability provision and is referred to as fault liability.[1]

The constituent elements of fault liability are act, unlawfulness, damage, causal link between the unlawful act, and damage, and finally, fault.[2] Fault is required for the establishment of the general tort liability regulated in TCO Art 49/1, and whether the fault is at the degree of intent or negligence does not make any difference in terms of establishing the liability. Even if the tortfeasor is at fault to a slight degree, tort liability arises. However, the gravity of the fault is taken into account in determining the amount of compensation and apportioning the responsibility among multiple tortfeasors.

In addition to fault liability, Turkish law recognizes several provisions of strict liability. Strict liability accepted in the TCO can be categorized into three groups: First, equity liability, which refers to the liability of persons who lack the power of discernment in accordance with equity, who otherwise could not have been held liable due to lack of power of discernment, hence, lack of fault. (TCO Art 65) Second, due diligence liability is another category of strict liability where TCO stipulates three provisions: employer's liability (TCO Art 66), animal keeper's liability TCO Art 67), and liability of the building owners (TCO Art 69). Third, danger liability refers to strict liability of the enterprises that arise from abnormally dangerous activity. (TCO Art 71)

B. Liability Arising from Immorality in General under Turkish/Swiss Laws

As opposed to the rule that any degree of fault is sufficient for the establishment of general tort liability (TCO Art 49/1) is the immorality provision in TCO Art 49/2. Pursuant to Art 49/2, which regulates liability arising from immorality: 'Even if there is no legal rule prohibiting the harmful act, a person who intentionally harms another person with an immoral act is also obliged to compensate for this damage.'

1 Fikret Eren, *Borçlar Hukuku Genel Hükümler* (26th edn, Yetkin 2021) 594.

2 M. Kemal Oğuzman and Turgut Öz, *Borçlar Hukuku Genel Hükümler Cilt: II* (14th edn, Vedat 2018) 12.

The immorality required in TCO Art 49/2 refers to the objective immorality prevailing in a particular society.[3] The objective morality prevailing in a certain society means the prevailing sense of justice, fairness in a certain time, place in the light of changes, and transformations in the society; therefore, the concept of immorality is subject to social change.[4] Some of the cases where immorality has already been accepted in Turkish/Swiss law include encouraging others to breach a contract, agreements made during an auction process (e.g. *pactum de non licitando*-agreement not to make an offer at an auction), abuse of the right to file a claim, and refraining from entering into a contract in the absence of a justifiable reason.[5]

Regarding whether awareness of immorality (*das Bewusstsein der Sittenwidrigkeit*) is required for the implementation of TCO Art 49/2, the prevailing view in the doctrine states that awareness of immorality is not required on the grounds that it is always possible for the tortfeasor to have a moral understanding different from the established general moral understanding in the society, and in such case, it is unacceptable for the tortfeasor to escape from responsibility claiming unawareness of immorality.[6]

Under TCO Art 49/2, intent is sought as a constituent element so that immorality constitutes a tort, and thus liability arises. The requirement of intent for the emergence of liability from immorality has the function of eliminating the danger of vast application of liability due to the vague concept of immorality.

II. The Concept of Intent and Its Degrees

A. The Concept of Intent

According to the generally accepted definition, fault means causing damage deliberately, and willfully (intentionally), or by not showing the necessary care

3 Franz Werro, Commentaire romand, *Code des obligations I Art. 1-529 CO* (2nd edn, Helbing and Lichtenhahn 2012) art. 41, n. 99; Walter Fellmann and Andrea Kottmann, *Schweizerisches Haftpflichtrecht* (Stämpfli 2012) N 397-398; Christoph Müller, *CHK- Handkommentar zum Schweizer Privatrecht* (3rd edn, Schulthess 2016) Art 41, N 55; Eren (n 1) 687; Nami Barlas, 'Başkasının Sözleşme İlişkisine Müdahale Sebebiyle Sorumluluk' in Engin Bİ, Baysal B and Aydın Ünver T (ed), *Prof. Dr. Rona Serozan'a Armağan* (OnikiLevha 2010) 422; Pınar Çağlayan Aksoy, *Hukuka ve Ahlaka Aykırılık Unsurları Çerçevesinde Salt Malvarlığı Zararlarının Tazmini* (Onikilevha 2016) 350; Kadir Berk Kapancı, *Ahlaka Aykırı Bir Fiille Kasten Verilen Zararın Tazmini (TBK m. 49 f. II)* (Vedat 2016) 14-15; Mustafa Alper Gümüş, *Borçlar Hukukunun Genel Hükümleri* (Yetkin 2021) 460.

4 Reto Bieri, 'Sittenwidrige Schädigung nach Art 41 Abs. 2 OR Einblick in eine 'Mauerblümchen'-Bestimmung des Haftpflichtrechts' (2008) *Aktuelle Juristische Praxis*) 551; Derya Ateş, *Borçlar Hukuku Sözleşmelerinde Genel Ahlaka Aykırılık* (Turhan 2007) 87; Çağlayan Aksoy (n 3) 350; Kapancı (n 3) 12, fn 39.

5 Ingeborg Schwenzer, *Schweizerisches Obligationenrecht Allgemeiner Teil* (7th edn, Stämpfli 2016) N 51.05-51.09; Claire Huguenin, *Obligationenrecht- Allgemeiner und Besonderer Teil* (5th edn, Schulthess 2014) N 1960; Müller (n 3) Art 41, N 56; Ahmet M. Kılıçoğlu, *Borçlar Hukuku Genel Hükümler* (26th edn, Turhan 2022) 371; Eren (n 1) 687; Çağlayan Aksoy (n 3) 427.

6 Selim Kaneti, *Haksız Fiilde Hukuka Aykırılık Unsuru* (Kazancı 2007) 175; Meliha Sermin Paksoy, *Sözleşmeyi İhlale Yöneltme* (Onikilevha 2018) 133; Barlas (n 3) 428; Çağlayan Aksoy (n 3) 379.

(negligently).[7] Turkish/Swiss private law doctrine divides the concept of fault into two: intent and negligence. Neither the concepts of fault, intent or negligence is defined in the Turkish, and Swiss Codes of Obligations.

There is no legal definition of fault in the German Civil Code either. In BGB §276, intent and negligence are counted as categories of fault by stating that liability will arise from intent and negligence. Although the concept of intent does not have a legal definition in BGB as in Turkish and Swiss laws, the definitions of direct intent and indirect intent applied in Turkish/Swiss law, which shall be explained below, are also valid in German law.[8] However, unlike Turkish/Swiss law, negligence is defined in BGB §276 as failure to exercise reasonable care. According to this definition, an objectified fault yardstick is applied in terms of negligence.[9] In determining fault, the tortfeasor is compared with a hypothetical person under the same external conditions, and the tortfeasor's personal inadequacies do not matter in this evaluation.[10] Although there is no legal definition of negligence neither in Turkish nor in Swiss law, the objective yardstick of fault is applied both in Turkish and Swiss laws.

The task of defining intent is left to the doctrine, and the judiciary by the legislator.[11] Intent means that the harmful result is known, and desired by the tortfeasor. In intent, the will of the tortfeasor is directed to a harmful result, and the value protected by law is violated deliberately. Accordingly, the tortfeasor knows that their behavior will cause harm, and wants the harm to occur or acts with the foresight that the result will occur. Hence, intent is a subjective matter of evaluation regarding the tortfeasor.[12]

The awareness of unlawfulness is not required to determine that the tortfeasor has acted with intent.[13] The decisive factor is that the tortfeasor knowingly, and willingly committed the act that is not approved by the legal order. Even if the tortfeasor does

7 Günhan Gönül Koşar, Haksız Fiil Sorumluluğunda Kusur ve Etkisi (Onikilevha 2020) 298.

8 Basil S. Markesinis and Hannes Unberath, *The German Law of Torts, A Comparative Treatise* (4th edn, Hart 2002) 84.

9 Erwin Deutsch, 'Grundmechanismen der Haftung nach deutschem Recht' in Klein FE (ed), *Colloquium über die Grundlagen und Funktionen des Haftpflichtrechts* (Helbing and Lichtenhahn 1973) 58.

10 Markesinis and Unberath (n 8) 814.

11 Vito Roberto, *Schweizerisches Haftpflichtrecht* (Stämpfli 2002) N 235; Heinrich Honsell, Bernhard Isenring and Martin A. Kessler, *Schweizerisches Haftpflichtrecht* (5th edn, Schulthess 2013) §6, N 30; Schwenzer (n 5) N 22.12; Fellmann and Kottmann (n 3) N 559; Bieri (n 4) 552; Ferit H. Saymen and Halid K, Elbir, *Türk Borçlar Hukuku Umumi Hükümler Birinci Cilt* (İsmail Akgün Matbaası) 1958 393; Haluk Tandoğan, *Türk Mes'uliyet Hukuku (Akit Dışı ve Akdi Mes'uliyet)* (1961 reprinted edn, Vedat 2010) 46; Osman Sabri Güven, 'Kusur Kavramı ve Çeşitleri (I)' (1981) 20 *Yargıtay Dergisi*) 585; Feyzi Necmeddin Feyzioğlu, *Borçlar Hukuku Genel Hükümler Cilt I* (Fakülteler Matbaası 1976) 479, *Borçlar Hukuku Genel Hükümler Cilt I* (Fakülteler Matbaası 1976) 478; Selahattin Sulhi Tekinay and others, *Tekinay Borçlar Hukuku Genel Hükümler* (7th edn, Filiz 1993) 493; Damla Gürpınar, *Sözleşme Dışı Yanlış Tavsiyede Bulunma, Öğüt veya Bilgi Vermeden Doğan Hukuki Sorumluluk* (Güncel Hukuk 2006) 109; Başak Baysal, *Zarar Görenin Kusuru (Müterafik Kusur)* (Onikilevha 2012) 131; Ali Naim İnan and Özge Yücel, *Borçlar Hukuku Genel Hükümler* (4th edn, Seçkin 2014) 394; Safa Reisoğlu, *Türk Borçlar Hukuku Genel Hükümler* (25th edn, Beta 2014) 172; Oğuzman and Öz (n 2) 55; O. Gökhan Antalya, *Borçlar Hukuku Genel Hükümler Volume II* (2nd edn, Legal 2018) 28; Hüseyin Hatemi and Emre Gökyayla, *Borçlar Hukuku Genel Bölüm* (5th edn, Filiz 2021) 155; Eren (n 1) 659; Kılıçoğlu (n 5) 409.

12 Theo Guhl and others, *Das Schweizerische Obligationenrecht mit Einschluss des Handels-und Wertpapierrechts* (9th edn, Schulthess 2000) §24 N 39.

13 Karl Oftinger and Emil W. Stark, *Schweizerisches Haftpflichtrecht Erster Bd.: Allgemeiner Teil* (4th edn, Schulthess 1995) §5, N 45; Oğuzman and Öz (n 2) 55-56.

not know about the existence of the rule violated, the intent is accepted if the act that causes the harmful result, which the tortfeasor had voluntarily created, is unlawful.[14] For example, there is intent even if the person does not know that their act constitutes fraud.

B. The Degrees of Intent

1. Direct Intent

In tort liability, intent is divided into two degrees: Direct intent (*dolus directus*), and indirect intent (*dolus eventualis*). Direct intent means that the tortfeasor has acted with the will to create the harmful result.[15] Generally, the concept of intent is defined broadly as such. In direct intent, the tortfeasor wants to cause harm, but the act that causes harm is not necessarily carried out solely for the purpose of causing this harm.[16] Contrary to *Absicht* (malice -pure intent to harm), which is debated whether it is a degree of intent as discussed below, in direct intent, the harmful act itself is not the end, but a means to achieve the goal.[17] For example, there is direct intent in damaging a car in order to retrieve its contents because in order to steal, the thief must first break the window.[18]

2. Malice (*Absicht*) as a degree of intent?

If the tortfeasor has carried out their act solely for the sake of achieving the harmful result, then there is malice/*Absicht* (pure intent to harm).[19] Accordingly, malice/*Absicht* (pure intent to harm) means that the main purpose of the act is to harm another person. An example of this is when someone breaks the window of a store because they enjoy causing harm.[20]

It is debated whether malice (*Absicht*) constitutes a degree of intent in tort law. A group of scholars argue that malice, which is a concept of criminal law, has no place

14 Gönül Koşar (n 7) 183.

15 Karl Oftinger and Emil W. Stark, *Schweizerisches Haftpflichtrecht Zweiter Band: Besonderer Teil - Erster TeilBd.: Verschuldenshaftung, gewöhnliche Kausalhaftungen, Haftung aus Gewässerverschmutzung* (4th edn, Schulthess 1995) §16 N.23; Emil W. Stark, *Ausservertragliches Haftpflichtrecht Skriptum* (2nd edn, Schulthess 1988) N 451; Martin A. Kessler, *Basler Kommentar, Obligationenrecht I: Art. 1–529 OR* (6th edn, Helbing and Lichtenhahn 2015) Art 41, N 45; Heinz Rey and Isabelle Wildhaber, *Ausservertragliches Haftpflichtrecht* (5th edn, Schulthess 2018) 171; Fellmann and Kottmann (n 3) N 561; Mehmet Ayan, *Borçlar Hukuku Genel Hükümler* (11th edn, Seçkin 2016) 273; Saymen and Elbir (n 11) 393; Eren (n 1) 659; Oğuzman and Öz (n 2) 55; Antalya (n 11) 29.

16 Alfred Keller, *Haftpflichtrecht im Privatrecht, Band I* (6th edn, Stämpfli 2002) N 118.

17 Gönül Koşar (n 7) 178.

18 Roland Brehm, *Berner Kommentar, Die Entstehung durch unerlaubte Handlungen, Art. 41 - 61 OR Schweizerisches Zivilgesetzbuch, Das Obligationenrecht* (4th edn, Stämpfli 2013) Art 41, N 194; Fellmann and Kottmann (n 3) N 561; Keller (n 16) N 118.

19 Oftinger and Stark (n 15) §16, N 23; Keller (n 16) N 118; Huguenin (n 5) N 1976; Brehm (n 18) Art 41, N 193; Rey and Wildhaber (n 15) 171; Fellmann and Kottmann (n 3) N 560; Gönül Koşar (n 7) 179.

20 Brehm (n 18) Art 41, N 193; Rey and Wildhaber (n 15) 171.

in tort law since direct intent is considered sufficient in tort law. Accordingly, where the law requires intent, direct intent is sufficient, and malice/pure intent to harm is not required in tort law. For this reason, there is no need for the concept of malice (*Absicht*) as qualified intent in tort law. In tort law, it is sufficient for the tortfeasor to perform the act knowingly and willingly, which corresponds to direct intent[21]; hence, the terms *Absicht* (malice), and *Vorsatz* (intent) have the same meaning in tort law, as opposed to criminal law.[22] To sum up, from the perspective of tort law, causing damage with the pure intent to cause harm/malice corresponds to intent in terms of the categories of fault. However, such malice is a matter to be taken into account against the tortfeasor in determining the amount of compensation.[23]

According to another group of scholars, the term *Absicht* in OR Art 41 is a conscious choice of the legislator, and malice will be sought.[24] As it shall be discussed further below, these authors, who find direct intent insufficient for the application of TCO Art 49/2-OR Art 41/2, argue that malice (*Absicht*) will be sought.

3. Indirect intent

Indirect intent (*dolus eventualis*) means that the tortfeasor does not directly wish the harmful result of their act, yet does not care about the occurrence of this damage, takes this risk, and consents to it.[25] If the tortfeasor leaves it to chance whether the harm will occur or not, then there is indirect intent. Accordingly, in indirect intent, the tortfeasor is aware of the possibility of the harmful result, and risks the possible consequences that may occur even if they do not wish this result.[26]

To illustrate, setting someone's house on fire at the risk that someone might die in the fire, while actually only wishing to burn the house would be indirect intent.[27] Another example of indirect intent would be a driver in a hurry who takes the risk of harming other vehicles and causes harm.[28] Similarly, it is considered indirect intent if the manufacturer knows that the cans it produces may poison the consumers, yet still

21 Schwenzer (n 5) N 22.13.

22 Kessler (n 15) Art 41, N 45; Roberto (n 11) N 235; Schwenzer (n 5) N 22; 13; Keller (n 16) N 118; Oftinger and Stark (n 15) §16, N 219-220.

23 Feyzioğlu (n 11) 479.

24 Stephan Fuhrer, 'Computerviren und Haftung' (1991) 87 *Schweizerische Juristen-Zeitung* 132; Brehm (n 18) Art, 41, N 243.

25 Oftinger and Stark (n 15) , §16, N 23; Stark (n 15) N 453; Honsell, Isenring and Kessler (n 11) §6, N 30; Huguenin (n 5) N 1976; Schwenzer (n 5) N 22.06, N 22.12; Kessler (n 15) Art 41, N 45; Rey and Wildhaber (n 15) 172; Fellmann and Kottmann (n 3) N 562; Keller (n 16) N 119; Andreas B. Schwarz, *Borçlar Hukuku Dersleri I. Cilt* (Kardeşler Basımevi 1948) 109; Tandoğan (n 11) 47; Saymen and Elbir (n 11) 394; Feyzioğlu (n 11) 479; Güven (n 11) 585; Tekinay and others (n 11) 493; Eren (n 1) 659; Oğuzman and Öz (n 2) 55; Hatemi and Gökyayla (n 11) 155; Antalya (n 11) 30; İnan and Yücel (n 11) 394; Reisoğlu (n 11) 172; Ayan (n 15) 273; Barlas (n 3) 428; Gürpınar (n 11) 109; Gönül Koşar (n 7) 180.

26 Brehm (n 18) Art 41, N 195.

27 Eren (n 1) 659.

28 Oğuzman and Öz (n 2) 55.

puts these cans on the market.[29] It is also considered indirect intent if a pedestrian who has right of way damages a car door with their fist[30], or a surgeon who performs an operation even though they know that they do not have the necessary skill, is at fault for the sake of performing said act (*Übernahmeverschulden*), and their fault can be characterized as indirect intent.[31]

III. The Degree of Intent Required for the Liability Arising from Immorality in German Law

Under BGB §826 titled 'Intentional damage contrary to public policy', a person who, in a manner contrary to public policy, intentionally inflicts damage on another person is liable to the other person to make compensation for the damage.[32] BGB §826 is the source law of OR Art 41/2- TCO Art 49/2.

The behavior of the tortfeasor must objectively constitute a violation of morality. The greatest difficulty in the context of BGB §826 is the concretization of the vague legal concept of morality as in Turkish/Swiss laws.[33] The goal of the German provision is to prevent someone from ignoring generally accepted standards of behavior and these standards of behavior are a minimum that is accepted by everyone and consists of both social-ethical and legal-ethical elements.[34] In order to promote legal certainty relating to this provision, the formation of case groups is encouraged. Some case groups from German law to illustrate immorality are misstatements, malicious falsehood, abuse of rights, malicious prosecution, and rejected applications to join business or social clubs.[35]

In order for this provision to apply, the awareness of immorality is not required.[36] It is not required that the tortfeasor was aware of the immorality as it would be an advantage for those who carry out the harmful act yet lack an understanding of morality; rather, it is required that the tortfeasor knew the actual circumstances from which the immorality has arisen.[37]

In German law, there is no discussion of whether malice (*Absicht*) is necessary for the application of the immorality provision; in fact, indirect intent is considered

29 Tekinay and others (n 11) 493, fn 2.

30 Brehm (n 18) Art 41, N 195.

31 Schwarz (n 25) 113.

32 The unofficial translation of the provision by the Federal Ministry of Justice of Germany can be found here: https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p3497 Date of Access 24 November 2023.

33 Maximilian Fuchs, *Deliktsrecht* (7th edn, Springer 2009) 146.

34 Fuchs (n 33) 146.

35 Markesinis and Unberath (n 8) 890-892.

36 Christian Förster C, *Beck'sche Online-Kommentare zum BGB* (63th edn, 2022) §826, N 30; Ansgar Staudinger, *Handkommentar zum BGB* (6th edn, Nomos 2009) §826, N 10.

37 Fuchs (n 33) 147.

sufficient for the application of this provision.[38] Indirect intent requires a cognitive element, the awareness that the occurrence of damage is within the realm of possibility, and a voluntative element, the acceptance of the occurrence of the damage.[39] In German law, the debate regarding the element of fault for the applicability of this provision is about how far the element of intent can be stretched. There are decisions where the German Federal Court of Justice stretched the element of intent to include recklessness (die *Leichtfertigkeit*)[40] and even advertent negligence (*die bewusste Fahrlässigkeit*), especially in cases regarding purely economic losses and the liability of the credit institutions, experts, tax consultants, auditors and informants (*Auskunftsperson*).[41]

Regarding the difference between indirect intent and advertent negligence, while both presuppose that the tortfeasor recognizes the occurrence of damage as possible and not entirely remote (cognitive element), they differ with regard to the approval of the occurrence of damage (voluntative element). The advertently negligent tortfeasor genuinely trusts the damage will ultimately not happen. However, the tortfeasor with indirect intent accepts the outcome of the act, even if it is inconvenient for them, possibly even reluctantly, knowing that they cannot achieve their goal otherwise.[42]

In German law, if the probability of damage occurring is high and recognized *ex ante* by the actor at the time, it must be assumed that the person causing the damage acted with recklessness (*die Leichtfertigkeit*), which falls into the category of intent.[43] Accordingly, reckless acts are considered to fall in the scope of indirect intent depending on the individual case.[44] The German Federal Court of Justice assumes an act intentional 'if the tortfeasor has acted so recklessly that he must have accepted damage' (*wenn der Schädiger so leichtfertig gehandelt hat, dass er eine Schädigung des anderen Teils in Kauf genommen haben muss*).[45]

It should be underlined that in the German approach, a degree of intent below indirect intent can be used to apply to the immorality provision, which is not accepted either in Turkish or in Swiss law.[46]

38 Hein Kötz and Gerhard Wagner, *Deliktsrecht* (13th edn, Vahlen 2016) N 268; Gerhard Wagner, *Münchener Kommentar zum BGB* (8th edn, C.H.BECK 2020) §826, N 28; Caes van Dam, *European Tort Law* (2nd edn, Oxford 2013) 83; Fuchs (n 33) 147; Förster (n 36) §826, N 32; Staudinger (n 36) §826, N 9; Markesinis and Unberath (n 8) 889;

39 Wagner (n 38) §826, N 28.

40 For *die Leichtfertigkeit* as a form of recklessness, see van Dam (n 38) 83.

41 Wagner (n 38) §826, N 32.

42 Förster (n 36) §826, N 33.

43 Wagner (n 38) §826, N 31.

44 Staudinger (n 36) §826, N 9.

45 Wagner (n 38) §826, N 31. (BGHZ 176, 281 Rn. 46 = NJW 2008, 2245)

46 Ingeborg Schwenzer and Beat Schönenberger, 'Civil Liability for Purely Economic Loss in Switzerland', in *XVth International Congress of Comparative Law* (Publications of the Swiss Institute of Comparative Law 1998) 355. The authors note that 'Courts in Switzerland remain faithful to the wording of this provision and do not apply it in cases of (even gross) negligence.' For Turkish law, see Barlas (n 3) 423; Çağlayan Aksoy (n 3) 382.

IV. The Degree of Intent Required for the Liability Arising from Immorality in Swiss Law

The provision which regulates immorality liability under Swiss law is OR Art 41/2 and reads as follows: 'A person who wilfully causes damage to another in an immoral manner is likewise obliged to provide compensation.' (*Ebenso ist zum Ersatze verpflichtet, wer einem, andern in einer gegen die guten Sitten verstossenden Weise absichtlich Schaden zufügt.*)

It is controversial in Swiss doctrine whether the term *Absicht* in the provision OR Art 41/2 is a conscious choice of the legislator. Some argue that *Absicht* means malice/the tortfeasor's purpose in carrying out the act is harming someone else, while others argue the term *Absicht* is not a conscious choice of the legislator, and the term *Absicht* means/equals to *Vorsatz*, and means intent.

According to a view argued by authors such as Brehm, and Fuhrer, in Swiss doctrine, the term *Absicht* in the provision does not allow for any other interpretation; hence, malice will be sought in the application of OR Art 41/2.[47] According to these authors, any other degree of intent, direct intent or indirect intent will not suffice for the application of this provision.

According to another opinion, which is also the prevailing opinion, *Absicht*/malice is not required for the application of the immorality provision for several reasons.[48] First, this is not a conscious choice of the legislator, and *Vorsatz* should be understood from the term *Absicht* in the provision. Second, the term *Vorsatz*/intent, not *Absicht*, is used in the German Civil Code BGB §826, which is referred to as source law in the legislative intent of OR Art 41/2. Third, where the law calls for *Absicht*, intent is sufficient, and malice is not required in tort law. As opposed to criminal law, the terms *Absicht*, and *Vorsatz* have the same meaning in tort law. Fourth, if it is accepted that only malice will be required for the application of the immorality provision, which is rarely applied due to its harsh conditions, then the immorality provision shall become useless. To sum up, '*Absicht*/malice' is not used here in the technical sense as the most severe form of intent.

According to Oftinger and Stark, it can also be deduced from the legislator's preferences in other provisions of the Swiss Code of Obligations that the legislator does not seek *Absicht* technically in OR Art 41/2, and considers any kind of intent sufficient. For example, in OR Art 100/1, and OR Art 248/1, it is accepted that *Absicht* and gross negligence will have the same consequences. Therefore, it cannot be argued that direct, or indirect intent is not included in a case where the term of *Absicht* and gross negligence is together referred to.[49]

47 Brehm (n 18) Art 41, N 243; Fuhrer (n 24) 132.

48 Honsell, Isenring and Kessler (n 11) §7, N 7; Stark (n 15) N 275; Bieri (n 4) 551-552; Kessler (n 15) Art 41, N 42, 45; Roberto (n 11) N 235; Schwenzer (n 5) N 22, 13; Keller (n 16) N 118; Huguenin (n 5) N 1959; Werro (n 3) art. 41, n. 100; Arnold F Rusch, 'Scheinvaterregess' in Fankhauser R and others (eds), *Brennpunkt Familienrecht* (Dike 2017) 486.

49 Oftinger and Stark (n 15) §16, N 220.

It is also worth mentioning that the French and Italian versions of the Swiss Code of Obligations refer to the term 'intentionally' as opposed to any other term such as 'maliciously': the French version uses the term *intentionnellement* and the Italian version uses the term *intenzionalmente*.[50] Finally, according to the prevailing opinion, which does not require malice to be existent, indirect intent is sufficient for the application of this provision.[51]

In brief, whereas some authors argue for the *Absicht* (malice) requirement as the provision explicitly mentions *Absicht* and not *Vorsatz*, others argue that (the prevailing opinion) *Vorsatz* – intent – is sufficient for the application of OR Art 41/2. According to the latter view, the provision in OR should be interpreted in accordance with German law (source law of Swiss law) where direct intent (*dolus directus*) (*Vorsatz*), and in fact, indirect intent (*dolus eventualis*) are sufficient for the application of the immorality provision.

V. The Degree of Intent Required for the Liability Arising from Immorality in Turkish Law

The provision which regulates immorality liability under Turkish law is TCO Art 49/2 and it reads as follows: 'Even if there is no legal rule prohibiting the harmful act, a person who intentionally harms another person with an immoral act is also obliged to compensate for this damage.' (*Zarar verici fiili yasaklayan bir hukuk kuralı bulunmasa bile, ahlaka aykırı bir fiille başkasına kasten zarar veren de, bu zararı gidermekle yükümlüdür.*)

Even though the Turkish Code of Obligations uses the Turkish term *kasıt* (*Vorsatz*/ intent) in its Art 49/2, and not *Absicht*, the debate in the Swiss doctrine has spread to Turkish doctrine. There is a disagreement regarding the degree of intent required in the provision while some authors state that, in accordance with Swiss law, *Absicht* (malice) should be required for the application of such provision with restrictive nature; other authors find even indirect intent (*dolus eventualis*) sufficient to invoke the immorality provision. Turkish doctrine is so divided on this issue that it is quite difficult to state whether malice or non-malice views constitute the prevailing opinion in the Turkish doctrine. Even though some authors state that the non-malice view supporters form the prevailing opinion,[52] upon detailed research, we found Turkish doctrine equally divided on this matter. Another reason for the difficulty to claim

50 French version of OR Art 41/2 is as follows: *Celui qui cause intentionnellement un dommage à autrui par des faits contraires aux moeurs est également tenu de le réparer*. Italian version of OR Art 41/2 is as follows: *Parimente chiunque è tenuto a riparare il danno che cagiona intenzionalmente ad altri con atti contrari ai buoni costumi*.

51 Honsell, Isenring and Kessler (n 11) §7, N 8; Fellmann and Kottmann (n 3) N 400; Keller 151; Oftinger and Stark (n 15) 69, N 220; Werro (n 3) art. 41, n. 100.

52 Nalan Kahveci, 'İnançlı İşlemlerde El ve İşbirliği ile Hareket Kavramı' (2021) 23 (1) *Dokuz Eylül University Law Faculty Journal* 286; Gümüş (n 3) 461. Kahveci is among non-malice view supporters and Gümüş is among malice view supporters; however, both authors state that non-malice view constitutes the prevailing opinion in Turkish doctrine.

the direction of the prevailing opinion is because some authors do not engage in the malice discussion at all and simply repeat the wording of the law.

According to a view argued in Turkish law, malice (*Absicht*) should be required for the application of the immorality provision for several reasons.[53] First, the source law-Swiss law mentions malice (*Absicht*). Turkish doctrine and jurisprudence generally follow the discussions and the jurisprudence in the source law. Second, the supporters of malice refer to the Swiss legislation and assert that the arguments in the Swiss doctrine are valid for Turkish law. Third, this immorality provision is foreseen as an exception and carries the risk of having a vast application due to the relativity of the concept of immorality, and only by accepting the requirement of malice can this provision be implemented in a narrow sense and in a controlled manner. These authors require malice even if this requirement narrows down the application area of the immorality provision.[54] In Turkish doctrine, while some authors do not mention this discussion at all, they state that the tortfeasor must have acted with the purpose of causing harm without referring to the term malice.[55]

According to another group of scholars, malice is not required and intent (*Vorsatz*) is sufficient for several reasons.[56] First, the word choice of the Turkish text is intent (*kasıt*) and not malice (*Absicht*). Second, the arguments of the prevailing opinion in Swiss doctrine, which does not require malice, should be supported. Third, the source law of the immorality provision is the German provision BGB §826 and this provision refers to intent (*Vorsatz*) and not malice (*Absicht*). Fourth and finally, Turkish Code of Obligations Art 49/2 does not differentiate between degrees of intent.

In our opinion, malice should not be required for the application of the immorality provision under Turkish law. We cannot agree with the Turkish scholars who uphold the Swiss scholars' view seeking malice based on the use of the term *Absicht* in OR Art 41/2 as there is no use of a term in Turkish law that justifies a similar thinking. In fact, we find the arguments of the non-malice view, which form the prevailing view in Swiss doctrine more legitimate. Moreover, the general tort liability provision OR Art 41/1 regulates that 'Any person who unlawfully causes damage to another, whether willfully or negligently [*sei es mit Absicht, sei es aus Fahrlässigkeit*], is

53 Rona Serozan, *Medeni Hukuk Genel Bölüm Kişiler Hukuku* (8th edn, Vedat 2018) 244; Bilge Öztan and Hatice Tolunay Ozanemre Yayla, 'Yargıtay Hukuk Genel Kurulu'nun 22.3.2017 Tarih 2017/4-1334 Esas ve 2017/545 Karar Sayılı Kararı Üzerine Eleştirel Bir Yaklaşım' (2017) 3 *Ankara Barosu Dergisi* 208; Emel Badur and Gamze Turan Başara, 'Aile Hukukunda Sadakat Yükümlülüğü ve İhlalinden Kaynaklanan Manevi Tazminat İstemi' (2016) 65 (1) *Ankara University Law Faculty Journal* 126; Mehmet Erdem and Aslı Makaracı Başak, *Aile Hukuku* (1th edn, Seçkin 2022) 200; Zeynep Şeyma Ceylan, 'Yargıtay Kararları Işığında Zina Sebebiyle Boşanmada Manevi Tazminat İstemi' (2022) 17 (1) *Erciyes Üniversitesi Hukuk Fakültesi Dergisi* 83; Kapancı (n 3) 31; Gümüş (n 3) 461.

54 Gümüş (n 3) 461.

55 Schwarz (n 25) 109; Tandoğan (n 11) 47; Saymen and Elbir (n 11) 394, 413; Kaneti (n 6) 175; Güven (n 11) 587; Tekinay and others (n 11) 493; İnan and Yücel (n 11) 395.

56 Atilla Altop, *Türk, İsviçre ve Alman Hukuklarında Bankaların Verdikleri Banka Bilgilerinden Dolayı Hukuki Sorumlulukları* (Filiz 1996) 101- 102; Oğuzman and Öz (n 2) 66; Barlas (n 3) 425; Çağlayan Aksoy (n 3) 375; Paksoy (n 6) 133; Gürpınar (n 11) 123; Kahveci (n 52) 286.

obliged to provide compensation.'[57] In order to express intent, this provision uses the term *Absicht* and there is no doubt that the term *Absicht* in OR Art 41/1 covers all degrees of intent.[58] Therefore, we find a different interpretation of the same term in different paragraphs of the same article (OR Art 41/1 and OR Art 41/2) inconsistent.[59] Furthermore, it is worth noting that malice is not required, and indirect intent is found sufficient without any hesitation under German law for the application of the immorality provision, which is the source law of the Swiss immorality provision, and this approach should be upheld in Turkish law as well. Finally, the requirement of malice in the element of intent would limit the framework of the immorality liability so much that this provision would become non-functional.

However, it should be noted that acting with the intent of harming another person will make this person's behavior immoral anyway. In other words, acting with the intent of harming someone else will qualify the act as immoral.[60] The proof of acting with the aim of harming someone else will be sufficient to prove both immorality and intent. In this scenario, the discussions in terms of the degree of intent sought in this provision will not have a major impact. It has been emphasized in the doctrine that the aim of harming is at the forefront in the 'overwhelming' majority of cases upon which this provision is based.[61] The effect of this discussion will be seen in cases where the tortfeasor does not act with the aim of harming another, but their act is still immoral.

Another discussion regarding the application of TCO Art 49/2 is whether indirect intent (*dolus eventualis*) will suffice, or whether direct intent (*dolus directus*) will be sought. This issue is controversial in Turkish doctrine. According to a group scholars, indirect intent is not sufficient on the grounds that it will greatly expand the limits of liability arising from immorality.[62] These authors, who criticize the view that indirect intent is sufficient for TCO Art 49/2 to be applied, draw attention to the ambiguous border between indirect intent and advertent negligence (*die bewusste Fahrlässigkeit*. They argue that it is not possible to make a healthy distinction between the two in practice, and that it would expand the application area of the immorality provision too much, whereas it should be quite limited.[63] Another group of scholars argues that since TCO Art 49/2 does not distinguish between the types of intent, the concept of intent required in this provision includes indirect intent as well.[64] Advertent negligence

57 The unofficial translation of the provision by the Federal Council of Switzerland can be found here: https://www.fedlex.admin.ch/eli/cc/27/317_321_377/en Date of Access 24 November 2023.

58 Rey and Wildhaber (n 15) 171.

59 Paksoy (n 6) 131.

60 Ateş (n 4) 191; Oğuzman and Öz (n 2) 66.

61 Kapancı (n 3) 34.

62 Başak Baysal, *Haksız Fiil Hukuku* (Onikilevha 2019) 154.

63 Kapancı (n 3) 32.

64 Oğuzman and Öz (n 2) 66; Barlas (n 3) 429; Altop (n 52) 101- 102; Çağlayan Aksoy (n 3) 375; Paksoy (n 6) 133; Gürpınar

is a term and a level of negligence in criminal law and not in tort law. The tort law understanding and practice differentiates between indirect intent and negligence. As put by Wagner, the distinction between intent and advertent negligence is not entirely impossible. Rather, intent can be determined on the basis of objective circumstances, such as circumstantial and empirical evidence.[65]

When it comes to the position in Turkish jurisprudence, the Turkish Supreme Court of Appeals (*Yargıtay*) requires malice for the application of the immorality provision (TCO Art 49/2). According to the Supreme Court of Appeals Assembly of Civil Chambers, '… in a lawsuit, any unlawful behavior, immoral behavior, that 'solely aims to harm the plaintiff intentionally'[66] that would lead to compensation under the Code of Obligations Art 41/2[67] has not been proven.'[68]

In addition to the above, a noteworthy matter is the context of the discussions regarding the element of intent required in the immorality provision in Turkish law. The Turkish immorality provision has become popular in recent years upon the Turkish Supreme Court of Appeals judgments of whether or not a cheated spouse can claim non-pecuniary damages from the third party who participated in the act of adultery with the other spouse. Formerly, the Turkish Supreme Court of Appeals had ruled in favor of these claims. However, Turkish doctrine heavily criticized this line of jurisprudence for different reasons, and then the Supreme Court of Appeals began to reject these claims. Upon contradicting judgments of the civil chambers, the highest authority within the Supreme Court of Appeals, the Grand General Assembly on the Unification of Judgments of the Supreme Court of Appeals gathered and ruled on this matter stating that 'In order for the purpose of willful harm in the sense specified in the law to exist, the third person must have committed the immoral act with the sole intent of harming the spouse of the person they have an affair with. Unless it can be said that the third person who participated in the act of adultery with the married spouse acted with the sole intent of harming the other spouse, this act of the third person shall no longer require compensation according to TCO Art 49/2.'[69] The Grand General Assembly on the Unification of Judgments has not delved into the discussion of malice as in the doctrine. However, it has explicitly required 'the sole intent of harming the other spouse'. It is necessary to mention that the judgments ruled by the

(n 11) 123.

65 Wagner (n 38) §826, N 30.

66 Emphasis added by the author.

67 Former Code of Obligations of Türkiye.

68 The Supreme Court of Appeals Assembly of Civil Chambers No E 1997/327 K 1997/765 (1 October 1997). www.lexpera.com.tr Date of Access 24 November 2023. See a similar judgment: The Supreme Court of Appeals 11th Civil Chamber No E 2002/7293 K 2002/11567 (13 December 2002): '… in the lawsuit filed by the defendant, any unlawful behavior, immoral behavior, that solely aims to harm the plaintiff intentionally that would lead to compensation under the Code of Obligations Art. 41/2 has not been proven.' www.lexpera.com.tr Date of Access 24 November 2023.

69 The Grand General Assembly on the Unification of Judgments of the Supreme Court of Appeals No E 2017/5 K 2018/7 (6 July 2018).

Grand General Assembly on the Unification of Judgments of the Supreme Court of Appeals is binding for the general assemblies, civil law chambers of the Supreme Court, and also for the courts of first instance.[70] So far, several Regional Court of Appeals judgments have been rendered that require malice, and state explicitly that indirect intent is insufficient for the application of the immorality provision (TCO Art 49/2). It should be noted that all these judgments refer to whether the cheated spouse can claim non-pecuniary damages from the third party with whom the cheating spouse had an affair.[71]

Conclusion

The Turkish provision that regulates liability arising from immorality (Turkish Code of Obligations Art 49/2) requires the tortfeasor to act intentionally. It is controversial in Swiss doctrine whether the source law of Turkish provision, Swiss Code of Obligations Art 41/2 requires *Absicht* – malice/pure intent to cause harm – as a different degree of intent. Even though TCO Art 49/2 uses the Turkish term *kasıt* – intent- (*Vorsatz*), the debate in the Swiss doctrine has spread to Turkish doctrine. There is a disagreement regarding the degree of intent required in the provision and some authors state that, in accordance with Swiss law, malice (*Absicht*) should be required for the application of such provision with restrictive nature; other authors find indirect intent (*dolus eventualis*) sufficient to invoke the immorality provision referring to German law upon which the immorality provision is based. Upon a review of the discussions in German, Swiss and Turkish laws, both the immorality provision in the Swiss Code of Obligations (Art 41/2) and in the Turkish Code of Obligations (Art 49/2) should be interpreted in parallel to each other, and malice (*Absicht*) should not be required as the degree of intent to apply to the immorality provision, on the contrary, direct intent (*dolus directus*-*Vorsatz*), and indirect intent (*dolus eventualis*) should be found sufficient for the application thereof.

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70 Art 45 of the Law on the Supreme Court of Appeals. https://www.mevzuat.gov.tr/mevzuatmetin/1.5.2797.pdf Date of Access 24 November 2023.

71 Antalya Regional Court of Appeals 4th Civil Chamber No E 2001/895 K 2001/12714 (21 March 2017); Antalya Regional Court of Appeals 4th Civil Chamber No E 2016/35 K 2016/39 (19 December 2016); Antalya Regional Court of Appeals 4th Civil Chamber No E 2017/310 K 2017/320 (18 April 2017); Antalya Regional Court of Appeals 25th Civil Chamber No E 2020/859 K 2020/1490 (2 September 2020); Konya Regional Court of Appeals 3rd Civil Chamber No E 2019/1456 K 2020/189 (5 February 2020); Konya Regional Court of Appeals 3rd Civil Chamber No E 2020/678 K 2020/783 (24 September 2020); Konya Regional Court of Appeals 4th Civil Chamber No E 2018/186 K 2018/1917 (19 December 2018). www.lexpera.com.tr Date of Access 24 November 2023.

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RESEARCH ARTICLE

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The Impact of the Mediation Process on the Default of the Debtor

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Abstract

Mediation, as defined in Law No. 6,325 on Mediation in Civil Disputes, constitutes a voluntary method for resolving disputes involving the participation of an impartial third party with specialized training. The mediator employs systematic techniques to facilitate discussion and negotiation among parties, fostering communication and mutual understanding to reach a solution. Should parties fail to find a resolution independently, the meditation may propose one. The mandatory inclusion of meditation in certain types of cases since 2018 has elevated its status as a frequently applied alternative dispute resolution mechanism in our jurisdiction. However, this frequent application has brought to light concerns regarding areas not adequate in cases involving debtor default, a matter complicated by the absence of specific regulations. Consequently, divergent interpretations have emerged within legal practice, notably evident in the rulings of the circuit courts of appeals. While some argue that mediation does not result in default, others posit that it may. In conclusion, the verdict rendered by the Court of Cassation serves to reconcile the contradictory judgment issued by the civil chambers of the circuit courts of appeals. Although this issue has been examined in various aspects within judicial decisions, it has not received comprehensive attention in legal doctrine. For instance, the question of whether mediation constitutes default has not yet been examined, particularly regarding the precise moment at which a debtor is considered to be in default. Given the significant ramifications of default, understanding the impact of the mediation process is crucial. This study delves into why the mediation process does not result in debtor default, drawing upon insights from the verdicts of circuit courts of appeals and the Court of Cassation, while also examining a few perspectives on the matter and analyzing all pertinent approaches.

Keywords

Mediation, mediator, debtor, default, default of debtor, default interest

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I. Concept of Debtor Default and Importance of Determining Default Date

Debtor default refers to the failure of the debtor to fulfill a debt by its due date as specified in the contract.[1] The determination of when default occurs holds considerable significance for several reasons. The Turkish Code of Obligations (TCO) imposes certain consequences for default. Upon the debtor's default, the creditor may demand specific performance of the obligation and seek compensation for any damage resulting from the delay in performance.[2] Article 118 of the TCO stipulates that a defaulting debtor is obligated to compensate the creditor for any losses and damages incurred due to the delay in performance unless the debtor can prove that they are not at fault for the default. Another significant consequence of debtor default is the transfer of liability for accidental damages to the debtor,[3] as outlined in Article 119 of the TCO. Under this provision, the defaulting debtor becomes liable for any accidental damage that occurs. In addition, defaulting on pecuniary debts entails further consequences. According to Article 120 of the TCO, a defaulting debtor is liable to pay additional default interest. This interest accumulates due to default in fulfilling the pecuniary debt.[4] Such default interest shall commence from the date of default and persist until the pecuniary debt is fulfilled.[5]

Generally, applications for collecting pecuniary debts are directed to a mediator. Thus, for pecuniary debts, particularly those stemming from commercial transactions, the determination of default and its date holds special significance within the mediation process. This significance is twofold. First, for pecuniary debts arising from commercial transactions, it is mandatory to engage a mediator before initiating legal action, as per Article 5/A of the Turkish Commercial Code (TCC). Second, the default interest rate applicable to commercial transactions has recently substantially increased. The "Communiqué on the default interest rate to be Applied in Late Payments in the Supply of Goods and Services and the Minimum Expense Amount that may be Requested for the Collection of Receivables," was issued by the Central Bank of the Republic of Turkey and published in the Official Gazette.[6] In this context,

1 Ahmet Kılıçoğlu, *Borçlar Hukuku Genel Hükümler* (26th, 2022) 874; Nami Barlas, *Para Borçlarının İfasında Borçlunun Temerrüdü ve Bu Temerrüt Açısından Düzenlenen Genel Sonuçlar* (Kazancı 1992) 15; Fikret Eren, *Borçlar Hukuku Genel Hükümler* (27th, Yetkin 2022) 1232; M. Kemal Oğuzman and Turgut Öz, *Borçlar Hukuku Genel Hükümler Cilt I (20th, Vedat 2022)* 474; Haluk Nami Nomer, Borçlar Hukuku Genel Hükümler (18th, Beta 2021) 399; Rona Serozan, Başak Baysal and Kerem Cem Sanlı, *Borçlar Hukuku Genel Bölüm* (8th, On İki Levha 2022) 301; Vedat Buz, *Borçlunun Temerrüdünde Sözleşmeden Dönme* (Yetkin 1998) 100; Hatice Esra Arap Saltoğlu, *Tam İki Tarafa Borç Yükleyen Sözleşmelerde Borçlunun Temerrüdü* (Seçkin 2022) 29; Mehmet Ayan, *Borçlar Hukuku Genel Hükümler* (12th, Adalet 2020) p. 467; Mustafa Alper Gümüş, *Borçlar Hukukunun Genel Hükümleri* (Yetkin 2021) 907.

2 For detailed information, see Kılıçoğlu, Borçlar, 894 ff.; Hatemi H and Gökyayla E, Borçlar Hukuku Genel Bölüm (5th, Filiz 2021) 297 ff.; Eren F, Borçlar Hukuku Genel Hükümler (27th, Yetkin 2022) 1246 ff.; Ayan M, Borçlar Hukuku Genel Hükümler (12th, Adalet 2020) 471 ff.; Buz, 104; Bilgehan Çetiner, Andreas Furrer and Markus Müller-Chen, *Borçlar Hukuku Genel Hükümler* (On İki Levha 2021) 631.

3 For detailed information, see Kılıçoğlu, *Borçlar*, 898 ff.; Hatemi and Gökyayla, 297 ff.; Eren, 1250 ff.; Ayan, 471 ff.; Buz, 105; Çetiner, Furrer and Müller-Chen, 633.

4 Kılıçoğlu, *Borçlar*, 900; Ayan, 472.

5 Kılıçoğlu, *Borçlar*, 900.

6 See the Official Gazette dated 2.1.2024 and numbered 32417.

the default interest rate regarding late payments to creditors in the exchange of goods and services among commercial enterprises if not regulated under the agreement or the relevant provisions that are invalid, stands at 48% annually. This circumstance underscores the substantial economic implications associated with whether default transpires through the mediation process or not.

II. Conditions for Debtor Default

Determining the date of default hinges on meeting the substantive conditions outlined by the law. The first condition required for debtor default is the existence of a due debt.[7] Article 117 of the TCO specifies this requirement as "the debtor of a due debt."

However, the mere existence of the due debt alone does not suffice for default to occur. Thus, as a rule,[8] the creditor must notify the debtor to fulfill their obligation. According to Article 117 of the TCO, debtor default is triggered by the creditor's notification. This notification serves as the creditor's call to the debtor to fulfill the performance obligation.[9] Moreover, filing a lawsuit against the debtor may also constitute notification.[10] In such circumstances, the legal doctrine states that debtor default occurs upon the service of the lawsuit petition to the debtor.[11] Furthermore, in legal doctrine practice, it is consistently acknowledged that initiating a lawsuit results in debtor default, enabling the creditor to request default interest from that moment onward.[12]

There is no formal requirement for notifications under the law.[13] However, a disputable issue arises regarding whether a formal requirement exists for notifications between merchants. According to the third paragraph of Article 18 of the TCC, notifications or warnings between merchants indicating default shall be served via a notary, registered mail, telegram, or registered electronic mail using a secure electronic signature. The prevailing stance considers these requirements not as formal requirements for validity, but rather as formal requirements for evidentiary

7 For detailed information, see Ayşe Havutçu, *Tam İki Tarafa Borç Yükleyen Sözleşmelerde Temerrüt ve Müsbet Zararın Tazmini* (İzmir 1995) 24; Oğuzman and Öz, 476 ff.; Barlas, 21 ff.; Eren, 1236; Mustafa Göktürk Yıldız, *Türk Borçlar Kanunu'nu Genel Hükümlerine Göre Borçlu Temerrüdün Şartları ve Sonuçları* (On İki Levha 2020) 4 ff.; Saltoğlu Arap, 39; Ayan, 467; Serozan, Baysal and Sanlı, 295 ff.; Buz, 101; Çetiner, Furrer and Müller-Chen, 624; Doruk Gönen, *Borçlar Hukuku Genel Hükümler* (Filiz 2021) 147.

8 See Barlas, 34.

9 Buz, 101 ff.; Havutçu, 25; Eren, 1237; Saltoğlu Arap, 44; also see Barlas, 34; Çetiner, Furrer and Müller-Chen, 626; Gönen, 147.

10 Arap, 44; Gümüş, 912; Oğuzman and Öz, 478; Yıldız, 39.

11 Çetiner, Furrer and Müller-Chen, 626; Gümüş, 912; Yıldız, 39.

12 See below.

13 Kılıçoğlu, *Borçlar*, 876; Barlas, 43; Nomer, 410; Havutçu, 27; Eren, 1238; Oğuzman and Öz, 478; Buz, 102; Yıldız, 15; Saltoğlu Arap, 49; Ayan, 469; Gönen, 147; Gümüş, 912.

purposes,[14] as supported by judicial decisions. The rationale behind this interpretation underscores its status as a form requirement for proof.[15]

As Article 117 of the TCO is not mandatory, parties reserve the right to stipulate that notification is unnecessary for default to occur.[16] In addition, specific regulations may apply to certain debts. As per the second paragraph of Article 117 of the TCO, if the parties mutually agree to duly notify the agreed-upon performance date, the debtor defaults upon the expiration of this time. In cases of tort, default occurs from the moment the tort transpires, whereas in cases of unjust enrichment, default is triggered from the date of enrichment. However, when unjust enrichment occurs in good faith, notification becomes necessary for default. Similarly, under Article 10 of the TCC, in the absence of any contrary contractual provisions, interest on commercial debts begins accruing at the end of the due date.[17]

In certain circumstances where notification is mandated for default, yet serving the notification proves to be unnecessary and futile, the default may occur without such notification.[18] This conclusion is reached by analogously applying the provision in the first paragraph of Article 124 of the TCO by analogy.[19] For instance, if the debtor explicitly declares their refusal to fulfill the debt, no notification of default is required.[20] Similarly, if this refusal is evident through the debtor's actions and their declaration, notification becomes unnecessary.[21]

In bilateral contracts, a special requirement sought for debtor default is the granting of additional time beyond general terms.[22] Article 123 of the TCO stipulates that in bilateral contracts, if one party defaults, the other party may grant either a reasonable extension for performance or request the court to grant such an extension.

14 Kılıçoğlu, *Borçlar*, 876; Saltoğlu Arap, 49; Oğuzman and Öz, 478 ff.; Gümüş, 912; Yıldız, 16. For counter-opinion see Ayan, 469; Eren, 1238; Sabih Arkan, *Ticari İşletme Hukuku (*28th, Banka ve Ticaret Hukuku Araştırma Enstitüsü, 2022), 172. For comparison between the old and new regulations, see Reha Poroy and Hamdi Yasaman, *Ticari İşletme Hukuku* (19th, Seçkin 2022)185 ff.

15 For instance, see Istanbul 13th Civil Chamber of Circuit Courts of Appeals, Dated 23.03.2023, Lawsuit File Number 2021/626, Decision Number 2023/520 (Lexpera).

16 Kılıçoğlu, *Borçlar*, 878; Saltoğlu Arap, 50; Gümüş, 920; Havutçu, 31.

17 Also see Article 117, II of the Turkish Code of Obligations.

18 Kılıçoğlu, *Borçlar*, 882; Eren, 1241; Oğuzman and Öz, 483; Saltoğlu Arap, 52; Barlas, 61 ff.; Haluk Bozovalı, *"İki Tarafa Borç Yükleyen Sözleşmelerde Borçlu Temerrüdünün Sonuçları"*, İstanbul Barosu Dergisi, C. 66, S. 1-2-3 (1992) 11 ff.; Çetiner, Furrer and Müller-Chen, 629; Yıldız, 50 ff.

19 Ayan, 470. See Serozan, Baysal and Sanlı, 299; Nomer, 413. Also see Havutçu, 31 with regard to the fact that expecting the service of the notification in such a situation shall be against the principle of honesty specified under Article 2 of the Turkish Civil Code.

20 Kılıçoğlu, *Borçlar,* 882; Oğuzman and Öz, 483; Nomer, 413; Yıldız, 50 ff.; Saltoğlu Arap, 52.

21 Gümüş, 9221

22 Kılıçoğlu, *Borçlar*, 886; Saltoğlu Arap, 53 ff.

III. Whether the Mediation Process Results in Debtor Default

A. Opinions Asserting that the Mediation Process does not Result in Default

The fundamental stance of opinions that indicates that the mediation process does not result in debtor default is based on Article 5 of Law No. 6,325, titled "Inadmissibility of Statements and Documents." According to this article, parties, mediators, or other third parties involved in the mediation process are prohibited from presenting the following statements and documents as evidence or testifying about them if a lawsuit is initiated or an arbitration proceeding is commenced regarding the dispute:

- Invitation to mediation is extended by the parties or a party's willingness to participate in the mediation process.
- Opinions and proposals by the parties aimed at resolving the dispute through mediation.
- Statements made by the parties or acknowledgments of facts or claims during the mediation process.
- Documents are created solely for the mediation process.

According to this article, documents generated during the mediation process are not admissible in civil lawsuits. Hence, for instance, a record indicating that the parties failed to agree during the mediation cannot be used in civil lawsuits. Consequently, it is not permissible to presume that the debtor defaults based on such a document.[23]

In a similar vein, another decision, adhering to the same principle, highlighted that an invitation to mediation does not constitute notification. The rationale behind this decision asserts that no invitation to mediation may specify the entire debt amount, and parties may seek a mediator even for indefinite debts.[24]

Furthermore, in a separate ruling, it was underscored that invitations to mediation or a party's inclination to participate in the mediation process are not admissible evidence under Article 5 of Law No. 6,325. Consequently, the mediation process, whether documented or through invitation, does not lead to debtor default.[25]

23 Ankara 7th Civil Chamber of Circuit Courts of Appeals, Dated 15.09.2021, Lawsuit File Number 2019/4047, Decision Number 2021/2282 (Lexpera).

24 Ankara 9th Civil Chamber of Circuit Courts of Appeals, Dated 07.12.2021, Lawsuit File Number 2020/651, Decision Number 2021/3374 (Lexpera).

25 Ankara 30th Civil Chamber of Circuit Courts of Appeals, Dated 09.11.2021, Lawsuit File Number 2021/2937, Decision Number 2021/2891 (Lexpera).

B. Opinions Asserting that the Mediation Process Results in Debtor Default

The question of whether the mediation process leads to debtor default has been particularly examined in the context of employee receivables. It has been argued that the mediation process indeed results in default on such receivables. Notably, the decision outlined the following determination:

- According to the practice of the Court of Cassation, default may arise even if the rights of the employee are specified without stating a monetary value in a notification sent by the employee. The crucial factor for default lies in clearly delineating the receivable items.
- Throughout the mediation process, both employees and employers identify receivables by name during the discussion. Consequently, the date of the final mediation session is deemed the default date.[26]

Given the disparate ruling from circuit courts of appeals, an application was made to the Court of Cassation to resolve the inconsistency. The Court of Cassation addressed the discrepancy among the civil chambers by determining that the debtor defaulted on the date of the final record (indicating the parties' failure to reach an agreement) of the mediation process.[27] The rationale for this decision is as follows:

- The absence of a formal requirement for default notification under the law emphasizes the importance of delivering a declaration of intent to the debtor.
- The final mediation record cannot be considered an inadmissible document in a lawsuit under Article 5 of Law No. 6,325, which prohibits the use of certain documents in legal proceedings. Thus, the prohibition on confidentiality does not extend to the final mediation record.
- Applying mediation has a similar consequence to initiating a lawsuit, as it entails a demand dispute resolution through a third party outside the judicial system. This demand also includes the claim that receivables stated in the mediation application are due but unpaid and must be paid.
- The counterparty must be informed about the mediation application, fulfilling a requirement concerning default.
- Consequently, the final mediation record is deemed to include "a precise declaration of intent covering the request for the payment of receivables," directed at the counterparty informed of the mediation application by the applying party.[28]

26 Ankara 6th Civil Chamber of Circuit Courts of Appeals, Dated 30.06.2021, Lawsuit File Number 2020/1584, Decision Number 2021/1855 (Lexpera). Similarly, see Ankara 8th Civil Chamber of Circuit Courts of Appeals, Dated 23.09.2021, Lawsuit File Number 2019/2770, Decision Number 2021/2065 (Lexpera).

27 9th Civil Chamber of Court of Cassation, Dated 21.3.2022, Lawsuit File Number 2022/3222, Decision Number 2022/3813 (Lexpera).

28 Similarly, see 9th Civil Chamber of Court of Cassation, Dated 18.5.2022, Lawsuit File Number 2022/5485, Decision Number 2022/6290 (Lexpera). See Ahmet Kılıçoğlu, *Arabuluculuk Sözleşmeleri (2nd, Turhan 2020)*105 with regard to the

IV. Our Opinion

Our stance on the matter is founded on the understanding that the mediation process does not result in debtor default due to its confidential nature and the inadmissibility of documents generated during this process as evidence in lawsuits. To elucidate, the purpose and scope of the prohibition on the use of statements and documents from the mediation process shall be clarified.

This prohibition is stipulated under Article 5 of Law No. 6,325, which states that "the parties, mediator, or other third parties involved in the mediation process may not offer statements and documents stated below as evidence or testify regarding them if a lawsuit is initiated or an arbitration proceeding is commenced regarding the dispute:

a. Invitation to mediation made by the parties or the inclination of a party to participate in the mediation process.

b. Opinions and proposals by the parties for the resolution of the dispute through mediation.

c. Opinions asserted by the parties or the admission of a fact or claim during the mediation process.

d. Documents were drawn up solely for the mediation process.

(2) The provision in the first paragraph shall be applied regardless of the form of the statement or document.

(3) Disclosure of the information stated in the first paragraph may not be requested by the court, arbitrator, or any administrative authority. These statements and documents may not be evaluated as evidence, even if they were presented as evidence contrary to the provision in the first paragraph. However, the information in question may be disclosed if it is required by a statute or to an extent necessary for the application or enforcement of the agreement formed after the mediation process."

The purpose of prohibiting the use of statements and documents in the mediation process is to ensure that discussions during mediation are conducted comfortably and realistically.[29] This prohibition safeguards confidentiality by preventing the use

possibility that the debtor may fall in default with the record of the final mediation session.

29 Ömer Ekmekçi, Muhammet Özekes, Murat Atalı and Vural Seven, *Hukuk Uyuşmazlıklarında Arabuluculuk (*2nd, On İki Levha 2019) 37; Süha Tanrıver, *Hukuk Uyuşmazlıkları Bağlamında Arabuluculuk (2nd, Yetkin 2022)* 69; Mustafa Serdar Özbek, *Alternatif Uyuşmazlık Çözümü* (5th, Yetkin 2022) 677 ff.; Erol Tatar, *"Hukuk Uyuşmazlıklarında Arabuluculuk Kanun Tasarısı Üzerine Bir Değerlendirme",* Yargıtay Dergisi, C. 35, S. 3, 2009, 261; Yasemin Işıktaç, *"Türk Arabuluculuğunda Etik Modeli ve Etik İkilemler", Hukuk Uyuşmazlıklarında Arabuluculuk Sempozyumu I, (Ed: Yasemin Işıktaç)* (Sümer 2014) 63; Seda Özmumcu, *Uzak Doğu'da Arabuluculuk Anlayışı ile Türk Hukuk Sisteminde Arabuluculuk Kurumuna Genel Bir Bakış (6325 sayılı Hukuk Uyuşmazlıklarında Arabuluculuk Kanunu Çerçevesinde) (3rd, On İki Levha 2013)*, 165; Seda Özmumcu, *Arabuluculuk Modelleri (On İki Levha 2021)* 80; Melis Taşpolat Tuğsavul, *Türk Hukukunda Arabuluculuk (6325 Sayılı Hukuk Uyuşmazlıkları Kanunu Çerçevesinde)* (Yetkin 2012) 135. See Betül Azaklı Arslan,

of confidential discussions, proposals, and documents submitted or created during negotiations as evidence against the parties in potential future litigation.[30] Without such protection, parties may refrain from making candid statements or sharing documents during mediation out of fear that these may be used against them in civil lawsuits.[31] This reluctance could hinder the realization of the benefits expected from the mediation process, potentially impeding the achievement of a win/win outcome. [32]

Article 5 of Law No. 6,325 has been invoked in judicial decisions to justify why the mediation process does not result in default. It is essential to determine whether the record of the final mediation session falls within the purview of Article 5. According to Article 5, "documents drawn up solely for the mediation process" are deemed confidential. Consequently, the record of the final mediation session qualifies as a document created exclusively for mediation activities, making it confidential. However, confidentiality alone does not prevent the occurrence of default. It is imperative to examine this matter from various perspectives.

First, examining the purpose of the prohibition is crucial. As stated above, the fundamental purpose of this prohibition is to provide an environment of trust during negotiations within the mediation process, ensuring that parties act genuinely and comfortably. While this prohibition relates to the external behaviors of the parties, default is an internal state. A significant aspect of default is the debtor's awareness of the claim for fulfilling the performance owed. The debtor must be aware that they are being requested to fulfill a performance that they have undertaken. Therefore, it cannot be argued that this internal state, namely knowing and understanding, can be disregarded due to confidentiality. In such an instance, expecting service of default notification would contravene the principle of good faith.

Second, the use of the record of the final mediation session is not always prohibited. Confidentiality of the record can be waived to some extent. For instance, if the mediation process concludes without an agreement, the record of the final mediation session serves as the sole evidence of this outcome. Therefore, parties are obligated to prove compliance with procedural requirements using this record. In such cases, parties cannot claim that this document should not be used due to confidentiality concerns.

Medenî Usûl Hukuku Açısından Zorunlu Arabuluculuk (Yetkin, 2018) 56 on how the confidentiality principle generates an environment of trust in the mediation process. Also see Tanrıver, *Alternatif*, 158; Emre Kıyak, *Dönüştürücü Arabuluculuk – Problem Çözücü Arabuluculuk ile Uyumlaştırılması* (Seçkin 2018) 33 regarding the importance of the confidentiality in terms of the alternative dispute resolution methods. See Castillejo Peetsch, p. 25 regarding the affirmative impact of the confidentiality on the impartiality of the mediator.

30 Ekmekçi, Özekes, Atalı and Seven, p. 37.

31 Cafer Eminoğlu and Ersin Erdoğan, *Ticari Uyuşmazlıklarda İhtiyari ve Dava Şartı Arabuluculuk* (Adalet 2020) 54 ff.

32 Eminoğlu and Erdoğan, 55 ff.

Even if, for a moment, it is assumed that default has not occurred due to confidentiality, it does not preclude the possibility of default in certain circumstances where a notification is required, yet serving the notification is deemed unnecessary and futile. For instance, if the debtor explicitly declares their refusal to fulfill the debt, no default notification is necessary. Similarly, if the debtor's behavior indicates that their refusal to fulfill the debt notification is unnecessary. If the mediation process for debt collection concludes without an agreement, it signifies that the debtor has obtained from fulfilling the obligation they have undertaken. In such cases, seeking an additional notification for debt payment would be inappropriate because the debtor has already made it clear through their behavior that they will not fulfill the debt. Consequently, it would be appropriate to consider that the debtor defaulted based on their behavior under the rules of substantive law.

Indeed, the validation of the aforementioned considerations is contingent on the absence of an agreement between the parties regarding the confidentiality rule during the mediation process. Article 5 of Law No. 6,325 is not mandatory, meaning that parties have the autonomy to agree that Article 5 regarding confidentiality shall not be applied.[33] In such instances, it is no longer tenable to assert that the mediation process does not result in default based on Article 5 of Law No. 6,325. Since confidentiality has been waived by the parties, documents generated during the mediation process and the legal consequences thereof are deemed admissible. Consequently, in this context, it should be acknowledged that the mediation process does result in default.

Following the determination that the mediation process results in default, the subsequent inquiry is to determine the timing of when default occurs. Several time frames may be relevant in this context:

- The moment of application to a mediator.
- The moment of delivery of the invitation to mediation to the debtor.
- The moment of holding the mediation meeting.
- The moment of recording the final mediation session reflects that the parties have not reached an agreement.

All the aforementioned possibilities shall be examined separately.

Regarding the application for mediation, it is a procedural requirement to apply to the mediation bureau or the chief office in places where no mediation bureau is established, as outlined in Article 18/A/IV of Law No. 6,325. Does such an application per se result in the default of the debtor? According to substantive law, default occurs

33 For detailed information, see Çiğdem Yazıcı Tıktık, *Arabuluculukta Gizliliğin Korunması* (On İki Levha 2013)58 ff.; İsmail Aydın, *Ticari Davalarda Dava Şartı Olarak Arabuluculuk* (On İki Levha 2022) 26; Ferhat Yıldırım, *"Avusturya Hukuk Uyuşmazlıklarında Arabuluculuk Federal Kanunu (ZivMediatGJnun Hukuk Uyuşmazlıklarında Arabuluculuk Kanunu Işığında İncelenmesi", Uluslararası Arabuluculuk Sempozyumu (Ed: Ferhat Yıldırım)* (Seçkin 2018) 83.

when the debtor is requested to fulfill their obligation. In other words, the debtor must be aware that they are being asked to fulfill their obligation. However, at the moment of application to a mediator, the debtor cannot be aware that they are being asked to fulfill their obligation. Moreover, since it is not mandatory to specify the amount of the receivable when applying to a mediator, the debtor cannot know how much of the debt is requested from them. Therefore, from this perspective, it can be stated that the application does not result in the debtor defaulting.[34] Furthermore, it is noteworthy that our legal practice handles similar situations in the context of lawsuits. Judicial decisions have established that the initiation of a lawsuit results in default for the defendant. For instance, according to a decision, default interest is calculated from the date of the lawsuit's initiative since default occurs when the lawsuit is filed and the amount specified.[35] In addition, default occurs on the date of amendment for any amendments made to the lawsuit, rather than upon the service of the amendment petition.[36] Consequently, default interest is calculated from the date of amendment.[37] However, in legal doctrine, the defendant defaults upon the service of the lawsuit petition, not at the moment of the lawsuit's initiation.[38]

In our opinion, the perspective outlined in the doctrine aligns with the TCO, as it asserts that the defendant becomes aware of the obligation to fulfill their performance upon being served with the lawsuit petition. Consequently, it becomes imperative to regard the moment of the defendant's default as coinciding with the service of the lawsuit petition. However, upon examining the ruling of the Court of Cassation, which establishes that default occurs at the initiation of the lawsuit, it is reasonable to anticipate the application of the same rationale and outcome to mediation proceedings. Notably, mediation, being a procedural prerequisite preceding the commencement of a lawsuit, presents a scenario in which consequences analogous to those of the lawsuit, particularly concerning default, may arise. Therefore, based on the Court

34 See Talat Canbolat, *"İş Hukuku Bakımından Arabuluculuk" Arabuluculuğun Geliştirilmesi Uluslararası Sempozyumu (Ed: Ersin Erdoğan)* (Ankara 2018) 107 regarding the occurrence of default upon the application to mediation for employee's receivables. The author did not provide a justification in this regard.

35 15th Civil Chamber of Court of Cassation, Lawsuit File Number 2015/3941, Decision Number 2016/2525, Dated 3.5.2016 (Lexpera).

36 9th Civil Chamber of Court of Cassation, Lawsuit File Number 2015/10055, Decision Number 2015/15212, Dated 28.4.2015 (Lexpera).

37 17th Civil Chamber of Court of Cassation, Lawsuit File Number 2010/1636, Decision Number 2010/4118, Dated 3.5.2010 (Lexpera).

38 Sabri Şakir Ansay, *Hukuk Yargılama Usulleri* (7th, Güzel Sanatlar Matbaası 1960) 218; Necmeddin B. Berkin, *Medenî Usul Hukuku Esasları* (Hamle 1969) 92; Necip Bilge and Ergun Önen, *Medenî Yargılama Hukuku Dersleri* (3rd, Sevinç 1978) 446; Baki Kuru and Burak Aydın, *Medenî Usul Hukuku El Kitabı C. I* (2nd, Yetkin 2021) 477; Baki Kuru and Burak Aydın, *İstinaf Sistemine Göre Yazılmış Medenî Usul Hukuku Ders Kitabı (8th, Yetkin 2023)*, 172; İlhan E. Postacıoğlu and Sümer Altay, *Medenî Usûl Hukuku Dersleri* (8th, Vedat 2020) 422; Hakan Pekcanıtez, *Pekcanıtez Medenî Usûl Hukuku, C. II* (15th, On İki Levha 2017) 1181; Hakan Pekcanıtez, Oğuz Atalay and Muhammet Özekes, *Medenî Usûl Hukuku Ders Kitabı* (11th, On İki Levha 2023) 252 ff.; Ramazan Arslan, Ejder Yılmaz, Sema Taşpınar Ayvaz and Emel Hanağası, *Medenî Usul Hukuku* (9th, Yetkin 2023) 354; Murat Atalı, İbrahim Ermenek and Ersin Erdoğan, *Medenî Usûl Hukuku* (6th, Yetkin 2023) 379; Şanal Görgün, Levent Börü and Mehmet Kodakoğlu, *Medenî Usûl Hukuku* (12th, Yetkin 2023) 276; for counter-opinion, see Saim Üstündağ, *Medenî Yargılama Hukuku C. I-II* (7, 2000) 492. Also see Mustafa Reşit Belgesay, *Hukuk Usulü Muhakemeleri Kanunu Şerhi* (İstanbul Üniversitesi 1939) 410.

of Cassation's verdict from 2021, it is affirmed that the application to the mediation bureau triggers the default of the debtor.[39]

We have elaborated on why the act of applying to a mediator does not automatically result in the default of the debtor. Another crucial aspect to underscore is whether serving an invitation to mediation to the counterparty results in default. This issue has been partially discussed in legal doctrine. In this context, according to *Çil, "*the act of serving the application to the counterparty is not explicitly stipulated by the Law or the Regulation. There is no requirement to notify the counterparty regarding the specific receivables claimed in the application letter. Therefore, it cannot be conclusively argued that the mediation application alone results in default in the lawsuit initiated subsequently due to the counterparty's failure to attend mediation meetings. However, it is pertinent to consider the opinion that mediation, in a procedural requirement before litigation, should result in default for the debtor. An example illustrating this point is within the realm of labor law: when an employee requests their "legal rights" without specifying their receivables, this action may result in default for the employer under the specific rules of labor law. Due to the inherent economic and social dominance of employees over employees and their control over accounting systems, employers are typically empowered to determine the compensation owed to employees. Consequently, if it is determined that the employer was aware of the employer's mediation application, mere notification can be considered adequate to establish default on the part of the employer."[40]

According to Law No. 6,325, the contact information of the involved parties is submitted to the designated mediator by the bureau. Applying this contact information as a reference, the mediator has the authority to conduct necessary inquiry ex-officio. Subsequently, the mediator uses all available means of communication to inform the parties about the appointment and extend invitations to the initial meetings. Furthermore, the mediator is responsible for documenting the processes of informing and inviting the parties, thereby certifying these actions (Art. 18/A, VII).[41] Notably, there is no explicit regulation regarding the form or content of the mediator's invitation. Thus, the invitation is not bound by any specific format.[42] However, the invitation's content typically includes information regarding the dispute, the mediator process, its implications, the legal basis concerning the matter, and the consequences of failing to

39 4th Civil Chamber of Court of Cassation, Lawsuit File Number 2021/18933, Decision Number 2021/4438, Dated 13.9.2021 (Lexpera). See Küçükkaya, p. 314 on how this verdict is wrong since the application to mediation does not mean initiating a lawsuit.

40 Şahin Çil, *İş Uyuşmazlıklarında Arabuluculuk Uygulamaları,* Unpublished Paper(quoted from Ekmekçi, Özekes, Atalı and Seven, p. 235). It has been observed that this opinion is found to be accurate in the doctrine. See Ekmekçi, Özekes, Atalı and Seven, p. 234.

41 See Mustafa Serdar Özbek, *Arabuluculuk ve Tahkim Mevzuatı (Yetkin 2022)*, 637 for the sample invitation letter.

42 Ekmekçi, Özekes, Atalı and Seven, p. 93; for the different situation in the State of Baden Württemberg, see Taşpolat Tuğsavul, 56.

respond affirmatively or attend the meetings.[43] The content of a mediation invitation is unlikely to trigger a default on the part of the debtor, particularly if the exact amount of the receivable is unspecified.[44] Conversely, if the invitation's content is comprehensive and explicitly outlines the amount of the receivable and the nature of the relationship giving rise to it, default may indeed be triggered. Notably, although invitations for mediation are generally deemed inadmissible in lawsuits under Article 5 of Law No. 6,325, the principles regarding the documentation of the final mediation session remain applicable to such invitations. Consequently, an invitation for mediation may result in default under specific circumstances.

In circumstances where the mediator's invitation does not result in default, it becomes necessary to establish the default date. There are two potential options: default may occur either on the date of the mediation meeting or on the date of the final mediation session record, which could be on a different date from the meeting. It is deemed that default has transpired if the creditor explicitly demands their receivable and specifies the amount during the mediation meeting. This declaration by the creditor serves as notification, and given that no special form is required for notifications, default is considered to have occurred. The final date for default determination in the mediation process is the date when the record of the final mediation session is formalized. As previously mentioned, this record may also result in default concerning the debt outlined within it.

These principles regarding default also apply to the voluntary mediation process since both processes operate under the same framework. In voluntary mediation, one party may notify the other of their mediation proposal through a notary. In such cases, default unquestionably arises if the party requesting their receivable does so while sending such notification.[45]

Conclusion

In conclusion, the mediation process extends its influence beyond procedural law, significantly impacting substantive law as well. The impact of the mediation process on substantive law has been regulated under various articles of Law No. 6,325. For instance, there are special provisions regarding statutes of limitations and preclusive

43 Ekmekçi, Özekes, Atalı and Seven, p. 93.

44 It has been observed that mediators in practice do not have information on the subject matter of the dispute. Haznedar has explained this situation as follows: "Another matter is this: We closely observe that when you receive an invitation regarding the mediation and call and ask the mediator, "What this dispute is about?", the mediator actually does not have information and that s/he invites the parties to the meeting without information. However, the practice in this manner is also against the legislation, since the mediator shall communicate with the applicant first, and once s/he has full information regarding the subject matter of the dispute, then s/he shall invite the parties to a meeting, there is also a problem in this regard." (Haznedar İ. M, *"Bankacılık Sektörü Yönünden İdari Davalarda Zorunlu Arabuluculuk", Farklı Bakış Açılarından Ticari Davalarda Dava Şartı Olarak Zorunlu Arabuluculuk Sempozyumu (Eds: Ufuk Tekin/Yasin Barış Özelci),* (Banka ve Ticaret Hukuku Araştırma Enstitüsü 2021) 9).

45 Öztek, p. 22.

time requirements. However, there is no special regulation concerning the default of the debtor. This legislative gap has contributed to uncertainty within legal practice regarding whether the mediation process triggers default. Through the examination of this uncertainty, the following conclusions have been established:

1. The confidentiality and inadmissibility of documents in the mediation process, as regulated under Article 5 of Law No. 6,325, have often been cited as rationales for arguing that the mediation process does not result in debtor default. However, it is essential to clarify that this article cannot serve as a justification for the absence of default. Article 5 primarily addresses the external statements made by parties and ensures that discussions during mediation occur within a comfortable and safe environment. However, the default of the debtor is an internal state, a legalization that the debtor is required to fulfill the obligations they have undertaken. This awareness is immutable, and the confidentiality of the mediation process does not eliminate it. Consequently, it has been concluded that the mediation process can result in debtor default.
2. The mediation process, particularly concerning mediation as a procedural requirement, commences upon the submission of an application to the mediation bureau and concludes upon the creation of the final mediation session record. It is crucial to determine precisely when the default of the debtor transpired within this timeline.
3. The act of applying for mediation does not trigger a default on the part of the debtor, as the exact amount of receivable is not required to be specified in the mediation application. Even if the exact amount is specified in the application, the debtor may not be aware of its submission. Therefore, default does not arise solely due to the application for the mediator.
4. Following the submission of the mediation application, the mediator proceeds to issue the invitation to the parties for a meeting. For such an invitation to the debtor to be considered a notification, a requirement for default, it must expressly detail the nature of the relationship giving rise to the receivable, its amount, and the creditor's request for the receivable. An invitation for mediation covering these essential elements indeed triggers default. Conversely, if these elements are absent from the invitation, it does not result in default on the part of the debtor.
5. Both the mediation meeting and the record of the final mediation session may result in the default of the debtor. Notably, the confidentiality of the mediation process does not prevent default from occurring. Furthermore, expecting notification after the record indicates that the parties have not reached an agreement, which could contravene the principle of good faith. By explicitly and unequivocally expressing their refusal to fulfill their obligation, as

indicated by the records acknowledgment of the lack of agreement, the debtor has explicitly notified the debtor that they will not fulfill their performance. In this context, further notification to the debtor for payment becomes unnecessary.

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Corr v IBC Vehicles Ltd [2008] UKHL 13, [2008] 1 AC 884.

R (Roberts) v Parole Board [2004] EWCA Civ 1031, [2005] QB 410.

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Callery v Gray [2001] EWCA Civ 1117, [2001] 1 WLR 2112 [42], [45].

Bunt v Tilley [2006] EWHC 407 (QB), [2006] 3 All ER 336 [1]–[37].

R v Leeds County Court, ex p Morris [1990] QB 523 (QB) 530–31.

If citing a particular judge:

Arscott v The Coal Authority [2004] EWCA Civ 892, [2005] Env LR 6 [27] (Laws LJ).

Statutes and statutory instruments

Act of Supremacy 1558.

Human Rights Act 1998, s 15(1)(b).

Penalties for Disorderly Behaviour (Amendment of Minimum Age) Order 2004, SI 2004/3166.

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Consolidated Version of the Treaty on European Union [2008] OJ C115/13.

Council Regulation (EC) 139/2004 on the control of concentrations between undertakings (EC Merger Regulation) [2004] OJ L24/1, art 5.

Case C–176/03 *Commission v Council* [2005] ECR I–7879, paras 47–48.

European Court of Human Rights

Omojudi v UK (2009) 51 EHRR 10.

Osman v UK ECHR 1998–VIII 3124.

Balogh v Hungary App no 47940/99 (ECHR, 20 July 2004).

Simpson v UK (1989) 64 DR 188.

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Thomas Hobbes, *Leviathan* (first published 1651, Penguin 1985) 268.

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Halsbury's Laws (5th edn, 2010) vol 57, para 53.

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Paul Craig, 'Theory, "Pure Theory" and Values in Public Law' [2005] PL 440.

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Graham Greenleaf, 'The Global Development of Free Access to Legal Information' (2010) 1(1) EJLT < http://ejlt.org//article/view/17 > accessed 27 July 2010.

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Department for International Development, *Eliminating World Poverty: Building our Common Future* (White Paper, Cm 7656, 2009) ch 5.

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<www.nakedlaw.com/2009/05/index.html> accessed 19 November 2009.

Newspaper articles

Jane Croft, 'Supreme Court Warns on Quality' *Financial Times* (London, 1 July 2010) 3.

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